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Summary record of the 2165th meeting

Topic:
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2165th MEETING

Wednesday, 30 May 1990, at 10.05 a.m.

Chairman: Mr. Jiuyong SHI

Present: Mr. Al-Khasawneh, Mr. Arangio-Ruiz, Mr. Barboza, Mr. Barsegov, Mr. Beesley, Mr. Bennouna, Mr. Calero Rodrigues, Mr. Díaz González, Mr. Eiriksson, Mr. Francis, Mr. Graefrath, Mr. Hayes, Mr. Illueca, Mr. Koroma, Mr. Mahiou, Mr. McCaffrey, Mr. Njenga, Mr. Ogiso, Mr. Pawlak, Mr. Razafindralambo, Mr. Roucounas, Mr. Solari Tudela, Mr. Thiam, Mr. Tomuschat.

Filling of a casual vacancy in the Commission (article 11 of the statute) (*concluded*)* (A/CN.4/433 and Add.1, ILC(XLII)/Misc.1)

[Agenda item 2]

1. The CHAIRMAN invited the Commission to hold a private meeting in order to fill the casual vacancy created by the death of Mr. Paul Reuter.

The meeting was suspended at 10.10 a.m. and resumed at 10.20 a.m.

2. The CHAIRMAN announced that the Commission had elected Mr. Alain Pellet to fill the casual vacancy created by the death of Mr. Paul Reuter. On behalf of the Commission, he would inform Mr. Pellet of his election and invite him to participate in the work of the current session.

The law of the non-navigational uses of international watercourses (*continued*) (A/CN.4/421 and Add.1 and 2,[1] A/CN.4/427 and Add.1,[2] A/CN.4/L.443, sect. F, ILC(XLII)/Conf.Room Doc.3)

[Agenda item 6]

FIFTH AND SIXTH REPORTS OF THE SPECIAL RAPPORTEUR (*continued*)

PARTS VII TO X OF THE DRAFT ARTICLES:

ARTICLE 24 (Relationship between navigational and non-navigational uses; absence of priority among uses)

ARTICLE 25 (Regulation of international watercourses)

ARTICLE 26 (Joint institutional management)

ARTICLE 27 (Protection of water resources and installations) *and*

ARTICLE 28 (Status of international watercourses and water installations in time of armed conflict) (*continued*)

ANNEX I (Implementation of the articles)[3] (*continued*)

3. Mr. GRAEFRATH said that the Special Rapporteur's sixth report (A/CN.4/427 and Add.1) contained several important provisions, in particular the draft articles on joint institutions and on implementation, which touched on the entire draft. The implementation stage was, in a sense, the moment of truth for every legal instrument, since the methods of implementation often revealed the instrument's true legal nature and the scope of the obligations it embodied.

4. With regard to draft article 26, he fully agreed with the Special Rapporteur that institutionalization might itself be viewed "as a form of implementation of the articles" (*ibid.*, para. 19). Institutional mechanisms not only provided States with a means of joint planning and monitoring of the utilization and protection of an international watercourse, but also introduced a new entity, able to act on its own initiative and to centralize certain functions, into the implementation process. In that light, he could not fully agree with the view expressed by Mr. Calero Rodrigues (2163rd meeting) that the provisions of articles 4, 9 and 10 already contained all necessary elements of co-operation among watercourse States, making a separate article on institutional co-operation unnecessary. The establishment of a joint organization represented a new aspect of such co-operation and deserved separate treatment. He was therefore in favour of the inclusion of a general provision on institutional management in the draft as a recommendation to watercourse States.

5. The question that arose in connection with paragraph 1 of article 26 was whether there was a rule in the law of the non-navigational uses of international watercourses involving a duty to consult with a view to establishing a joint body or organization. His view was that, while there was no such duty in general international law, there were specific fields of regulation where the establishment of institutional mechanisms was dictated by the logic of the subject-matter being regulated and by the interdependence of the States concerned. That seemed to be true in the case under consideration. He therefore supported the inclusion of a provision along the lines proposed by the Special Rapporteur, although some drafting amendments were certainly necessary and, for example, the position of article 26 in the overall structure of the draft would have to be reviewed. He would come back to that question at a later stage.

