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Summary record of the 2065th meeting

Topic:
Law of the non-navigational uses of international watercourses

Extract from the Yearbook of the International Law Commission:-
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required the regular exchange only of data and information that were "reasonably available", so that the State called upon to provide them was not required to make a special effort or incur much additional expense.

41. The possibility of an excessive accumulation of data had also been mentioned by Mr. Tomuschat (2051st meeting). In such a case, the State receiving the data could ask for an abatement of the flow. That problem would be dealt with in the commentary, if not in the body of the article.

42. He had prepared some preliminary drafts of commentaries on the articles which were before the Drafting Committee, and would be glad to supply any member with advance copies of the texts being processed by the secretariat.

43. Mr. Graefrath (2063rd meeting) had raised the question of the definition of "pollution" in paragraph 1 of article 16 [17] and its relation to the "appreciable harm" standard in paragraph 2 of that article. The definition in paragraph 1 spoke of "effects detrimental to human health or safety", which could include causing a headache—an effect falling far short of "appreciable harm". The same problem arose in other international instruments. For example, article 1, paragraph 1, of the 1982 United Nations Convention on the Law of the Sea, in its definition of "pollution of the marine environment" referred to the introduction by man of "substances or energy" resulting in "deleterious effects", such as harm to marine life or hazards to human health. But article 194, paragraph 2, of that Convention required States to take measures to ensure that their activities were so conducted as not to cause "damage by pollution to other States and their environment". The concept of "damage by pollution" was rather similar to that of "harm" in article 16 [17], and the contrast between "damage" and "deleterious effects" was similar to that between "appreciable harm" and "effects detrimental to human health or safety". One way out of the difficulty might be to replace the expression "appreciable harm", in paragraph 2 of article 16 [17], by the word "pollution". He himself would prefer to retain the concept of "appreciable harm".

44. The question of reconciling the rules on the present topic with those on State responsibility had been raised by Mr. Barboza. That point would be dealt with in the commentary he was preparing for draft article 8 [9] (Obligation not to cause appreciable harm). If appreciable harm occurred, and the State of origin had exercised due diligence to avoid it, no responsibility was entailed. International responsibility arose for the State of origin only if it had not exercised due diligence.

45. It had been asked whether the present topic involved issues of responsibility for wrongful acts or of liability for lawful acts. It was perhaps attractive to say that the only duty of the State of origin was to pay compensation to the injured State. That approach, however, raised some serious questions. One could imagine an upper riparian State which, being rich, found it convenient to pay compensation in order to be able to pollute the watercourse, thereby causing harm to a lower riparian State, which received the compensation. The undesir-

able effect would be to force a pollution servitude upon the lower riparian State.

The meeting rose at 1.05 p.m.

2065th MEETING

Tuesday, 21 June 1988, at 10 a.m.

Chairman: Mr. Leonardo DÍAZ GONZÁLEZ

later: Mr. Bernhard GRAEFRATH

Present: Mr. Al-Khasawneh, Mr. Arangio-Ruiz, Mr. Barboza, Mr. Barsegov, Mr. Beesley, Mr. Bennouna, Mr. Calero Rodrigues, Mr. Eiriksson, Mr. Francis, Mr. Hayes, Mr. Koroma, Mr. Mahiou, Mr. McCaffrey, Mr. Njenga, Mr. Ogiso, Mr. Pawlak, Mr. Sreenivasa Rao, Mr. Razafindralambo, Mr. Reuter, Mr. Roucouas, Mr. Shi, Mr. Thiam, Mr. Tomuschat, Mr. Yankov.

The law of the non-navigational uses of international watercourses (*continued*) (A/CN.4/406 and Add.1 and 2,¹ A/CN.4/412 and Add.1 and 2,² A/CN.4/L.420, sect. C, ILC(XL)/Conf.Room Doc.1 and Add.1)

[Agenda item 6]

FOURTH REPORT OF THE SPECIAL RAPporteur (*continued*)

PART V OF THE DRAFT ARTICLES:

ARTICLE 16 [17] (Pollution of international watercourse[s] [systems])

ARTICLE 17 [18] (Protection of the environment of international watercourse[s] [systems]) *and*

ARTICLE 18 [19] (Pollution or environmental emergencies)³ (*continued*)

1. Mr. MAHIOU congratulated the Special Rapporteur on having adopted the method, in chapter III of his fourth report (A/CN.4/412 and Add.1 and 2), of presenting the problem and the sources in sections A and B, and the text of the draft articles in section C; that would enable the Commission to make a well-informed decision on the proposed provisions.

2. He wished to respond to certain points raised by the Special Rapporteur. The first, which was referred to in paragraph (12) of the comments on article 16, concerned the relationship between the rule of equitable utilization (art. 6), the prohibition to cause appreciable harm (art. 8 [9]) and the obligation embodied in paragraph 2 of article 16, now under consideration. On that subject, the Special Rapporteur invited the Com-

¹ Reproduced in *Yearbook* . . . 1987, vol. II (Part One).

