Document:-
A/CN.4/SR.2071

Summary record of the 2071st meeting

Topic:
<multiple topics>

Extract from the Yearbook of the International Law Commission:-
1988, vol. I

2071st MEETING

Thursday, 30 June 1988, at 10 a.m.

Chairman: Mr. Leonardo DÍAZ GONZÁLEZ

Present: Mr. Arangio-Ruiz, Mr. Barsegov, Mr. Bennouna, Mr. Calero Rodrigues, Mr. Eiriksson, Mr. Francis, Mr. Graefrath, Mr. Hayes, Mr. Koroma, Mr. Mahiou, Mr. McCaffrey, Mr. Ogiso, Mr. Pawlak, Mr. Sreenivasa Rao, Mr. Razafindralambo, Mr. Reuter, Mr. Roucounas, Mr. Sepúlveda Gutiérrez, Mr. Shi, Mr. Solari Tudela, 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, A/CN.4/L.421)

[Agenda item 6]

DRAFT ARTICLES PROPOSED BY THE DRAFTING COMMITTEE (*continued*)

ARTICLE 9 [10][3] (General obligation to co-operate) (*concluded*)

1. Mr. EIRIKSSON said that, in the interests of consistency, the word "obtain", in the second clause of article 9 [10], should be replaced by "attain", which was the word used in article 6 in the same context.

2. Mr. TOMUSCHAT (Chairman of the Drafting Committee) said that it was undoubtedly a mistake, which would be corrected.

3. The CHAIRMAN said that, if there were no objections, he would take it that the Commission agreed provisionally to adopt article 9 [10].

Article 9 [10] was adopted.

4. Mr. BARSEGOV said that he had already pointed out at the previous session that, in his view, the expression "international watercourse" was mistaken and that the expression "multinational watercourse" should be used. The expression "international watercourse" implied the existence of an international régime. The instrument that was being formulated could only be a framework agreement, having the force of a recommendation for the conclusion of watercourse agreements. That remark applied to the draft articles as a whole. If at the previous meeting he had not objected to the deletion, in article 8 [9], of the words "unless otherwise provided for in a watercourse agreement or other agreement or arrangement" in the original text proposed by the Special Rapporteur, that was precisely because the Chairman of the Drafting Committee had explained (2070th meeting, para. 39) that the Committee considered that phrase unnecessary in view of the Commission's decision to prepare a framework agreement. When the Commission reverted to that question, he would have to reserve his position in the absence of agreement by the other members.

5. The CHAIRMAN said that Mr. Barsegov's position would be reflected in the summary record of the meeting.

ARTICLE 10 [15] [16] (Regular exchange of data and information)

6. Mr. TOMUSCHAT (Chairman of the Drafting Committee) introduced the text proposed by the Drafting Committee for article 10 [15] [16], which read:

Article 10 [15] [16]. Regular exchange of data and information

1. Pursuant to article 9, watercourse States shall on a regular basis exchange reasonably available data and information on the condition of the watercourse [system], in particular that of a hydrological, meteorological, hydrogeological and ecological nature, as well as related forecasts.

2. If a watercourse State is requested to provide data or information that is not reasonably available, it shall employ its best efforts to comply with the request but may condition its compliance upon payment by the requesting watercourse State of the reasonable costs of collecting and, where appropriate, processing such data or information.

3. Watercourse States shall employ their best efforts to collect and, where appropriate, to process data and information in a manner which facilitates its utilization by the other watercourse States to which it is communicated.

7. Article 10 corresponded to article 15 [16] proposed by the Special Rapporteur at the current session (see 2050th meeting, para. 1). As indicated by the word "regular" in the title and in paragraph 1, the article provided for an ongoing and systematic exchange of information as distinct from the *ad hoc* tendering of data envisaged in part III, concerning planned measures. It was therefore a specific application of the general obligation to co-operate laid down in article 9, and it was for that reason that the Drafting Committee recommended that it be placed immediately after that article, as the last provision in part II.

8. The Commission would note that the text consisted of three paragraphs, whereas in the article originally proposed there had been five. The Drafting Committee had noted that the Special Rapporteur intended to deal in a separate part with the matter of water-related hazards or calamities and had therefore reserved paragraph 4 of the original text for later action. The Committee had made paragraph 5 into a separate article, numbered 20 (see 2073rd meeting, para. 62).

9. The Committee had started from the premise that the rule enunciated in paragraph 1 constituted a specific application of the general obligation to co-operate laid down in article 9, so that casting it in terms of an obligation to co-operate would be repetitious. It had therefore given preference to the alternative approach suggested by the Special Rapporteur in paragraph (2) of his comments (A/CN.4/412 and Add.1 and 2, para. 27). The words "Pursuant to article 9" were intended to make it clear that the obligation in paragraph 1 gave concrete expression to the obligation set forth in article 9.

10. Attention had been drawn in the context of article 10 to the possibility that direct exchanges of infor-

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

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

[3] For the text, see 2070th meeting, para. 72.

mation might be precluded by such circumstances as a state of war or the absence of diplomatic relations. The Drafting Committee had given serious consideration to that question, had noted that it also arose in connection with various articles of part III, and had therefore agreed to deal with it in a separate provision, namely article 21 (Indirect procedures).

