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Summary record of the 2217th meeting

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

Extract from the Yearbook of the International Law Commission:-
1991, vol. I

2217th MEETING

Friday, 31 May 1991, at 10 a.m.

Chairman: Mr. César SEPÚLVEDA GUTIÉRREZ

Present: Mr. Al-Khasawneh, Mr. Arangio-Ruiz, Mr. Barboza, Mr. Barsegov, Mr. Beesley, Mr. Díaz González, Mr. Francis, Mr. Graefrath, Mr. Hayes, Mr. Mahiou, Mr. McCaffrey, Mr. Ogiso, Mr. Pawlak, Mr. Sreenivasa Rao, Mr. Razafindralambo, Mr. Roucounas, Mr. Shi, Mr. Solari Tudela, Mr. Thiam, Mr. Tomuschat.

The law of the non-navigational uses of international watercourses (*continued*) (A/CN.4/436,[1] A/CN.4/L.456, sect. D, A/CN.4/L.458 and Corr.1 and Add.1, ILC(XLIII)/Conf. Room Doc.2)

[Agenda item 5]

SEVENTH REPORT OF THE SPECIAL RAPPORTEUR (*continued*)

PART I OF THE DRAFT ARTICLES

ARTICLE [1] [2] (Use of terms)[2] (*continued*)

1. Mr. BEESLEY said that, like the earlier ones, the Special Rapporteur's seventh report was exemplary in that it dealt with the basic and secondary issues arising from the topic in the context of some more general problems which also had to be taken into account by the Commission. He had been right to include some technical materials in his report which would enable the members of the Commission—at the time when the Planning Group was discussing the need to consult experts—to familiarize themselves with matters in fields about which they knew very little. While recognizing that it was not applicable in all cases, he fully supported that very original approach, which opened up new horizons for the Commission.

2. The nature of the instrument on which the Commission was working called for some observations. The first was that it would probably become a framework agreement which could not be imposed on States. States might decide at a diplomatic conference to accede to it, but the rules it contained would always be residual. The text was thus in some ways comparable to an optional protocol. States could either accept or reject it or they could decide to apply it in so far as its provisions were not contrary to those of legal instruments already in force. Various methods could be used for that purpose, including that of reservations, which was criticized because of the abuses to which it gave rise, but to which no one had apparently objected during the debate. Without underestimating the value of its work to writers of articles, to the legal profession in general and sometimes even to international courts, the Commission should therefore not forget that the text it was drafting would serve only as a framework agreement; that would help it solve outstanding problems and face the continuation of its work calmly and confidently.

3. With regard to the draft article, he said that, as stated in the report, all components of the same hydrographic system, even those which might appear autonomous, were actually interrelated. The existence of those natural links was not enough to dictate the regime applicable to watercourses, but it was a fact which could not be ignored. If the Commission did not wish to engage only in a codification exercise, but also meant to contribute to the progressive development of the law, it had to take account of the real world and, in particular, of the now well-known relationship between the various components of the environment.

4. In particular, the draft would be incomplete if it did not deal with groundwater. But, there again, there was no need to include all groundwater in the scope of the draft. His own preference would be to extend the scope of the draft to free groundwater and leave aside confined groundwater, even if the distinction between those two categories of waters was hardly a scientific one.

5. Glaciers, another component of the hydrographic system, should also be covered by the draft articles, but he would not pursue that point if the other members of the Commission were against it.

6. The time had come to adopt an approach which would reconcile the problem's environmental dimension with its political and legal dimensions. There would be no sense in simply rejecting the principle of State sovereignty by saying that it was outdated: States were not about to disappear and they would always tend to want to keep control of their resources and be the only ones to decide how they should be protected and utilized. If the Commission wanted its work to benefit future generations, however, it had to take account of ecological realities as well and, in particular, of all the components of hydrographic systems. Otherwise, its text would be of no use in solving the increasingly serious problems that would inevitably arise in future in the field under consideration.

7. Such an approach was not without precedent: the United Nations Convention on the Law of the Sea would not have seen the light of day if it had not reconciled opposing principles (State sovereignty, on the one hand, and freedom of the high seas, on the other), defined new concepts (economic zone) and formulated new rules (freedom of transit). The international community had shown on that occasion that it was capable of overcoming problems and finding innovative solutions. That was what the Commission should try to do in offering States guidelines which they could follow if they deemed fit. The apparent contradiction between ecological and political or legal imperatives should not be allowed to paralyse the Commission's action.