² Reproduced in *Yearbook* . . . 1988, vol. II (Part One).

³ For the texts, see 2062nd meeting, para. 2.

mission to adopt a solution that recognized the importance of the prevention of pollution and the protection of the environment, irrespective of the decision it took with respect to the link between articles 6 and 8 [9]. If the Commission did not agree that there could be an exception to article 8 [9] on the basis of article 6, the problem was resolved, for in that case paragraph 2 of article 16 was merely a special application of the general prohibition to cause appreciable harm. Even if the position was reversed, the exception, according to the Special Rapporteur, would not operate for paragraph 2 of article 16. In other words, appreciable harm would never be justified by equitable utilization. He agreed with that view, for in his opinion the exception under article 16 would preclude any satisfactory policy for the protection of the environment. It was also a matter of common sense, because pollution considerably restricted the uses of watercourses and, in particular, made them too costly for some developing countries owing to the expense involved in removing the pollution.

3. In paragraph (20) of the same comments, the Special Rapporteur sought the Commission's views on whether certain substances should be prohibited by means of lists of the kind referred to in paragraph 3 of article 16. Paragraph 3 embodied two closely related ideas: on the one hand, it contained a prohibition on the discharge of dangerous substances, which simply set forth in more concrete and precise terms the general obligation laid down in the previous paragraph; on the other hand, it indicated the procedure to be followed to give effect to that prohibition, namely, the establishment of lists of dangerous substances. It would be best, in his view, to provide for that procedure in general terms only, since details concerning the number and types of lists to be drawn up were more a matter for watercourse agreements.

4. His response to the question whether the provisions on pollution and protection of the environment should form a separate part of the draft was in the affirmative, for three reasons. First, the dangers of pollution were extremely serious, threatening most of the watercourses of the world. The subject could probably be dealt with throughout the draft, in the articles on the various uses of watercourses, but that would have the drawback of taking the edge off the problem instead of underlining how acute it was. Secondly, the other parts of the draft dealt solely with the rights and obligations of watercourse [system] States, whereas pollution could very well extend to third States or even to the international domain, including the common heritage of mankind; and in fact, part V applied as well to States other than watercourse States. Parenthetically, he awaited with interest the Special Rapporteur's reply to Mr. Ogiso's extremely interesting question (2064th meeting) regarding the relations between watercourse States and other States. Thirdly, as already noted by Mr. Bennouna (*ibid.*) and Mr. Yankov (2063rd meeting), once it was decided to draft comprehensive and detailed rules on the protection of the environment, a special part of the draft should properly be devoted to them. He had listened most carefully to the comments made on article 16 by Mr. Yankov, who, as chairman of the committee appointed at the Third United Nations Conference on the Law of the Sea to draft provisions on

pollution and protection of the marine environment, was an expert in the matter. Those comments, as well as those Mr. Yankov would undoubtedly make on future draft articles, certainly deserved the Special Rapporteur's closest attention. Coming as he did from a country bordering on the Mediterranean, a semi-enclosed sea in a critical state almost entirely due to land-based pollution, particularly from rivers, he was particularly aware of the fact that, although pollution of watercourses was primarily the concern of riparian States, it could also affect a sea in its entirety—semi-enclosed and enclosed seas being especially vulnerable in that regard—and could thus, as he had already mentioned, affect third States.

5. With regard to the régime of responsibility provided for under paragraph 2 of article 16, since that paragraph laid down an obligation of due diligence, the responsibility attaching thereto was responsibility for wrongful acts. The polluting State was guilty of the violation of an obligation to prevent a certain occurrence, and that fell under article 23 of part 1 of the draft articles on State responsibility.⁴ Mr. Barboza (2064th meeting) had in fact made a comment along the same lines. The Drafting Committee would no doubt find a way of removing the ambiguities in the present wording, to which Mr. Graefrath (2063rd meeting), among others, had referred.

6. He would not dwell on the problems of a separation between the various topics with which the Commission was concerned, but would revert to a question he had already raised (2048th meeting) concerning an obvious point of contact between responsibility under paragraph 2 of article 16 and liability for the consequences of lawful acts, which was Mr. Barboza's topic. To take the example he had cited in that connection, assuming that State A polluted the tributary of an international watercourse without, however, causing appreciable harm—and thus without coming within the ambit of article 16—and that State B likewise polluted another tributary of that watercourse, what would be the position of State C, a riparian of the same watercourse, if the combination of both pollutions caused it appreciable harm? State C could not invoke the provisions of article 16 either against State A or against State B. Would responsibility be incurred in that case for harmful consequences arising out of lawful activities? It would seem reasonable. A problem of interpretation would then arise, however, for it could be argued that in such a case a special convention (on the uses of watercourses) would be superseded by a general convention (on liability for the consequences of lawful activities). He would be grateful for clarification on that point.