11. The Drafting Committee had also eliminated from paragraph 1 the opening phrase: "In order to ensure the equitable and reasonable utilization of an international watercourse [system] and to attain optimal utilization thereof", which it deemed superfluous, since article 6 already set out the basic rules of equitable and reasonable utilization and the fundamental goal of optimum utilization.

12. The words "reasonably available" were intended to indicate that the information which watercourse States were under an obligation to exchange was information obtainable without undue expense or effort.

13. The Drafting Committee had replaced the words "concerning the physical characteristics", which lent themselves to unduly broad interpretations, by "on the condition", which was considered more precise. It had substituted "in particular" for "including" in order to make it clear that, while the list in the text was not, and could not possibly be, exhaustive in view of the diversity of international watercourses, the types of data expressly mentioned in the text were the most important. The word "ecological" had been added to take account of the environmental concerns expressed within the Commission, particularly in regard to the living resources of watercourses. The Committee had furthermore included a reference to "related forecasts", which, like the rest of the data and information covered by the articles, were to be communicated only to the extent that they were "reasonably available".

14. Again, the Committee had eliminated the last part of the original paragraph 1 proposed by the Special Rapporteur, taking the view that the phrase "and concerning present and planned uses thereof" was superfluous. It would be noted in that connection that the question of supplying information on "planned uses" was dealt with in part III and that, as with regard to present uses, the exchange of information on uses which affected the condition of the watercourse was provided for in the first part of the paragraph. That point would be elaborated on in the commentary. The phrase "unless no watercourse State is presently using or planning to use the international watercourse [system]", had been eliminated not only because it dealt with a highly hypothetical situation but also because regular exchange of information could be useful even in the case of an unused international watercourse.

15. It had been suggested during the discussion on article 10 [15] [16] that the Drafting Committee should envisage the possibility that information on a watercourse might be in the hands of a third State, and should therefore provide for an obligation of that State to pass on such information to the watercourse States. The Committee had considered that, although the draft articles were primarily intended to regulate relations between watercourse States, that question should be kept in mind and reserved for a later stage.

16. Paragraph 2 was almost identical with that proposed by the Special Rapporteur. Minor changes included the replacement of the words "use its best efforts" by "employ its best efforts", borrowed from paragraph 3, the deletion of the words "in a spirit of co-operation", which the Committee had considered unnecessary because the concept of co-operation was implicit in the phrase "employ its best efforts", and the deletion of the words "or other entity", which had been advocated by several members of the Commission. In that connection, it would be recalled that existing administrative arrangements, such as joint commissions, would be dealt with in a subsequent part of the draft.

17. Paragraph 3 was also a close reproduction of the text proposed by the Special Rapporteur, except for the replacement of the words "where necessary" by "where appropriate", which gave the text more flexibility, and the word "disseminated" by "communicated", which brought out better the direct transmission of information from one State to another. In addition, the word "co-operative" had been deleted: the Drafting Committee had regarded it as unduly restrictive because the data and information could be used individually by the States concerned.

18. Mr. ARANGIO-RUIZ suggested that the word "condition", in paragraph 1, should be put in the plural and that the word "that" should be replaced by the more elegant "those".

19. Mr. SEPÚLVEDA GUTIÉRREZ suggested that, in paragraphs 2 and 3 of the Spanish text, the words *reunión* and *reunir* should be replaced by *recopilación* and *recopilar*.

20. Mr. YANKOV said it was surprising that the words "reasonable costs", in paragraph 2, should have been rendered in French by *coût normal*. Again, some treaties made provision for the communication of samples for the evaluation of certain situations. Did the expression "data and information" cover samples, which would appear to be particularly useful in evaluating the composition or pollution of the water?

21. Mr. EIRIKSSON said he was not satisfied with the use of the word "reasonably" to qualify the word "available" in paragraphs 1 and 2. In treaty practice, that term was generally used to avoid imposing an obligation on States to communicate data and information that was not at hand. In the present instance, the impression was that, in paragraph 2, States were being requested to do something that was not "reasonable". Perhaps the word *normalement*, used in the French text, was better suited to the purpose of the article, namely to impose an obligation on watercourse States to collect and communicate data and information which was either at hand or could be obtained easily or—as in the situation envisaged in paragraph 2—which they could use their best efforts to obtain at their cost.

22. In addition, the beginning of paragraph 2 should be reworded as follows: "If a watercourse State is requested by another watercourse State", and deleting the word "watercourse" from the words "the requesting watercourse State". Bearing in mind the comments of the Chairman of the Drafting Committee, the Commission could also delete the words "where appropriate" in

paragraph 3. Lastly, the words "to which it is communicated", at the end of paragraph 3, were superfluous: a State which collected and processed data and information did not necessarily know to whom it would communicate it.

23. Mr. RAZAFINDRALAMBO said the formula used in French to render the expression "requesting watercourse State", namely *Etat du cours d'eau dont la demande émane* was clumsy. It should be replaced by *Etat auteur de la demande*, and the amendment proposed by Mr. Eiriksson should also be adopted. In addition, he failed to see why the word *élaboration* had replaced the word *exploitation*, which was a more accurate term, which appeared in the text proposed by the Special Rapporteur and which was also used in article XXIX of the Helsinki Rules. Obviously, the same remark also applied to the word *élaborer* in paragraph 3.

24. Mr. KOROMA after associating himself with the comments made by Mr. Eiriksson, suggested that the word "available", in paragraph 1, should be replaced by "obtainable". Besides, the paragraph appeared to him to be clumsily worded.