6. Paragraphs 2 and 3, whose main purpose was to list the functions and powers with which a river commission might be entrusted, raised problems of a different kind. In view of their framework-agreement nature, the draft articles did not provide for the establishment of a permanent organization, as the Special Rapporteur rightly made clear in paragraph (3) of his comments on draft article 7 of annex I. It would therefore be for the parties to future watercourse agreements to define the functions of the body to be set up under those agreements. The purpose of paragraph 2 of article 26 could thus be only to indicate what might be the functions of a joint body under an efficient

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* Resumed from the 2152nd meeting.

[1] Reproduced in *Yearbook ... 1989*, vol. II (Part One).

[2] Reproduced in *Yearbook ... 1990*, vol. II (Part One).

[3] For the texts, see 2162nd meeting, para. 26.

management scheme. Watercourse States had no duty to adopt the functions indicated in a framework agreement, to which they might not all be parties. The functions would therefore have to be described in very general terms or else the list of functions would have to be drawn up as a purely illustrative rather than non-exhaustive one, the word "includes" in the introductory clause of paragraph 2 being replaced by the words "may include". In the same clause, it should be stated clearly that paragraph 2 defined the possible functions of the organization and not the concept of management; paragraph 3 was already drafted in that way.

7. Improvements were also necessary in paragraph 2 (*a*), since, as it now stood, it suggested that the principal function of a future river commission would be to implement the obligations of watercourse States under the present articles, whereas, in fact, the commission in question would, of course, have to perform functions under the specific watercourse agreement establishing it. The subparagraph was not precise enough in another respect: it was not for the organization, but for the States themselves, to discharge the obligations incumbent upon them. The organization's purpose was to promote and monitor implementation by watercourse States and to perform certain centralized functions. The references to the present articles and to parts II and III thereof should be deleted.

8. The list of the joint organization's implementation functions in paragraph 3 might be supplemented by a new subparagraph, which should become subparagraph (*a*), referring to promoting agreement on institutionalized procedures for monitoring compliance and recommending corrective action by the organization and by member States in order to assist States in implementing their obligations. A similar provision was contained in the 1987 Montreal Protocol on Substances that Deplete the Ozone Layer. That element of co-operation was different from fact-finding and the settlement of disputes and should be stressed by the inclusion of a separate provision.

9. Taken as a whole, the changes he had proposed would strengthen the organization's implementation functions. Finally, he proposed that, with a view to shifting the emphasis from the management aspect to the institutional element, the title of article 26 should be amended to read: "Institutional arrangements".

10. Turning to part X of the draft articles, on protection of water resources and installations, he associated himself with the members of the Commission who considered that extending the scope of draft article 27 to protection of international watercourses themselves in paragraphs 1, 2 (*b*) and 3 of the article was inappropriate because the subject was already dealt with in other articles. The main purpose of article 27 was to regulate co-operation among watercourse States in order to ensure the security of watercourse-related installations, facilities and works. That purpose should be made clear in the article and general references to protection should be deleted. Paragraph 1, which did not add new substance to the draft, might be deleted or redrafted. The main question arising in connection with the scope of article 27 and its place in the draft was, however, whether it covered new (planned) or existing installations, or both. In his opinion, new installations represented a typical example of "planned measures with possible adverse effects", as envisaged in part III of the draft.[4] The residual rule on the safety of existing installations, the exchange of information relative thereto and, possibly, the establishment of safety standards would be most appropriately placed between article 10, on regular exchange of data and information, and part III on planned measures.

11. With regard to draft article 28, he said that he favoured the idea of strengthening the protection of international watercourses, which were the main sources of fresh water, also in times of armed conflict. The rules of international humanitarian law in force might not suffice and might need to be amended in order to cope with problems of the environment and developments in weapons technology. He also understood the broad approach revealed by the choice of such terms as "peaceful purposes" and "inviolable", neither of which was a term of art in international humanitarian law. However, he shared the scepticism about the article expressed by other members. While it might be impossible to amend or improve existing international humanitarian law by adding an article on protection in times of armed conflict to a framework agreement on international watercourses, the Commission might try recommending to watercourse States that, when determining the equitable and reasonable utilization of a watercourse in a specific watercourse agreement, they should ensure that the watercourse was used exclusively for peaceful purposes. Such a provision would have its place in part II of the draft, on general principles.