7. His misgivings with respect to the distinction between pre-existing pollution and new pollution had not been removed on reading Mr. Schwebel's conclusion, in his third report, which the Special Rapporteur cited in paragraph (10) of his comments. Mr. Schwebel had explained in a few lines that there was no point to the distinction but had not supported his conclusion with arguments that made it possible to form an opinion. The question the Commission should ask related more

⁴ See 2062nd meeting, footnote 9.

to the choice between a comprehensive régime to combat pollution, involving both remedial and preventive aspects, and a régime geared solely to prevention. In the former case, the distinction was pointless, but in the latter it acquired full value. He would prefer the first choice for, in order to combat pollution effectively, both prevention and remedy were needed. At the same time, he recognized that prevention and remedial action involved the introduction of separate mechanisms, and that the draft should provide for collaboration between riparian States in reducing and eliminating pre-existing pollution under equitable and reasonable conditions.

8. In his report (A/CN.4/412 and Add.1 and 2, para. 91), the Special Rapporteur declared his readiness to extend the coverage of the draft articles on pollution and protection of the environment. The views thus far expressed should encourage him in that path, in the greater interest of all States.

9. Mr. SHI said that rational utilization and conservation of water resources were questions that affected the very existence of mankind. Man could not live without water: measures were therefore needed to improve a situation that was deteriorating year by year owing to certain natural phenomena, population growth, and the destruction caused by man. For international watercourses, Principle 21 of the Stockholm Declaration, which imposed an obligation on riparian States not only to use watercourses in a reasonable and equitable manner but also not to cause harm to the environment, was of vital importance, and it was that principle which, together with the concept of sustainable development, should in the long term shape thinking on the subject.

10. Provisions relating to pollution and environmental protection should certainly be included in the draft articles. The Commission should not be troubled by the question whether a prohibition of pollution existed in general international law: the urgent needs of the international community called for a progressive development of the law, something that was within the Commission's mandate. In that connection, the paragraph of the report entitled "Our common future", prepared by the World Commission on Environment and Development, quoted by the Special Rapporteur in his report (A/CN.4/412 and Add.1 and 2, footnote 249), was very pertinent. At the same time, however, account must be taken of the fact that, for various reasons, including technological possibility and availability of financial resources, the prevention, control, abatement and elimination of pollution and environmental depredation of international watercourses were no easy task for States and required long-term efforts.

11. With regard to article 16, he considered it necessary to incorporate a precise definition of pollution in the draft articles but, like some other members of the Commission, he would prefer the definition to be moved to article 1 (Use of terms), for reasons of coherence and also of consistency with the Commission's normal practice.

12. The proposed definition, unlike the definitions in some international agreements, did not mention the means whereby the pollution was produced. Personally, he did not believe it would be useful to specify the point,

first because, as the Special Rapporteur stated in paragraph (2) of his comments, the indication of the types of alterations envisaged covered the manner in which the pollution was produced, and chiefly because so broad a definition had the merit of filling in practically all gaps.

13. First of all, paragraph 2, which was the essence of article 16, did not prohibit pollution as such, for, as noted by the Special Rapporteur, contemporary international law did not bear out such a prohibition; it prohibited pollution only to the extent that pollution caused appreciable harm. The Special Rapporteur's view was that appreciable harm constituted the threshold of international wrongfulness. That would appear to mean that any breach of the obligation not to cause appreciable pollution harm gave rise to State responsibility based on fault. While there appeared to be no objection to laying down an obligation not to cause appreciable harm as such, the question nevertheless arose how to reconcile that rule with the rules on no-fault liability, on which Mr. Barboza was working. Actually, transboundary pollution harm to another watercourse State often stemmed from activities not prohibited by international law. If such harm could give rise to State responsibility, that would represent an exception to the rules formulated in the framework of no-fault liability, and it was doubtful whether such an exception would be proper or even feasible.

14. Secondly, it was difficult to understand the concept of "appreciable harm", in paragraph 2, in relation to that, in paragraph 1, of "effects detrimental to human health and safety", notwithstanding the Special Rapporteur's explanation that it was theoretically possible for such effects not to amount to appreciable harm. Once appreciable harm was objectively determined, responsibility might well play an important role in the abatement, control and elimination of pollution, but that might be too late from the point of view of the health of the population endangered by the polluted waters of a watercourse. From the moral standpoint, should not pollution producing effects detrimental to human health be prohibited outright? In any case, it was necessary to establish "black" and "grey" lists; if it was not deemed appropriate to include such lists in a framework instrument of a general nature, paragraph 3 should provide for an obligation on the part of watercourse States to negotiate such lists and to prohibit the discharge of any substance appearing on the "black" list.

15. Thirdly, for practical reasons, a distinction should be made between new and existing pollution, even though modern treaty practice tended rather to distinguish between different types of pollutants. Perhaps if both distinctions were made in the articles, they might prove more acceptable to States as a whole.