25. Mr. BARSEGOV pointed out that the word *normalement*, which qualified the adjective *disponibles* in paragraphs 1 and 2 of the French text, corresponded exactly to the word used in the Russian text. Accordingly, the word "reasonably", in the English text, should be replaced by "normally".

26. Mr. BENNOUNA said that the word *normalement* should be deleted because it was not clear: either the information was available, or it was not. Paragraph 2 was cumbersome and inelegant. It could perhaps be improved by adopting the suggestions made by Mr. Eiriksson and Mr. Razafindralambo. Lastly, the order of the paragraphs should be altered: paragraph 3, which stated the general obligation to collect information, should precede paragraph 2.

27. The CHAIRMAN, speaking as a member of the Commission, said that in the interests of clarity he supported the suggestion to delete the word "reasonably" (*normalement*) in paragraphs 1 and 2. In a legal text, it was always delicate to make use of a word which implied a subjective assessment. In any case, the word "reasonable" should be replaced by "normal", and, in the Spanish text, the word *razonables* by *normales*.

28. Mr. TOMUSCHAT (Chairman of the Drafting Committee) said he had no objection to the proposal by Mr. Sepúlveda Gutiérrez to replace *reunión* by *recopilación* in the Spanish version.

29. The Drafting Committee had already examined the question raised by Mr. Arangio-Ruiz regarding the word "that": according to the English-speaking members of the Committee, it was the grammatically correct term to use. Similarly, the use of the word "condition" in the singular appeared to be correct. It also had the advantage of corresponding to the word *état*, in the French text, which was also in the singular.

30. Mr. Yankov had mentioned the possibility of watercourse States exchanging samples, not only data and information. It had to be remembered, however, that the Commission was preparing a framework agreement and that it would be for the signatory States of watercourse agreements to agree on the precise nature of their communications.

31. Mr. Yankov, Mr. Barsegov and Mr. Bennouna had questioned the use in languages other than French of the word "reasonably", or rather its equivalent, when the word used in the French text was *normalement*. The word "reasonably" had been used in order to give the text a measure of flexibility. It was necessary to avoid two pitfalls. In the first place, States should not be required to exchange all the data available to them: for example, a State possessing advanced technology would, for the part of the watercourse on its territory, have extremely full analyses that would be of doubtful use for neighbouring States. But it was also necessary to avoid a situation in which a State would collect no data at all on the watercourse: in accordance with the text, it was "reasonably" supposed to furnish data. The Drafting Committee had considered that the English term "reasonably" and its Spanish equivalent were useful and well-balanced, despite their subjective appearance, but perhaps it would be better to consult the Special Rapporteur on that point. In the French text, the term *normalement* appeared to be required by usage. *Raisonnablement* had different connotations and was little used in French law. Moreover, it was not necessarily a drawback for the various language versions to differ slightly because, when read together, they shed light on each other and brought out the nuances.

32. Mr. Razafindralambo's suggestion to replace *l'Etat du cours d'eau dont la demande émane*, in the French text of paragraph 2, by *l'Etat du cours d'eau auteur de la demande* constituted an improvement.

33. The choice between *élaborer les données* and *exploiter les données* had been discussed in the Drafting Committee and the French-speaking members had deemed the term *élaborer* to be the appropriate one.

34. With regard to Mr. Koroma's suggestion to replace the words "reasonably available" by "reasonably obtainable", it had to be borne in mind that some data were already available to the State.

35. Mr. Eiriksson had proposed an extensive recasting of paragraph 3. The present wording was quite cumbersome, but precision should not be sacrificed in the interests of elegance. The Commission was in the process of adopting the draft articles and it could not review the concept of the articles at the present stage.

36. Mr. McCAFFREY (Special Rapporteur) pointed out that the expression "reasonably available" was to be found in numerous international instruments, in particular in the 1966 Helsinki Rules on the Uses of the Waters of International Rivers. As used in article 10, it was intended to introduce some measure of flexibility. Moreover, it designated both information that a watercourse State already possessed and information that was easily accessible, whereas the expression "reasonably obtainable" would cover only the second category. Lastly, the notion expressed by "reasonably" was much used by English-speaking lawyers and the term *normalement*, used in French law, would have no meaning in

English in the context. He therefore urged that the word "reasonably" should be kept.

37. In addition, article 10 did not seek to impose any burden on the States that concluded a watercourse agreement; the aim was simply to express with precision the terms of their co-operation by emphasizing the need to exchange data and information. It was precisely the desire to avoid laying down an unduly strict obligation which explained the use of the words "where appropriate" in paragraphs 2 and 3.

38. Mr. BARSEGOV endorsed the Special Rapporteur's remarks confirming that paragraph 1 dealt with data and information which the State concerned already had in its possession or could collect without special effort. In his view, the word "available" was too vague.

39. Mr. ROUCOUNAS said that he too shared the Special Rapporteur's views on the use of the adverb "reasonably". The term had the merit of implying a principle of diligence: States were presumed to be in possession of some information, and it was that information they were to communicate to other States.

40. With regard to the French version of the words "requesting watercourse State", in paragraph 2, it could be improved along the lines suggested by Mr. Razafindralambo, but the words *l'Etat du cours d'eau qui fait la demande* would be just as clear and even simpler.