12. Transferring articles 27 and 28 to a more suitable place in the draft would have the welcome effect of establishing a direct connection between article 26 and the draft articles on implementation in annex I. Moreover, article 26 might be combined with the articles of annex I into a fully-fledged part on implementation. That would eliminate a major deficiency of annex I, namely the fact that the implementation measures for which it provided were restricted to recourse possibilities for individuals under domestic law. The draft articles had to take account of the fact that, in the law of the non-navigational uses of international watercourses, as in other related branches of international law, implementation measures encompassed a combination of inter-State and private remedies, the former being quite often implemented through institutionalized procedures. Thus the inclusion of article 26 in a part on implementation could re-establish the balance between inter-State and private remedies. In addition to article 26, the part in question could contain a new article combining the provisions of draft article 3, paragraph 1, and draft article 4 of annex I, on recourse under domestic law and equal right of access, respectively.

13. As for the other articles of annex I, he said that draft article 1, being a definition, could be incorporated in the article on the use of terms, while draft articles 2

[4] See *Yearbook ... 1988*, vol. II (Part Two), pp. 45 *et seq.*, especially p. 46 (art. 12).

and 5, which did not, strictly speaking, deal with implementation measures, could either be deleted or be incorporated in the part of the draft on planned measures, to which they belonged by their very nature. Draft article 6 was not necessary in an instrument on international watercourses and should be deleted.

14. In paragraph (3) of his comments on draft article 7, the Special Rapporteur admitted being hesitant to propose a permanent institution in connection with what was envisaged as a framework agreement. He himself would go even further and say that the framework-agreement character of the draft and the general nature of its provisions did not justify the establishment of an organization or conference, whether permanent or non-permanent. The conventions containing provisions on the establishment of a review conference cited by the Special Rapporteur were not framework conventions comparable to the draft articles under consideration. The 1973 Convention on International Trade in Endangered Species of Wild Fauna and Flora, the 1985 Vienna Convention for the Protection of the Ozone Layer and the 1979 Convention on Long-range Transboundary Air Pollution (see A/CN.4/427 and Add.1, annex) all created specific legal régimes for particular activities or resources which had to be kept under constant review. That was not the case with a framework convention, which would be concretized by the conclusion of specific watercourse agreements creating specific legal régimes for particular watercourses and, in most cases, providing for the establishment of some form of permanent body. Should amendments to the present articles become necessary, they could well be made through annexes or protocols.

15. In conclusion, he said that the sixth report contained all the necessary elements of a part dealing with implementation. Although those elements would, in his opinion, have to be reorganized, most of the groundwork had already been done.

16. Mr. CALERO RODRIGUES, referring to chapter III of the Special Rapporteur's sixth report (A/CN.4/427 and Add.1) on implementation of the articles, noted that the eight articles it contained were being proposed as an annex to the draft articles, but that the Commission had been asked to consider the possibility of including them in the body of the draft.

17. He would begin by focusing on draft articles 2 to 6, which established five substantial obligations for States.

18. The first was the obligation for States to take into account adverse effects in another State in the same manner as adverse effects in their own territory, as set forth in draft article 2. In the light of paragraph 1 (*c*) of article 7 of the draft as provisionally adopted by the Commission, which stipulated that the utilization of an international watercourse in an equitable and reasonable manner required taking into account "the effects of the use or uses... on other watercourse States", he found that provision to be unnecessary.

19. The second obligation was for States to give persons harmed or subjected to risk in another State the same treatment as persons in the same situation in their own territory. In his view, that obligation had been developed too lengthily. First of all, draft article 3, paragraph 1, laid down the obligation for States to ensure "that recourse is available in accordance with their legal systems for prompt and adequate compensation or other relief in respect of appreciable harm caused or threatened in other States by activities carried on or planned by natural or juridical persons under their jurisdiction"; and draft article 4, paragraph 1, enunciated the obligation to ensure that any person in another State who had suffered appreciable harm or was exposed to a significant risk thereof "receives treatment that is at least as favourable as that afforded in the watercourse State of origin in cases of domestic appreciable harm... to persons of equivalent condition or status", including the right (art. 4, para. 2) to take part in or have resort to all relevant administrative and judicial procedures and the right (art. 6, para. 1) to equality of treatment with regard to jurisdictional immunity. Such a detailed enumeration seemed to depart from the Special Rapporteur's stated intention to lay down "overarching principles" (A/CN.4/427 and Add.1, para. 37).