16. Fourthly, although the Special Rapporteur had adequately explained in his comments that the obligation not to cause appreciable harm constituted an obligation of due diligence, he himself had doubts regarding the propriety of linking the concept of due diligence with an international minimum standard to be expected of a "good government" or a "civilized State", a doctrine propounded by Pierre Dupuy that

was reminiscent of the controversial international minimum standard doctrine of traditional international law. The obligation to exercise due diligence would be more acceptable to States as a whole if it was linked to vigilance consonant with a State's degree of development.

17. Lastly, the Special Rapporteur was right not to regard the principle of equitable and reasonable utilization as a possible exception to the obligation not to cause appreciable pollution harm. Draft article 16 should be referred to the Drafting Committee for consideration in the light of the comments made by members of the Commission.

18. Mr. ARANGIO-RUIZ, after paying tribute to the Special Rapporteur's excellent work, said that he was always hesitant to speak on subjects like that of draft article 16, relating to the environment, because of the obvious difficulties of that matter at the international level. The subject was already complex at the national level, where the multiplicity of forms of pollution was fortunately offset by the existence of central and local authorities vested with all the necessary legislative, administrative and judicial powers to protect the environment, but the struggle against the scourge of pollution often seemed an almost desperate enterprise at the international level. More than in any other area, there was no comparison between the need for a universally accepted and enforced regulation on the one hand, and on the other, the legislative—and still more, the institutional—means available to adopt and implement adequate rules.

19. A very recent example had been provided by the 21 legal principles for environmental protection and sustainable development proposed by the Experts Group on Environmental Law of the World Commission on Environment and Development.⁵ If the universal declaration and the convention on the environment and development contemplated by that Commission in its report, entitled "Our common future", were to draw on such vague and general concepts as the 21 principles in question, there was every reason to fear for "our common future", at least with regard to the environment. It was therefore gratifying to note that the Special Rapporteur had allocated a separate part of the draft articles to pollution and had submitted draft articles on the subject; he thus provided the Commission with an opportunity to give an example by framing texts that went beyond general principles and had the character and scope of genuine legal rules.

20. As to draft article 16 itself, Mr. Shi was right to say that it could be improved by placing greater emphasis on the progressive development of the law.

21. With regard to the character of the responsibility involved—construed in the sense of the English term "liability"—he agreed with Mr. Barboza, who had already expressed the idea in 1980 and 1981, an idea endorsed at the time by Mr. Reuter and Mr. Ushakov, that

paragraph 2 of article 16 should state an obligation of result, namely the obligation of every watercourse State to exercise due diligence to avoid causing appreciable harm to other watercourse States, to the ecology of the watercourse or indirectly to the marine environment.

22. Nevertheless, that obligation of due diligence did not seem sufficient, for how would the affected State prove that the conduct of the State of origin did not meet that criterion? The search for evidence, which was difficult enough in the national framework, could here come into conflict with the practically unsurmountable obstacles of independence and territorial sovereignty. Would the State of origin open its frontiers to permit the on-site investigations necessary to determine the degree of diligence it had, or had not, exercised? The rule which established responsibility thus ran the risk of remaining a dead letter. It was thus in the general interest, as well as in the interest of watercourse States, to improve the position of the affected State, perhaps by drawing on certain rules of internal law.

23. In the Italian Civil Code, for example, the aspects of responsibility covered by article 1384 of the French Civil Code—an old provision that was generally regarded as much too terse—were the subject of provisions that dealt in much greater detail with the various situations which, in France, had given rise to a case-law based on the said article 1384. Articles 2048 and 2050, which reversed the burden of proof (*onus probandi*), were particularly interesting in that respect. Article 2048, on the responsibility arising from the acts of minors, specified that parents, guardians and other persons in charge were not released from their responsibility for acts of minors in their care unless they could prove that they had been unable to prevent the occurrence of the act. Article 2050, relating to dangerous activities, specified that any person causing harm to another in the course of an activity that was either inherently dangerous, or hazardous because of the nature of the means employed to perform it, was obliged to make reparation, unless he could prove that he had taken all the measures calculated to prevent the harm. Admittedly, those rules still fell far short of strict responsibility, since they made express provision for exoneration by proof that due diligence had been exercised; they also fell far short of the rules embodied in the 1960 Paris and 1963 Vienna Conventions on the liability of operators of land-based nuclear installations, or of the similar rules of the 1962 Brussels Convention on the responsibility of operators of nuclear vessels.⁶ They nevertheless had the merit, from the standpoint of justice and in terms of the general interest, of releasing the affected persons from the onus of proof and making the burden thereof rest on the persons who were in a position to assess the hazards and to take the appropriate measures to eliminate or reduce them.

24. A similar reversal of proof should be considered for paragraph 2 of article 16. That would enable the Commission, in addition to improving the wording of the article, to give a useful indication to those whose

⁵ *Environmental Protection and Sustainable Development: Legal Principles and Recommendations* (Dordrecht, Martinus Nijhoff, 1987); summarized in the report of the World Commission on Environment and Development, "Our common future" (A/42/427), annex I.