41. Mr. KOROMA proposed the deletion of the words "reasonably available" in paragraph 1, which might then be slightly altered to read: "watercourse States shall on a regular basis and when necessary exchange data and information on the condition of the watercourse [system]".

42. Mr. REUTER said that what the proponents of the word "reasonably" doubtless had in mind was to avoid imposing an obligation to provide a specific amount of information. If the text read simply "provide available data and information", it was conceivable that the requested State might reply to the requesting State that the requested data was, as statisticians were fond of saying, "not available". The point of the adverb "reasonably" was precisely that it enabled the requesting State, in such a case, to say that the requested information should exist and that the requested State had not entirely fulfilled its obligation. In that way, the dialogue could continue, which after all was the object of article 10.

43. The adverb *normalement* employed in the French text was not wholly objective; its meaning could vary, for example, depending on whether the State concerned was a highly developed or a developing one.

44. Mr. Sreenivasa RAO said that, by and large, he agreed with the explanations given by the Chairman of the Drafting Committee and the Special Rapporteur concerning the expression "reasonably available". Many other variations or synonyms were possible, but the basic point was that the obligation to exchange data and information stemmed from the obligation to co-operate. Since States did not necessarily have the same watercourse management requirements, in all likelihood they did not all have the same information at their disposal. However, the concept of co-operation involved that of reciprocity; all States bound by an agreement were supposed to collect data concerning the watercourse in question, data that could be said to be "available". The word had the advantage of applying simultaneously to existing data already collected and to data which could easily be collected. Nevertheless, any other wording would be acceptable, provided that it properly reflected the purpose of article 10.

45. Mr. YANKOV referred to paragraph 8 of article 5 of the 1958 Geneva Convention on the Continental Shelf,[4] where it was stated that "the coastal State shall not *normally** withhold its consent". In his view, the adverb "normally" was more objective than "reasonably". The English text should be in line with the French, since the use of different words might give rise to different interpretations.

46. Mr. EIRIKSSON said that article 10 tried to say too many things in too few words. Explanations would have to be provided in the commentary; in particular, the Special Rapporteur would have to specify what meaning was to be attached to "reasonable". The requested State might still think that the request was not "reasonable" in view of its situation.

47. Agreeing with the view expressed by the Chairman of the Drafting Committee, he said that he would abandon the pursuit of elegance in the formulation of paragraph 3.

48. The CHAIRMAN, speaking as a member of the Commission, said he agreed with the statements made by the Chairman of the Drafting Committee and the Special Rapporteur, except on one point. The Commission was in the process of drafting a text which was to serve as a basis for conventions and agreements that would be interpreted, not by linguists, but by lawyers. Clearly, therefore, the various language versions should be as close as possible to one another, it being unlikely that lawyers would seek clarification of a text in another text drafted in a different language. A compromise solution, consisting in replacing "reasonably" by "normally" in all languages except English, might be adopted in order to reconcile the various versions.

49. Mr. TOMUSCHAT (Chairman of the Drafting Committee) said that Mr. Bennouna's proposal to reverse the order of paragraphs 2 and 3 seemed reasonable, as the situation dealt with in paragraph 2 formed an exception. Mr. Eiriksson's drafting proposals concerning paragraph 2 would likewise facilitate an understanding of the text. So far as the French text was concerned, the French-speaking members of the Commission would have to choose between the alternatives *l'Etat du cours d'eau auteur de la demande* and *l'Etat du cours d'eau qui fait la demande*. Replying to Mr. Koroma, he said that he did not propose to change the wording of paragraph 1. Mr. Reuter had correctly defined the meaning which should be attached to the expression "reasonably available": it covered both data and information already available and data and information which could easily be obtained. The outcome of the discussion seemed to be that a qualifying adverb

[4] United Nations, *Treaty Series*, vol. 499, p. 311.

should be retained; it would be for the Special Rapporteur to comment on the use of the term "normally" in the English text.

50. Mr. CALERO RODRIGUES considered that paragraph 3, which applied both to the data and information referred to in paragraph 1 and to that envisaged in paragraph 2, should be maintained in its present position.

51. Mr. TOMUSCHAT (Chairman of the Drafting Committee) agreed with that view.

52. Mr. McCAFFREY (Special Rapporteur) recalled that he had already had occasion to explain the various connotations attached in legal English to the terms "reasonably" and "normally". Would the word "normally" imply that, where data and information was in fact at a watercourse State's disposal but not "normally" available to it, the State was not obliged to communicate it? He did not think that that was the idea the Commission wished to convey. In any case, the term "reasonably" was broader and covered all possible situations: information that was difficult to obtain, for example, or difficult to provide because of its great bulk. The term could thus be said to possess considerable legal elasticity, which explained its presence in many instruments. As to Mr. Yankov's allusion to article 5, paragraph 8, of the Convention on the Continental Shelf, the word "reasonably" could not have been employed in that case because the context was quite different.

53. Mr. SOLARI TUDELA said that the word *razonablemente* ("reasonably") added nothing to the Spanish text of article 10 because in Spanish the expression "available information" was rendered as information of which States *puedan disponer*. Thus the adverb merely introduced an element of subjectivity, especially as not all States were on an equal footing in terms of the possibility of obtaining data and information. He was therefore in favour of deleting it.