20. In fact, a careful examination of the provisions he had just mentioned led to the conclusion that they simply presented different aspects or cases of application of a single obligation, clearly stipulated in article 3, paragraph 1, to ensure that the administrative and judicial institutions of the State provided the "foreign victims" of real or potential damage with the same remedies that were available to the State's own nationals. That was an "overarching principle" and it would be sufficient in a framework agreement. It should, however, not be set out in an annex and he doubted whether there was a need for an annex to the articles: if some provisions did not fit into the structure that was being developed, they could be placed either in a new part entitled "Miscellaneous provisions", as had been done in other instruments, or in part II of the draft, on "General principles".

21. In the light of those comments, he suggested the following wording, which might cover the obligation in question concisely:

> "A watercourse State shall ensure that the protection and redress available to persons in its territory who are subject to risk or suffer damage as a result of activities related to the utilization of an international watercourse are available on the same basis to persons who are subject to a similar risk or suffer similar damage in other States."

22. The third obligation was the obligation to provide information to persons in other States who were subject to significant risk of appreciable harm, which was set forth in draft article 5. However, the articles already provisionally adopted by the Commission on first reading contained obligations to provide information: article 10 laid down the obligation to exchange data and information on the condition of the watercourse, and article 11 the obligation to provide information on the possible effects of planned measures on the condition of the watercourse; and article 12 was even more specific with regard to measures which might have an appreciable adverse effect on other watercourse States.

Obligations to provide information were also contained in draft articles 22 and 23,[5] referred to the Drafting Committee at the previous session. In fact, there seemed to be only two new elements that were specific to draft article 5: first, that the information would be provided with the purpose of allowing persons in other States who were exposed to a significant risk of appreciable harm "meaningful participation in existing procedures in the watercourse State of origin" (para. 2); and, secondly, that the information would be provided to one or more authorities in the "exposed country", which would disseminate it.

23. He did not believe that the element of purpose justified yet another provision on information. States would already be receiving the information provided for in articles 10, 12, 22 and 23. Nothing would prevent them, if they found it useful, from transmitting that information to interested persons in their territory and he did not see the need to establish a separate international obligation on that point. With regard to the second element, was it really necessary, in a framework agreement, for the Commission to involve itself in the bureaucratic procedures of a State which received information and was to disseminate it within its jurisdiction? The fact that a provision of that kind was contained in a recommendation of the OECD Council was not a justification for adopting such a provision in the far more general instrument the Commission was drafting. He was therefore not in favour of retaining draft article 5.

24. The fourth obligation was the obligation for watercourse States to ensure that their agencies and instrumentalities acted in a manner consistent with the present articles, as stipulated in draft article 6, paragraph 2. When a State assumed obligations, it was obvious that its agencies and instrumentalities must also abide by them. It would therefore be unnecessary to say so. In the particular case of the present articles, however, States would have the obligation not only to act in a certain manner, but also to ensure that anyone in their territory also acted in that manner. That applied to individuals or entities, private or public. The articles were not confined to regulating activities of the State, but covered all activities carried on in the territory of the State. To say, therefore, that the State had an obligation to ensure that the conduct of its agencies and instrumentalities was consistent with the articles might be interpreted too restrictively as meaning that the State had no obligation to ensure similar conduct by individuals and private entities. In addition to being unnecessary, the provision might therefore be dangerous.

25. The Special Rapporteur said in paragraph (4) of his comments on article 6 that paragraph 2 was based on article 236 of the 1982 United Nations Convention on the Law of the Sea. He would point out, however, that the situation referred to in article 236 was of an entirely different nature. Having exempted warships and other State vessels from the provisions concerning the protection and preservation of the marine environment, that article stated that such vessels must nevertheless not act in a manner inconsistent with the Convention, adding, for good measure, the words "so far as is reasonable and practicable". The two situations were so different that he could not see how article 236 could be a basis for draft article 6, paragraph 2.