⁶ For the texts of the conventions cited in this paragraph, see IAEA, *International Conventions on Civil Liability for Nuclear Damage*, Legal Series No. 4, rev. ed. (Vienna, 1976).

task it would be to formulate the universal declaration and the convention on the environment advocated by the World Commission on Environment and Development.

25. With regard to the criterion of "appreciable harm", in paragraph 2 of article 16, while the adjective "appreciable" was the least controversial, it was nevertheless superfluous. The real issue was to determine whether harm had been done, and that was a matter for the natural sciences and technology. If harm existed, it was necessarily appreciable. The danger in using the adjective "appreciable" was that it made for restrictive interpretations of the obligation of result, interpretations that would inevitably end up by disregarding the phenomenon of creeping pollution, an example of which had been given earlier by Mr. Mahiou. Deletion of the adjective "appreciable", which also raised certain problems with respect to the distinction between new and existing pollution, would be useful. He requested the Drafting Committee to consider that suggestion both for paragraph 2 of article 16 and for the other provisions in which the word was to be found, for instance in article 8 [9].

26. Mr. REUTER, while commending the quality of the texts submitted by the Special Rapporteur, said that reading draft article 16 and hearing his colleagues' statements had filled him with something approaching dread. He would in no way deny the great importance of the problem of pollution, but the task facing the Commission was indeed a crushing and fearsome one. The question therefore was whether it should give part V of the draft articles the careful study it deserved or whether it should abide by the text already drafted, recognize its incomplete nature and pursue the work on pollution, yet dissociate it materially from the rest of the draft. If the Commission proposed to treat part V with all the requisite attention, it would find itself, as the Special Rapporteur had surely sensed in declaring his readiness to develop that part of the text, confronted with an extremely heavy task which would delay completion of the work on the topic. As Mr. Bennouna (2064th meeting) had said on the subject of the draft articles submitted, it was either too much or too little. While there was no question of abandoning the study of the problem of pollution, it was legitimate to doubt the wisdom of tying the immediate fate of the first 15 articles in with the drafting of the subsequent articles.

27. The very concept of pollution was neither simple nor obvious. The number of treaties concluded on the subject was very large—a welcome fact, but they were usually highly specific and limited in scope, either geographically or in terms of subject-matter. Again, could pollution problems be resolved in the same way in all foreseeable cases? For example, in his fourth report (A/CN.4/412 and Add.1 and 2, footnote 207), the Special Rapporteur defined pollution as any alteration in the composition or quality of waters resulting from the introduction of substances, species or energy. The word "species" suggested that the quality of water was determined, *inter alia*, by the fish it contained. But would it be a case of pollution if a watercourse State placed in the watercourse a quantity of pike which later fed on fish being bred by another watercourse State? He

doubted it, noting in that connection that the drafters of the 1982 United Nations Convention on the Law of the Sea had taken care to refrain from juxtaposing fishing and pollution. Other hypotheses envisaged in the proposed definition, if carefully examined, could well give rise to similar difficulties.

28. The question of responsibility also raised a major problem; that was evidenced, as Mr. Arangio-Ruiz and Mr. Mahiou had pointed out, by the fact that the Commission had not yet decided on a precise terminology in the matter. In referring to Mr. Ago's definitions of the obligation of conduct and the obligation of result in connection with the topic of State responsibility, the Commission should not forget that in Mr. Ago's view the obligation of conduct was more binding on the State than the obligation of result inasmuch as it deprived the State, so to speak, of its choice of means. Yet some members placed a different interpretation on things, so that the obligation of conduct was transformed into the "duty of diligence". Unfortunately, the latter concept lacked precision, for it was generally possible to speak of "normal diligence" or "reasonable diligence in the light of the circumstances", but that was not the case in the particular field of pollution or of the environment. It was said, for example, that pollution became wrongful when it exceeded a certain threshold, which implied the existence of a quantified level of products, substances, or even heat units. But in that case, how did the obligation of conduct differ from the obligation of result?

29. From that point of view, the provisions of paragraph 2 of article 16 were not free from ambiguity. Taken literally, they imposed an absolute obligation of result based on the idea that wrongfulness in environmental matters consisted of the violation of the territorial sovereignty of another State. That had been the thesis of the late Robert Q. Quentin-Baxter, one that could not be completely rejected, since there were cases where it was necessary to impose a very strict obligation, for instance in the case of "immissions", to use the term employed by the publicist Hans Thalmann in his innovative thesis of 1951.⁷ In the *Lake Lanoux* arbitration, the tribunal had taken the view that the construction of a dam did not create a particular hazard, but he wondered whether the tribunal would have approached the problem in the same way immediately after the catastrophic bursting of a dam. A specific standard of a very strict kind could well make a dam an "abnormal" hazard, as was the case with nuclear power stations. More generally, in a legal area still to be delimited, it was perhaps possible to establish an unconditional rule to the effect that strict State responsibility was incurred as a result of the mere fact of a phenomenon's extending beyond the State's frontiers.