54. The CHAIRMAN, speaking as a member of the Commission, said that he would have preferred the adverb to be deleted from all the provisions, or at least to have the word *razonablemente* in the Spanish text replaced by *normalmente*, because he too thought the former word was too subjective.

55. Mr. BARSEGOV said he deplored the drawn-out debate taking place on article 10. He suggested that the present text should be maintained and that the meaning attached in English to the words "reasonably available" should be explained in the commentary.

56. Mr. REUTER said he shared Mr. Barsegov's view. The word "reasonably" corresponded to a basic concept in common law, and it would be a pity not to take advantage of the resources offered by that law. The commentary should explain the meaning of the expressions "reasonably available" and *normalement disponibles*, namely that they referred to data and information already in existence or easily obtainable.

57. Mr. SEPÚLVEDA GUTIÉRREZ said that the French word *normalement* and the Spanish word *normalmente* did not have the same meaning. They had been discussed at length in the Drafting Committee, and the members had agreed to use the terms now appearing in the document under consideration. Furthermore, the word *razonablemente* was employed in a number of Latin-American—or at any rate Mexican—documents pertaining to criminal law, civil law and international law. The solution proposed by Mr. Barsegov and supported by Mr. Reuter was therefore logical and timely.

58. The CHAIRMAN said that, if there were no objections, he would take it that the Commission agreed provisionally to adopt article 10 [15] [16] as amended in the various languages during the discussion, on the understanding that all necessary explanations of the meaning of the terms "reasonably available" and *normalement disponibles* would be supplied in the commentary.

It was so agreed.

Article 10 [15] [16] was adopted.

ARTICLE 11 (Information concerning planned measures)

59. Mr. TOMUSCHAT (Chairman of the Drafting Committee) introduced the text proposed by the Drafting Committee for article 11, which read:

Article 11. Information concerning planned measures

Watercourse States shall exchange information and consult each other on the possible effects of planned measures on the condition of the watercourse [system].

60. The Drafting Committee was proposing that article 11 should serve as an introduction to part III of the draft, because it considered that the procedural rules set out in the subsequent articles should be preceded by the enunciation of the general obligation of watercourse States to provide each other with information on measures which any of them might plan. The expression "planned measures" had a twofold advantage over the expression "planned uses" appearing in the previous text—that of being all-embracing and that of making it clear that the element triggering the obligation to inform was the launching of the planning process. The phrase "possible effects" encompassed all possible effects of the planned measures, whether adverse or beneficial, thus avoiding the problems inherent in the unilateral character of assessments that would be made by States. Lastly, the words "the condition of the watercourse [system]", which also appeared in paragraph 1 of article 10, applied to characteristics such as water quantity and quality.

61. Mr. KOROMA drew attention to a difficulty arising from the remarks by the Chairman of the Drafting Committee. If "possible effects" meant both adverse and beneficial effects, did not article 11 impose on the watercourse State which knew that the measures it was planning would have adverse effects upon other States the duty to admit that it was about to breach an international obligation? He wished to be assured that the explanations given by the Chairman of the Drafting Committee would not constitute the Commission's commentary to article 11.

62. The CHAIRMAN said that the Commission's commentary would be drafted after the adoption of the draft articles and in agreement with the Special Rapporteur.

63. Mr. TOMUSCHAT (Chairman of the Drafting Committee) reiterated that it had been the Drafting Committee's intention to place an article enunciating a general obligation to exchange information at the beginning of part III of the draft, before the articles specifically dealing with possible adverse effects of planned measures.

64. The CHAIRMAN said that, if there were no objections, he would take it that the Commission agreed provisionally to adopt article 11.

Article 11 was adopted.

ARTICLE 12 [11] (Notification concerning planned measures with possible adverse effects)

65. Mr. TOMUSCHAT (Chairman of the Drafting Committee) introduced the text proposed by the Drafting Committee for article 12 [11], which read:

Article 12 [11]. Notification concerning planned measures with possible adverse effects

Before a watercourse State implements or permits the implementation of planned measures which may have an appreciable adverse effect upon other watercourse States, it shall provide those States with timely notification thereof. Such notification shall be accompanied by available technical data and information in order to enable the notified States to evaluate the possible effects of the planned measures.

66. Article 12 as proposed by the Drafting Committee was based on article 11 as submitted by the Special Rapporteur at the previous session.[5] All the changes made in that text by the Drafting Committee were designed to make it more precise. The words "If a State contemplates", in the first sentence, had been replaced by "Before a watercourse State implements", which described more accurately the chronological sequence of events. The word "contemplates", which at the previous session had been deemed too vague, had been replaced by "implements or permits the implementation of", so that the article covered not only State activities but also private activities.

67. In the interests of consistency, the Committee had replaced the concept of "new uses" by the broader one of "planned measures". The expression "which may cause appreciable harm" had been replaced by "which may have an appreciable adverse effect", in accordance with the suggestion made by the Special Rapporteur at the previous session in response to the argument that States could not be expected to admit to the intent to commit an internationally wrongful act. The word "notice" had been replaced by "notification", which also appeared in the title.

68. The adjective "available", qualifying "technical data and information", was intended to make it clear that the planning State was bound to communicate only such information as was in its possession or easily accessible to it, as distinct from the totality of relevant information.