26. The fifth obligation was the obligation to co-operate in the implementation and development of international law relating to responsibility and liability for compensation for damage and the settlement of related disputes, as set out in draft article 3, paragraph 2. There was no doubt whatever that the establishment and application of clear rules on responsibility and liability would be very helpful in solving the problems of compensation for damage to which the articles under consideration would probably give rise. He was nevertheless not sure whether a provision containing an obligation for States to co-operate in developing and implementing such rules was needed. As far as the development of international law was concerned, the obligation would be a rather vague one, for when could it be said that there had been no compliance with such an obligation? Some States might find, for instance, that the rules proposed in the draft articles the Commission was preparing on State responsibility and on international liability for injurious consequences arising out of acts not prohibited by international law were not satisfactory. If, at an international conference convened to conclude a convention, they expressed their disapproval and decided not to become parties to the convention, could it be said that they had not complied with their obligation to co-operate? The obligation to co-operate in the implementation of international law was even more problematic, since it might be asked whether an obligation to co-operate in the implementation of a rule that a State had accepted was different from the obligation to implement that rule. In the light of those considerations, he would prefer that paragraph 2 of article 3 be deleted.

27. The only possible conclusion he could reach was that, with the exception of article 3, paragraph 1, which embodied a principle that could be expressed in a provision of part II of the draft, on "General principles", no provision in the proposed annex on implementation appeared necessary and the annex as a whole therefore seemed superfluous.

28. As to the definition contained in draft article 1 of annex I, since it was intended to explain an expression used only in the annex, it also had no *raison d'être*, except in so far as it contained a concept which was to be found in several other provisions of the draft articles and which warranted a more precise formulation. The expression "watercourse States" sometimes referred not to watercourse States in general, but to watercourse States whose activities had or might have adverse effects or cause harm in other States. A concise expression might be found to characterize such States and it might be defined in the article on the use of terms. That question could be dealt with during the second reading of the draft articles.

29. Draft article 7 of annex I provided that the parties would meet every two years in a "Conference of the

[5] *Yearbook ... 1989*, vol. II (Part Two), p. 124, para. 637, and p. 125, para. 641, respectively.

Parties". The Conference would consider and adopt amendments, but that would be an occasional task, for it was not likely that proposed amendments would always be before it when it met. It would make "recommendations for improving the effectiveness" of the articles (para. 2 (*c*)), but that would also be occasional, since the provision itself said that it would be done "where appropriate". The Conference would "receive and consider any reports presented by any Party" (para. 2 (*b*)) or by any panel, commission or other body established under the provisions on the settlement of disputes in annex II. However, there was no mention of such reports anywhere in the draft articles.

30. In paragraph (3) of his comments on article 7, the Special Rapporteur seemed to want to go even further, stating that, if a convention were eventually concluded on the basis of the present articles, the parties might establish a secretariat. In paragraph (2) of his comments, the Special Rapporteur explained that he had based the article on the 1973 Convention on International Trade in Endangered Species of Wild Fauna and Flora. Under that Convention and the other conventions referred to by the Special Rapporteur (A/CN.4/427 and Add.1, footnote 114 and annex), secretariat functions concerning the instruments in question had been attributed to some existing secretariat, and that was justified because of the nature of those instruments. In the case of the 1973 Convention, a full system of control over the trade in endangered species had been created and a secretariat had been considered necessary to co-ordinate that action. In the case of the 1985 Vienna Convention for the Protection of the Ozone Layer and the 1987 Montreal Protocol on Substances that Deplete the Ozone Layer, a secretariat was also needed to co-ordinate research and information on scientific assessment. And as soon as there was a secretariat, regular meetings of the parties were necessary, if only to adopt financial provisions concerning the functioning of the secretariat. However, in the case of the draft articles under consideration, the situation was entirely different: no secretariat was needed, for, in fact, although the articles established rules which might be susceptible of universal application, they would not be directly applied universally. Each watercourse was a universe in itself and only States belonging to that universe would participate directly in the application in their territory of the rules embodied in the articles. What assistance would come from a central secretariat? And if there was no secretariat, where was the need to establish a regular schedule for meetings of the parties? None of the functions indicated in article 7, neither "review [of] the implementation of the... articles" nor those set out in paragraph 2 (*a*), (*b*) and (*c*), justified the institutionalization of such meetings. If the parties themselves decided that a meeting would be useful, they could hold it free of the constraints of a rigid and financially onerous schedule. He could therefore not endorse article 7.