30. The concept of obligation was just as ambiguous everywhere else it occurred in the text under consideration. How could it be established, for example, that a State had failed to observe the obligation to negotiate? The obligation was apparently a "slight" one, another nuance which mitigated the very principle on which the notion of obligation was based.

⁷ H. Thalmann, *Grundprinzipien des modernen zwischenstaatlichen Nachbarrechts* (Zurich, Polygraphischer Verlag, 1951).

31. It was surprising that no special rapporteur since 1963 had tackled the problem of causality in connection with State responsibility in the area under consideration. True, the problem was a difficult one and was made still more complex by the fact that it was not considered from the same angle by all national legislations. Paragraph 1 of article 16 spoke of "alteration . . . which results directly or indirectly from human conduct", and Mr. Ogiso (2064th meeting) had welcomed the word "indirectly" because in his view it covered situations such as pollution through shellfish, of which he had given an example. Under French law, the discharge into a river of a toxic product that would not kill fish but would eventually poison human beings when concentrated in the human organism would be considered a matter of causality which, because it was exclusive, was direct. Paragraph 1 would then apply, even in the absence of the word "indirectly". If the Commission intended to develop the concept of indirect responsibility, it would have to go a great deal further and take a step that should give it pause. For example, was there or was there not responsibility in the event of torrential rains leading to the pollution of a watercourse? The answer seemed obvious, and yet, if a State had stored a toxic product near the watercourse concerned and done so under less than perfect conditions, and if, as a result of the rain, the toxic product had been washed away and become mixed in with the waters of the river, the inescapable conclusion would be that the pollution had two causes. Surprisingly enough, no member of the Commission had so far raised the question of multiple causes.

32. Later on, in drafting the articles on reparation, the Special Rapporteur would have to tackle that aspect of responsibility. In any event, if the draft was to be consistent, the Commission would have to agree on a particular vocabulary and keep to it. In order to do so, it would have to decide upon the degree of effectiveness it wished to give to the provisions on pollution. The outcome of its work on the question of international rivers had been awaited so long that the Commission was, as it were, driven into a corner and forced to make a choice.

Mr. Graefrath, First Vice-Chairman, took the Chair.

33. Mr. BARSEGOV said he thought it perfectly legitimate for the Commission to concern itself with provisions on pollution in its work on the topic under consideration. However, the real point at issue was the means of preventing pollution, which had to be acceptable to States. For his part, he based his approach to the subject on the premise that the draft in course of preparation constituted a set of recommendations, or a framework agreement establishing general principles based on international practice in the matter.

34. Once again, therefore, it was necessary to consider the sources of the law on the non-navigational uses of international watercourses which the Commission was seeking to define. He was returning to that point because only a realistic and objective assessment of the available normative materials could ensure success for the Commission's work. It had been stated that 159 States had signed the 1982 United Nations Convention on the Law of the Sea, but how many States had ratified it six years later? Fewer than 40, and some major coun-

tries, whose conduct was decisive for environmental protection, were still not parties. It was therefore necessary to take account of the fundamental differences existing in legal situations: the problem of the utilization of international watercourses must be seen in terms of territorial jurisdictions, whereas that was not the case for the law of the sea. Realism required that the provisions contemplated should be considered in the light of the legal status of the areas concerned.

35. Protection of the marine environment was an established principle of international law. Unfortunately, the will for international regulation was inversely proportional to the extent of national sovereignty over specific marine areas: the approach to protection of the high seas was different from that concerning protection in the exclusive economic zone, and different again from that concerning territorial seas or internal waters. In the exclusive economic zone, for example, the coastal State's sovereign right to exploit the natural resources was conditional upon that State's duty to preserve the marine environment in accordance with its own environmental policies. Thus the coastal State's laws and regulations became mandatory for other States in the zone, while the coastal State itself was not subject to any control. The situation was still worse in the case of territorial or internal seas: there, the coastal State could use its own rules to remove foreign competition from its ports. The question thus arose of the coastal States' respect of their duty to protect the quality of the territorial and internal waters, which formed part of the world ocean, whereas pollution from land-based sources was exempt from international regulation, although, as had been pointed out, such pollution represented 80 to 90 per cent of all marine pollution. The harsh reality was that, in that domain, States seemed particularly lacking in the will to exercise self-discipline.

36. It was also difficult to agree with the increasingly widespread tendency to consider that the entire contents of conventions which had not yet entered into force automatically constituted "custom". While customary norms were emerging more rapidly by reason of the interdependence of the contemporary world, the action of the mass media and the fact that agreements which had been signed but not ratified could be regarded as *opinio juris*, it was hardly correct to invoke the entire content of a convention that had not yet been ratified as a basis of customary law.

37. The section of the United Nations Convention on the Law of the Sea which had a direct bearing on the subject under consideration was that on pollution from land-based sources. Should the Commission take it upon itself to deal with a problem which the Third United Nations Conference on the Law of the Sea had been unable to resolve after 10 years of effort? In his view, such an initiative would have little chance of success.