69. The changes in the second sentence were largely consequential on the reformulation of the first sentence. The word "notice" had again been replaced by "notification" and in consequence the word "other" had been replaced by "notified". The Committee had also replaced the word "determine", which implied something binding, by the word "evaluate". It had also harmonized the end of the sentence with the first sentence by replacing the word "harm" by "possible effects" and "proposed new use" by "planned measures". It had decided to delete the adjective "sufficient", which in some cases might be difficult to reconcile with the concept of availability enunciated earlier in the text. Lastly, the Committee had altered the title of the article to bring it into line with the content.

70. Mr. EIRIKSSON said that the word "timely" was too vague and might give rise to confusion if set against the six-month period laid down in articles 13 and 17.

71. Furthermore, the explanations given by the Chairman of the Drafting Committee as to the meaning of the word "available" were highly reminiscent of those he had given concerning the expression "reasonably available" in article 10 (see para. 49 above). The Commission's commentary on that point would have to be drafted with a great deal of care so as to remove all ambiguity.

72. Mr. KOROMA said that, in his view, the use of the words "appreciable adverse effect" did not eliminate the need for a watercourse State to admit in advance that it was planning something that would cause harm to another State. Moreover, since the obligation to notify existed only for a State which foresaw that the planned measures would have an adverse effect, difficulties as to the burden of proof were bound to arise because the State taking the measures could always allege that it did not expect them to have such an effect: in that case, who would have to bear the burden of proof?

73. The CHAIRMAN, speaking as a member of the Commission, said he endorsed Mr. Eiriksson's remark regarding the word "timely" and suggested that, in the Spanish text, the word *oportunamente* should be replaced by *a su debido tiempo*. With regard to the word "appreciable", he would reiterate his comments during the discussion on draft article 8 (2070th meeting, para. 62). He associated himself also with Mr. Eiriksson's observations on the word "available" and urged that the Commission's commentary, or at least the observations it would be submitting to the General Assembly, should clearly emphasize the interpretation to be given to that term.

74. Mr. McCAFFREY (Special Rapporteur) said he agreed with Mr. Koroma that the use of the expression "appreciable adverse effect" did not completely resolve the difficulty. That expression, however, had attracted a broad measure of support at the previous session and the Drafting Committee had not found a better one. The main thing was to avoid using in article 12 the same terms as in article 8 and thus avoid the problem mentioned by Mr. Koroma. Moreover, an "appreciable adverse effect" would presumably be less serious than "appreciable harm" and, by planning the measures in question, the State did not intend to go beyond its proper share in the equitable utilization of the watercourse. In any case, the adverse effect involved would be potential rather than definite.

[5] See *Yearbook . . . 1987*, vol. II (Part Two), p. 22, footnote 77.

75. With regard to the onus of proof, if a watercourse State thought that another State was planning measures likely to have an appreciable adverse effect, it could initiate the procedure specified in article 18. The Commission would have an opportunity to revert to that question when it came to examine article 18.

76. Mr. TOMUSCHAT (Chairman of the Drafting Committee), responding to the Chairman's remark, said he was not sure that *oportunamente* was the exact Spanish translation of the English word "timely". Nevertheless, it was important to keep the word "timely" in the English version. The notification had to be made as early as possible in order to avoid the project reaching too advanced a stage to be suspended.

77. With reference to Mr. Eiriksson's comment, the "available" information and technical data was in fact that which existed already. A careful distinction had to be made between the "available" information mentioned in article 12 and the "reasonably available" information referred to in article 10.

78. Mr. Sreenivasa RAO suggested that the word "available" might simply be replaced by "existing".

79. Mr. McCAFFREY (Special Rapporteur) pointed out that the data and information mentioned in article 10 covered a wide range of subjects and that it was therefore necessary to use a more restrictive qualification than in article 12, in which the data and information mentioned was of a more limited nature. For that reason, the Drafting Committee had deemed it sufficient to say "available". A precedent could be found in article 2 (*b*) of the 1986 Convention on Early Notification of a Nuclear Accident,[6] in which it was stated that, in the event of an accident, the State in question had to provide the other States and IAEA with "such available information relevant to". The reason for the wording was that, in that case too, the information was narrowly circumscribed. All those explanations would appear in the Commission's commentary.

80. The CHAIRMAN said that, if there were no objections, he would take it that the Commission agreed provisionally to adopt article 12 [11].

Article 12 [11] was adopted.

Co-operation with other bodies (*continued*)*

[Agenda item 10]

Statement by the Observer for the European Committee on Legal Co-operation

81. The CHAIRMAN stressed the Commission's long-standing ties with the European Committee on Legal Co-operation and pointed out that the members of the Commission had often had occasion to take into account the solutions adopted by the Committee in the conventions and other legal texts resulting from its work. It was significant that the General Assembly, in paragraph 12 of its resolution 42/156 of 7 December 1987, had reaffirmed its wish that the Commission should continue to enhance its co-operation with intergovernmental legal bodies whose work was of interest for the progressive development of international law and its codification.

82. Mr. HONDIUS (Observer for the European Committee on Legal Co-operation) said he welcomed the visit to the Council of Europe in May by Mr. Roucounas as representative of the Commission and wished first to summarize the current situation with regard to treaties. It was through treaties that regional organizations like the Council of Europe expressed their determination to translate into facts the common European values and ideals, and it was through ratification of those treaties that the member States of the Council of Europe demonstrated their determination to take seriously their obligations under the Statute of the Council of Europe. In accordance with the Statute, membership in a regional organization did not in any way prevent membership in other organizations: that was true in particular for the United Nations, to which most of the members of the Council of Europe belonged and for the European Communities, to which 12 of the Council's 21 members belonged. Accordingly, the International Law Commission, which played a decisive role in the construction of the modern law of treaties, would be interested to see how member States of the Council of Europe applied the law of treaties.