31. Draft article 8 of the annex concerned amendments to the articles. That matter, as was well known, was dealt with in article 40 of the 1969 Vienna Convention on the Law of Treaties, which referred to the possibility that more specific provisions might be required in some instruments to regulate the question of the presentation and adoption of amendments. He was not at all sure that that would be the case of the draft articles under consideration, but, in any event, he doubted that what was suggested in draft article 8 would be an improvement on the general procedures laid down in the Vienna Convention.

32. According to that Convention, any State party to a treaty could propose an amendment. However, under the terms of draft article 8, which, like draft article 7, was based on the 1973 Convention on International Trade in Endangered Species of Wild Fauna and Flora, an amendment would be considered only if it had been proposed in writing by at least one third of the parties. The other instruments mentioned by the Special Rapporteur all followed the model of the Vienna Convention on the Law of Treaties. In the light of that Convention and of article 312 of the 1982 United Nations Convention on the Law of the Sea, there seemed to be no valid reason for denying a State the right to submit amendments. Furthermore, any provision on amendments was usually part of the final clauses of an international instrument. So far as he knew, the Commission had made a point of not drafting final clauses, leaving them to be worked out by States when they considered the draft articles it proposed. The Commission should depart from that tradition only if there were good reasons for doing so, and that did not seem to be the case. In his view, the inclusion of article 8, or indeed of any provision on amendments, was therefore of no importance.

33. Mr. RAZAFINDRALAMBO congratulated the Special Rapporteur on his sixth report (A/CN.4/427 and Add.1), which, like the previous ones, bore the stamp of erudition.

34. Commenting first on the articles submitted in the fifth report (A/CN.4/421 and Add.1 and 2), he said that he endorsed the underlying principle of draft article 24 (Relationship between navigational and non-navigational uses; absence of priority among uses), a principle based on a penetrating analysis of the gradual change-over from a preferential status for navigation to a situation in which priority was given to the other uses of international watercourses. That evolution could be explained by the overwhelming importance that road, rail and air transport had assumed and also by the ever greater shortage of water resources which affected all parts of the world, but particularly the developing countries, such as the sub-Saharan countries. A provision could therefore conceivably be included, as the Special Rapporteur proposed in paragraph 1 of article 24, to the effect that no use would have priority over other uses. With regard to paragraph 2, which dealt with possible conflict between several uses and the factors to be taken into account in assessing the respective importance of such uses, he wondered, like Mr. Njenga 2163rd meeting), whether it would not be advisable to refer to the obligation not to cause appreciable harm set forth in article 8 of the draft, in addition to the principle of equitable utilization in accordance with articles 6 and 7.

35. Draft article 25 (Regulation of international watercourses) was a specific example of the application of the general obligation to co-operate laid down in article 9 of the draft and naturally had his support. It would perhaps be more logical, however, to start by defining the term "regulation", as the articles on "Regulation of the flow of water of international watercourses" adopted by the International Law Association at Belgrade in 1980 (see A/CN.4/421 and Add.1 and 2, para. 139) had done. The definition proposed by Mr. Schwebel cited by the Special Rapporteur in paragraph (3) of his comments on article 25 in his fifth report seemed to be sufficiently concise and clear to be included in an opening paragraph of the article. So far as paragraph 2 was concerned, the opening clause did not seem altogether appropriate as it could be interpreted as authorizing an agreement contrary to the principle of participation "on an equitable basis". He would prefer a reservation clause of the kind used in the French text of paragraph 1 of draft article 24 and which might read: "Unless they agree otherwise, watercourse States . . . ". He also wondered whether the words "and other measures" or "and other installations" should not be added after the words "regulation works", on condition that the term "regulation" was defined.