38. In view of the Soviet Union's vast size and the large number of its watercourses, and given the importance of State practice in the matter under consideration, he had devoted some study to the bilateral and multilateral agreements concluded between the Soviet Union and neighbouring countries. Under the multi-

lateral agreement on the protection from pollution of the waters of the river Tissa and its tributaries, " 'pollution' means a process which directly or indirectly causes the deterioration of the composition or properties of the waters. The waters are considered polluted if their composition or properties have been altered as a result of human activities and they have become partly or wholly unsuitable for any specific use". The definition of pollution, thus worded, covered both the introduction and the extraction of certain elements. The existence of pollution was determined on the basis of result, i.e. of alteration in the composition or properties of the waters resulting from human activity which rendered the water partly or wholly unsuitable for a given use. Thus the other criterion for evaluating pollution was the reduction or complete loss of the possibilities of using the water. Another agreement contained a definition, not of pollution, but of protection from pollution, in other words protection of the waters from the direct or indirect introduction of solids, liquids or gaseous substances or heat in quantities capable of deteriorating the waters' composition or properties in relation to the standards approved by the parties.

39. Another feature of practice which should not be ignored was that watercourse agreements did not speak of pollution in general and did not prohibit pollution completely; they established specific parameters for each particular watercourse which, for that reason, were not universally applicable. The point had been made that, without standards and criteria, it was impossible to combat pollution; in that connection, Mr. Beesley had remarked that standards should be flexible and adaptable and that, while having objective significance, they could vary in time and place. But in practice, the idea taken as the starting-point was that the conditions applicable to each watercourse corresponded to certain parameters which were established by agreement among the watercourse States themselves and which determined both the quality of the water at a specific time and the acceptable margin of alteration.

40. The same procedure must be applied with regard to lists of pollutants. He could not agree that such lists could be drawn up by the Commission or that they should be universally applicable; first, because such an operation required specialist knowledge and, secondly, because it would be impossible in practice to draw up an exhaustive list corresponding to the specific situation of all watercourses. As for selective lists, they would not meet the specific requirements of each particular watercourse. In fact, lists of pollutants could be drawn up by the watercourse States themselves on the basis of consultation and agreement among themselves. In his view, the text of paragraph 3 of article 16 should be drafted along those lines.

41. With regard to the legal import of those standards and lists, it could be understood only in the context of a particular interpretation of responsibility. But responsibility could take various forms, each based on different concepts. That was what created the impression that the Commission was groping without success, although in reality it had made progress, at least in respect of responsibility taken in the English sense of "liability".

42. How did the Special Rapporteur treat the question of responsibility for transboundary pollution? In paragraph (4) of the comments on article 16, he acknowledged that "it is doubtful that pollution, *per se*, of an international watercourse can be said to be proscribed by contemporary international law", going on to say: "Rather, it is when such pollution causes appreciable harm to another watercourse State that it becomes internationally wrongful." In other words, a watercourse State should not cause appreciable harm, through pollution, to another watercourse State or to the ecology of the watercourse, as stated in paragraph 2 of article 16.

43. According to the Special Rapporteur, the concept of appreciable harm as a criterion for evaluation constituted a factual standard, compliance with which could be objectively defined. Personally, he had doubts about the accuracy of that statement, for in regard to harm the dividing line between what was appreciable and what was not appreciable was extremely subjective. Any attempt to define the concept could only confuse the issue. In paragraph (4) of the comments, the Special Rapporteur explained that " 'appreciable' harm is harm that is significant—i.e. not trivial or inconsequential—but . . . less than 'substantial' ". It was difficult to see how that concept could be defined—although the real problem lay elsewhere.

44. The Special Rapporteur considered that, under paragraph 2 of article 16, a State in which the pollution originated could necessarily be held responsible for any appreciable harm caused by such pollution. Paragraph 2 dealt with "one of the" obligations to exercise due diligence in order to avoid causing appreciable harm. But what of the others? That question had not been answered. Like Mr. Barboza, the Special Rapporteur drew a distinction between responsibility for wrongfulness and causal responsibility, and introduced the concept of due diligence as the basis of responsibility. If a State clearly failed to exercise due diligence, it apparently violated an obligation. But if it acted with all due diligence, it did not violate an obligation, and the harm caused would be linked to events or factors independent of its will. In other words, the case would be one not of fault, but of accidental harm. The Special Rapporteur based his reasoning on the idea that the degree of diligence depended on the circumstances, and that the activity which had caused the harm, as well as the harm itself, should be foreseeable: the State knew or should have known that a given activity might result in pollution. That was one of the distinctions between that form of responsibility and what was termed, in English, liability.