83. The practices of the Council of Europe, like those of the Commission, were anchored in reality, i.e. in the facts and in the interpretation of the facts—a situation which explained the emphasis placed on the spadework in the preparation of treaties. The Council of Europe also attached great importance to the present state of the law, in particular the constitutional law of its member States. That law governed the manner in which those States expressed their consent to be bound by treaty obligations. The procedures involved were in some cases lengthy and complicated, but they were part of the life of European nations and must be respected.

84. Reality also meant "political reality". No amount of agreement between experts could move Governments to ratify a treaty if there was no political will to do so. Acknowledgement of that fact had taught the Council of Europe two lessons. The first was to take advantage of opportunities when they occurred. The conclusion in 1985, three months after the tragedy in the Heysel stadium, of the European Convention on Spectator Violence and Misbehaviour at Sports Events and in Particular Football Matches[7] provided a good illustration. The Convention had entered into force at the beginning of the following football season and had been ratified by 13 States, including the United Kingdom. Secondly, the Council of Europe was aware of the fact that it could not skip stages in the treaty-making process. With a view to obtaining optimum participation in treaties, it did not try to impose too many obligations too soon, but endeavoured instead to include in a treaty the seed that would later make it blossom forth, as had been done with the most important of European treaties, namely the European Convention on Human Rights.[8]

* Resumed from the 2047th meeting.

[6] See IAEA, Legal Series No. 14 (Vienna, 1987).

[7] Council of Europe, European Treaty Series, No. 120.

[8] Convention for the Protection of Human Rights and Fundamental Freedoms (Rome, 1950) (United Nations, *Treaty Series*, vol. 213, p. 221).

85. As from 1 January 1988, the European conventions and agreements which were computer stored were published in loose-leaf form, so that they could be kept constantly up to date with regard to signatures, ratifications, entry into force, reservations and declarations. In the course of the past year, four new treaties[9] had been opened for signature: the European Convention for the Protection of Pet Animals; the European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment, which provided for the establishment of an international committee empowered to visit all places holding persons deprived of their liberty by a public authority; the Convention on Mutual Administrative Assistance in Tax Matters, prepared by the Council jointly with OECD; and the Additional Protocol to the European Social Charter. Furthermore, Cyprus, following the example of the other States members of the Council of Europe, had on 21 June last announced its intention to grant the individual right of petition provided for in the European Convention on Human Rights, a right that was fundamental to the truly international protection of human rights.

86. Of the total number of 128 conventions in the European Treaty Series, 107 were in force. Nine draft conventions were at present pending before various organs of the Council of Europe, six of them in the legal field: two on civil and trade law, two on the law relating to asylum and two on criminal law.

87. With regard to the application of treaties, the European Committee on Legal Co-operation had recently drawn the attention of the Committee of Ministers to the delay being experienced in the entry into force of some of those instruments. On that point, the European Committee had arrived at the conclusion that it would be desirable to add to the Council's model final clauses for European conventions and agreements an "opting-out" clause which would help, in particular, to speed up the entry into force of technical protocols amending a convention or a treaty. The European Committee would see to it that reasonable time-limits were laid down in those clauses so as not to create difficulties for States which preferred to go through the conventional procedure of ratification.

88. The European Ministers of Justice, at their sixteenth Conference, held the previous week in Lisbon, had dealt with certain general questions relating to the European conventions. In the first place, they had given their support to the initiative to consolidate in a single instrument, and at the same time simplify and update, the provisions of a dozen different treaties in the field of criminal law dealing with extradition, recognition of judgments, transfer of prisoners and mutual co-operation. In doing so, the European Committee remained sensitive to fundamental political interests, which should not be sacrificed on the altar of efficiency. For that reason, the Council had excluded such treaties as the European Convention on the Suppression of Terrorism,[10] which dealt with subjects that were much too delicate.

89. In regard to private law, the European Ministers of Justice had received a report from the Austrian Minister of Justice analysing the reasons for the success or failure of certain conventions. The Ministers had accordingly proposed a series of practical steps to promote the ratification and practical application of conventions, such as improved information for those who might wish to use those treaties—for instance, judges and lawyers—and to favour requests from non-member States for accession to private law treaties. It seemed appropriate that the Council of Europe, which was endeavouring to achieve closer unity between its member States, should not neglect the benefit which other States, inside and outside Europe, could obtain from participation in certain European treaties. It was in that spirit that the Council was co-operating with countries in other parts of the world and was strengthening its ties with the States of Eastern Europe.

90. The legal work of the Council of Europe reflected the main preoccupations of its member States with the challenges to democratic society, many of which were of international concern: terrorism, drugs, AIDS, traffic in children and young women, and environmental hazards. When a new subject was approached, the first stage often consisted in a statement by the Committee of Ministers of the basic principles enunciated in recommendations or declarations, i.e. non-mandatory instruments. The States members thereupon elaborated their national legislations on the basis of those principles, and it was only after that process that the question arose whether the national laws should be harmonized and strengthened by the adoption of a European convention. A good example of that graded approach was the current work on bio-ethics. On that topic, which touched at the same time on law, ethics and science, and on which there was hardly any national legislation, the Council was as yet formulating principles. He was convinced, however, that sooner or later a convention on the subject would have to be formulated, since it was the future of the whole of mankind that was at stake.