36. The sixth report (A/CN.4/427 and Add.1) dealt with the final parts of the draft articles, concerning management of international watercourses and protection of water resources and installations. In that connection, he noted that, although the Special Rapporteur had announced at a previous session that he would also submit a part on the settlement of disputes, he had dealt in annex I, entitled "Implementation of the articles", with ways and means of facilitating private remedies for existing or potential harm. At the end of his statement, he would raise the question whether the time had in fact come to deal with that matter.

37. Like Mr. Calero Rodrigues (2163rd meeting), he wondered whether draft article 26 (Joint institutional management), which was simply a concrete application of the general obligation to co-operate laid down in article 9, was absolutely necessary. All things considered, however, it did seem to him that, even if there was a direct link between regulation and management of an international watercourse, it would be useful to have a separate provision on the establishment of a joint organization responsible for such management, which would be entirely in keeping with the rule of co-operation laid down in draft article 25. Furthermore, a list of the functions of the organization as set forth in paragraphs 2 and 3 had its place in article 26, for two reasons. First, an enumeration of the functions to be entrusted to the joint organization would enable the scope of the concept of "management" to be determined and was the logical consequence of paragraph 1. Secondly, it was hardly conceivable to devote an annex, or a protocol, solely to management functions—unless, of course, the Special Rapporteur was prepared to submit a comprehensive text on the establishment of a permanent institution for management and regulation, describing in minute detail its objectives and functions and the procedure for the settlement of disputes. No previous special rapporteur had gone that far.

38. Although the list of functions was not meant to be exhaustive, it might be useful to mention the functions that were peculiar to watercourses in third world countries, and in African countries in particular, for example action to combat endemic diseases transmitted by river waters. In that connection, it would be advisable to follow the 1980 Convention creating the Niger Basin Authority, cited by the Special Rapporteur in paragraph (3) (*a*) of his comments on article 26 in his sixth report, under which the Authority was also responsible for the preservation of human health and genetic resources (fauna and flora) (art. 4, para. 2 (*d*) (iii)).

39. He had certain changes to suggest to the French text of article 26, for the consideration of the Drafting Committee. In particular, he proposed that the word *conjointe* be substituted for the word *mixte*, which qualified the organization in question and was rather used in reference to a difference of kind or of status as between the participants. He would further propose that the word *organisation* be replaced by *organisme*.

40. With regard to draft article 27 (Protection of water resources and installations), he noted that the text dealt mainly with watercourses and that protection of water resources was mentioned only in paragraph 3 in connection with the exchange of data and information. He wondered whether it would not be advisable to repeat the expression "water resources", which appeared in the title of the article, in the body of the text, since it was a less restrictive formula than "watercourse" in that it emcompassed all the water resources of the watercourse, including those that supplied the watercourse proper, and hence the whole of the river basin.

41. He agreed that there might be some question about the usefulness of article 27, having regard to the obligations of prevention, co-operation and information imposed on watercourse States independently of the article. As with the management of watercourses, however, a reference to those obligations in the case of the protection of water resources and installations would not be superfluous, in his view.

42. He could accept the terms of draft article 28 (Status of international watercourses and water installations in time of armed conflict) within the context of the progressive development of international law and having regard to the observations of the Special Rapporteur, in particular those made in paragraph (2) of his comments on the article.

43. His comments on annex I (Implementation of the articles) would, at the current stage, be of a preliminary nature only. The approach adopted by the Special Rapporteur was somewhat evocative of the approach of the authors of the International Covenant on Civil and Political Rights, who had decided on an optional protocol to deal with the remedies available to private persons against States accused of violating the rights embodied in the Covenant. Given the objective of the annex, he considered that it would indeed be difficult to incorporate its provisions in the body of the draft articles.

44. In the event, the Special Rapporteur had apparently been guided above all by treaty provisions relating to environmental protection and transboundary pollution, but that link was not in itself likely to call into question the usefulness of the provisions in annex I, provided that they formed the subject of a protocol that was optional.