45. The Special Rapporteur held that, in order to establish responsibility, it was necessary to consider the means employed by States to prevent pollution; and he proposed, among the other criteria to be applied in determining whether a State had fulfilled its obligations, an assessment of the diligence that could be expected of "a State acting in good faith". In the opinion of the Special Rapporteur, the degree of diligence also depended on the circumstances in which harm had occurred or might occur, and on the procedures for ensuring effective control. Moreover, the degree of diligence

might depend on the level of development of the State in question—a differentiation that lightened the burden of developing countries in which pollution originated, but offered scant consolation to their neighbours, possibly developing countries, too, which were the victims of a polluting activity. Nevertheless, such pragmatism was laudable, especially since State practice took account of differences in technical and economic capabilities. By establishing the category of due diligence, the Special Rapporteur sought to lighten the responsibility established for a wrongful activity; he sought to rid it of its automatic character and to render it dependent on certain conditions.

46. However, if accepted international standards were established, their breach, irrespective of the consequences, must automatically be considered as a violation of the law. Mr. Barboza (2064th meeting) had expressed doubts as to the feasibility of introducing such a formulation in a general convention, even though it was certainly desirable to establish clear and precise international standards. He himself agreed with the members of the Commission who thought that the prohibition as it now stood in article 16 was too peremptory; it was not in line with the actual state of international relations and could have an adverse impact on economic activity.

47. Mr. Barboza had suggested a more realistic, and consequently more productive solution, namely, a transitional regulation based on the idea that States would agree among themselves on the means of reducing the pollution to acceptable levels within a given time-frame through co-operation. It would seem difficult to reject such a solution, which was in keeping with actual practice in the interdependent world of today, where all States sought, on the basis of mutual interest, to strike a balance between the requirements of economic development and the need to protect the environment and to keep pollution down to a tolerable level. In support of that argument, he referred to a number of provisions in the agreements he had cited earlier. In the context of anti-pollution measures, those agreements enumerated steps to be taken in case of unforeseeable and unforeseen pollution: obligatory and immediate notification of the watercourse States concerned, elimination of the causes and consequences of the pollution, and prevention and reduction of the damage caused by the pollution of the waters; they also indicated ways of acting jointly against pollution in so far as that was feasible and necessary and taking advantage of opportunities for mutual assistance on the basis of reciprocal agreements. The fact that none of the agreements to which he had referred contained special provisions on responsibility did not mean that the question of compensation had been overlooked. The authors of the texts simply appeared to consider that the problem could be resolved by agreement among the parties directly concerned and in accordance with the procedures laid down in the agreements themselves.

48. It would be preferable not to refer draft articles 17 and 18 to the Drafting Committee until the Commission had before it all the draft articles on the subject under consideration. It would be virtually impossible to determine whether the draft articles fulfilled the desired objective if they were considered separately. Under the cir-

cumstances, the Commission could neither decide whether it was appropriate to combine the draft articles on pollution with the other draft articles, nor determine the form they must take in order to be incorporated in the law of the non-navigational uses of international watercourses. He had no intention whatsoever of questioning the calibre of the work done by the Special Rapporteur; he believed, however, that the Commission must have the entire text before it in order to see the problem clearly.

49. Mr. BENNOUNA said that the discussion on the three draft articles had brought out a problem of method in that the Commission did not know what the Special Rapporteur proposed to do with part V. Before the discussion proceeded further, he would like to hear about the Special Rapporteur's intentions regarding both the scope and the very purpose that were to be assigned to that part of the draft articles.

The meeting rose at 1.05 p.m.

2066th MEETING

Wednesday, 22 June 1988, at 10 a.m.

Chairman: Mr. Leonardo DÍAZ GONZÁLEZ

Present: Mr. Al-Khasawneh, Mr. Al-Qaysi, Mr. Arangio-Ruiz, Mr. Barboza, Mr. Barsegov, Mr. Beesley, Mr. Bennouna, Mr. Calero Rodrigues, Mr. Eiriksson, Mr. Francis, Mr. Graefrath, Mr. Hayes, Mr. Koroma, Mr. Mahiou, Mr. McCaffrey, Mr. Njenga, Mr. Ogiso, Mr. Pawlak, Mr. Sreenivasa Rao, Mr. Razafindralambo, Mr. Reuter, Mr. Roucouнас, Mr. Shi, Mr. Thiam, Mr. Tomuschat, Mr. Yankov.

The law of the non-navigational uses of international watercourses (*continued*) (A/CN.4/406 and Add.1 and 2,¹ A/CN.4/412 and Add.1 and 2,² A/CN.4/L.420, sect. C, ILC(XL)/Conf.Room Doc.1 and Add.1)

[Agenda item 6]

FOURTH REPORT OF THE SPECIAL RAPPORTEUR
(*continued*)

PART V OF THE DRAFT ARTICLES:

ARTICLE 16 [17] (Pollution of international watercourse[s] [systems])

ARTICLE 17 [18] (Protection of the environment of international watercourse[s] [systems]) *and*

ARTICLE 18 [19] (Pollution or environmental emergencies)³ (*continued*)

¹ Reproduced in *Yearbook* . . . 1987, vol. II (Part One).

² Reproduced in *Yearbook* . . . 1988, vol. II (Part One).

³ For the texts, see 2062nd meeting, para. 2.