91. The Council's legal activities also touched on issues resulting directly from the movement towards European unity. One of the priority questions in that regard was that of multiple nationality, which was to be studied by a new committee of experts that would be starting work shortly.

92. In the field of direct interest to the International Law Commission, the Council's Committee of Experts on Public International Law, which continued to be very active, served as a clearing-house for information to the member States. One of the standing items on its agenda was precisely the progress of the work of the Commission. The Committee of Experts also acted as the adviser to the Council on important matters of international law. In the past year, it had held exchanges of views on the question of the international liability which might arise from accidents such as that of Chernobyl. It had adopted an opinion on the implications in international law of the measures taken to avoid abuses of diplomatic or consular privileges and immunities in connection with terrorist activities; it had examined the problems of reciprocity in the application of the 1961 and 1963 Vienna Conventions on diplomatic relations

[9] Council of Europe, European Treaty Series, Nos. 125, 126, 127 and 128.

[10] *Ibid.*, No. 90.

and on consular relations and had undertaken a new study of the privileges and immunities to be granted to international organizations of a technical or commercial nature. That study had resulted from the fact that, among the international organizations that were constantly being developed, some had quite original and very surprising structures.

93. Lastly, he wished to place the report of the Secretary-General of the Council of Europe on the Council's legal activities from May 1986 to May 1988 at the disposal of the members of the Commission, and he invited the members and the secretariat to visit the Maison de l'Europe in Strasbourg.

94. The CHAIRMAN thanked the Observer for the European Committee on Legal Co-operation for his interesting statement on the activities on progressive development and codification of the law being conducted by that prestigious organization, the Council of Europe.

95. Mr. ROUCOUNAS said that he had welcomed the opportunity of representing the Commission at the forty-ninth session of the European Committee on Legal Co-operation. He had been particularly interested in the Committee's work on multiple nationality, on the international aspects of bankruptcy, on liability in the event of accidents to the environment, on medical research and the law, and on violence in the media. He had noted with interest the statement by Mr. Hondius on the "opting-out" formula to speed up the entry into force of conventions. With that formula, the Council of Europe was applying methods suited to its special needs, which were those of a regional organization with only a limited number of member States. The methods used by the International Law Commission were no less anchored in reality, but in a very different reality, because the drafts on which the Commission was working were intended for the whole of the international community.

96. It was gratifying to note the links which bound the European Committee on Legal Co-operation and the International Law Commission and he looked forward to continued co-operation between the Commission and the organs which, in different parts of the world, were engaged in the harmonizing and developing of the law.

The meeting rose at 1 p.m.

2072nd MEETING

Friday, 1 July 1988, at 10 a.m.

Chairman: Mr. Leonardo DÍAZ GONZÁLEZ

Present: Mr. Al-Qaysi, Mr. Arangio-Ruiz, 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. Roucounas, Mr. Sepúlveda Gutiérrez, Mr. Shi, Mr. Solari Tudela, 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, A/CN.4/L.421)

[Agenda item 6]

DRAFT ARTICLES PROPOSED BY THE DRAFTING COMMITTEE (*continued*)

ARTICLE 13 [12] (Period for reply to notification)

1. Mr. TOMUSCHAT (Chairman of the Drafting Committee) introduced the text proposed by the Drafting Committee for article 13 [12], which read:

Article 13 [12]. Period for reply to notification

Unless otherwise agreed, a watercourse State providing a notification under article 12 shall allow the notified States a period of six months within which to study and evaluate the possible effects of the planned measures and to communicate their findings to it.

2. The present article was based on article 12, submitted by the Special Rapporteur at the previous session,[3] which had dealt with two issues: the period within which the notified State could study and evaluate the effects of planned measures and reply to the notification of the notifying State, and the obligations of the notifying State during that period. The Drafting Committee had decided, in the light of the comments made in plenary meeting, that the second of those issues involved an important obligation and should be given more prominence in a separate article, which would be introduced later as article 14.

3. The new article 13 dealt with the first issue and was closer to alternative B of paragraph 1 of the former article 12. The Drafting Committee had retained the six-month period within which notified States could examine the possible effects of planned measures and give their replies. As the rule laid down was residual and hence effective only in the absence of any agreement, States could always agree on a shorter or longer period. The purpose of the words "Unless otherwise agreed", at the beginning of the article, was to encourage States to negotiate the requisite period; the six-month period would apply only if they failed to do so. Consequently, paragraph 3 of the former article 12 was superfluous and had been deleted. To bring the text of article 13 into line with that of article 12, the word "determinations" had been replaced by "findings", which did not convey the idea of a binding determination.

4. Mr. EIRIKSSON said that, as he read article 13, the main point in regard to the period for reply to notification was that no implementation of the planned measures would be permitted until that period had expired; that being so, he would have preferred a separate article rather than a radical redrafting of the provision. He therefore proposed that articles 13 and 14 should be combined in the following manner: article 13 would become the first sentence of paragraph 1 of the com-

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

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

[3] See *Yearbook . . . 1987*, vol. II (Part Two), p. 22, footnote 77.