45. Since the Commission planned to complete its consideration of the draft articles on first reading at its next session, however, it would be preferable if the Special Rapporteur could submit to it as a matter of priority the articles that had been announced on the settlement of disputes. He, too, therefore considered that it would be advisable to postpone consideration of the proposed articles on implementation until after the first reading and not to refer them to the Drafting Committee at the current stage, particularly since some members of the Commission had pointed out that some of those articles should rather be placed among the general principles, and that would call into question provisions already adopted by the Commission.

46. Mr. McCAFFREY (Special Rapporteur) said that he had submitted provisions on the settlement of disputes to the Secretariat and trusted that they would be distributed during the course of the current session.[6] That would enable members to take cognizance of the provisions in time for the next session and to express their views on the matter then.

47. Mr. FRANCIS, referring to the comments made by Mr. Bennouna at the previous meeting with regard to the wording of paragraph 1 of draft article 24 (Relationship between navigational and non-navigational uses; absence of priority among uses), said that, in his view, it would be difficult for the Special Rapporteur to avoid referring to navigation, since the objective was also to lay down the principle of equality between the different uses to which an international watercourse might be subject. He would, however, have preferred paragraph 1 to read:

> "Neither navigational use nor any use contemplated by these articles shall enjoy any inherent priority over any other use."

Worded in that way, the paragraph would probably have more chance of being accepted.

The meeting rose at 11.30 a.m. to enable the Drafting Committee to meet.

[6] Annex II to the draft articles, on fact-finding and settlement of disputes, is contained in chapter IV of the Special Rapporteur's sixth report (A/CN.4/427 and Add.1).

2166th MEETING

Thursday, 31 May 1990, at 10 a.m.

Chairman: Mr. Jiuyong SHI

Present: Mr. Al-Khasawneh, Mr. Arangio-Ruiz, Mr. Barboza, Mr. Barsegov, Mr. Beesley, Mr. Bennouna, Mr. Calero Rodrigues, Mr. Díaz González, Mr. Eiriksson, Mr. Francis, Mr. Graefrath, Mr. Hayes, Mr. Illueca, Mr. Koroma, Mr. Mahiou, Mr. McCaffrey, Mr. Njenga, Mr. Ogiso, Mr. Pawlak, Mr. Razafindralambo, Mr. Roucounas, Mr. Sepúlveda Gutiérrez, Mr. Solari Tudela, Mr. Thiam, Mr. Tomuschat.

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

[Agenda item 10]

STATEMENT BY THE OBSERVER FOR THE INTER-AMERICAN JURIDICAL COMMITTEE

1. The CHAIRMAN invited Mr. Guerreiro, Observer for the Inter-American Juridical Committee, to address the Commission.

2. Mr. GUERREIRO (Observer for the Inter-American Juridical Committee) said that, fortunately, the Commission and the Inter-American Juridical Committee had been able to maintain the co-operation provided for in their statutes. The visit by the Commission's outgoing Chairman, Mr. Graefrath, at the Committee's August 1989 session held at Rio de Janeiro had been much appreciated.

3. The Inter-American Juridical Committee's field of operation covered not only public international law but also private international law, consultative opinions, legal aspects of regional integration and studies on the possibilities for uniform legislation. The Committee was in a sense the heir to various legal organs of the inter-American system going back to 1906. For its part, the Commission was the result of a General Assembly decision pursuant to Article 13, paragraph 1 (*a*), of the Charter of the United Nations, and its statute reflected the trends prevailing at the time the Commission had been established: the trend which favoured conventions as the only proper method of codification; the school which thought that anything beyond "restatements" was dangerous; and the middle course which advocated flexibility, leaving it open to the Commission to recommend the conclusion of a treaty or the adoption of a resolution, or even simply to take note of something. The Committee followed more informal methods, probably because of its regional character and smaller membership. However, the spirit of both the Commission and the Committee, and to a large extent the topics discussed, were similar.

4. In recent years, the Committee's agenda had been dominated by items connected with the drug problem and preservation of the environment. In 1989, it had held only one session, at which it had completed its draft American Declaration on the Environment. Article 1 contained the essence of the right of man to a balanced and healthy environment, while article 2 stressed that preservation of the environment was not only everyone's right, but also their duty. The draft declaration was thus addressed to the public at large.

* Resumed from the 2160th meeting.