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[1] Reproduced in *Yearbook ... 1991*, vol. II (Part One).

[2] For text, see 2213th meeting, para. 66.

8. In his view, the concept of the relative international character of international watercourses could safely be abandoned even if it was still being used at present.

9. As to the structure of the draft, he could see no objection to reversing the order of articles 1 and 2, as proposed by the Special Rapporteur.

10. On the subject of the use of terms, he noted that the working hypothesis adopted in 1980[3] and used by the members of the Commission since that time in no way prejudged the definition of an international watercourse that would eventually be adopted.

11. Referring briefly to some passages of the report which had given him food for thought and on which he would have wished to be able to comment at greater length, he said that, in the section dealing with the components to be included in the definition of an international watercourse in particular, the Special Rapporteur had very successfully summed up the consequences of the unitary nature of hydrographic systems by stating that:

> Unless the scope of the draft articles was limited to contiguous watercourses and boundary lakes—a suggestion that had not been made in the Commission to the knowledge of the Special Rapporteur—the rules of the draft by their very nature will require watercourse States to consider the possible impact on other watercourse States of activities that may not be in the immediate vicinity of a border... The same would be true of the capacity to cause appreciable harm. For example, toxic chemicals discharged into a minor watercourse flowing into a boundary lake might ultimately make their way across the lake, causing harm on the other side of the border to another watercourse State.

12. Still on the subject of the definition of the term "international watercourse", the Special Rapporteur was right to state that a definition that focused upon the portion of a stream, lake, etc., that formed or crossed an international boundary would seem too narrow to be helpful to those responsible for applying the draft articles.

13. The passage on free water was also of great interest. By stating that water was constantly in motion, the Special Rapporteur accentuated an ecological reality which the Commission absolutely had to take into account. An equally important reality, namely, that water was an enduring yet finite resource on which the Earth's burgeoning human population was placing ever-increasing demands, was likewise recalled.

14. He had also taken note with interest of the percentages given by the Special Rapporteur, for example, regarding the amount of fresh water "locked" in polar icecaps and glaciers, and of the fact that a majority of the world's population was currently dependent upon groundwater.

15. The Special Rapporteur, who considered that surface waters and groundwater were all interrelated, referred in support of his theory to a specialized work which stated that:

> There are enough examples of streamflow depletion by groundwater development, and of groundwater pollution from wastes released into surface waters, to attest to the close though variable relation between surface water and groundwater.

In his own view, however, that was going too far: not all groundwater was necessarily related to surface water.

16. With regard to the article proposed, he did not yet want to choose between alternatives A and B because they might differ more than appeared at first sight. He would wait until the Special Rapporteur had given further explanations before taking a stand.

17. It was regrettable that no agreement had yet been reached in the Commission, but that was no surprise. It was even inevitable because, in the present case, the Commission had no text to rely on. Nothing had yet been done in that field and it was up to the Commission to make the first choice.

18. Mr. ARANGIO-RUIZ said that the current discussion and the Special Rapporteur's report revealed the eternal dilemma between safeguarding State sovereignty and equality, on the one hand, and, on the other, promoting international solidarity and friendly and effective cooperation in solving the problems of a world that was increasingly proving to be an indivisible physical, economic and social entity. The Commission was thus torn between two imperatives: avoiding the adoption of a text which would reduce the number of States willing to accede to a convention on watercourse law and promoting solidarity and cooperation, which was becoming an increasingly urgent matter.

19. With regard to technical choices, he considered that the Commission should rely on the expertise the Special Rapporteur had acquired in the field, particularly since the topic was less strictly legal than other topics and any legal choices in the matter would be closely interrelated with technical matters. It must also be remembered that any choices made by the Commission, whether legal or technical, would be subject to careful scrutiny both by the Sixth Committee and by States themselves, which, at the diplomatic conference, would make the final choices from which a convention would emerge that could be signed and ratified.

20. As to the key issue of the definition of a watercourse system, he was in favour of the adoption on first reading of the Special Rapporteur's proposal, possibly adapted by the Drafting Committee. Subject to the choices to be made by the General Assembly and Governments, he was particularly in favour of the inclusion of groundwater in the definition of a watercourse system. The reasons which justified that inclusion had been referred to by Mr. Barboza (2216th meeting) and explained at length in the Special Rapporteur's report. In any case, the Commission could always revise its text on second reading, in the light of the reactions of the Sixth Committee and Governments and, in particular, of Member States with a major interest in the adoption of one regime rather than another.

21. If that solution, which could be described as maximalist, was unacceptable to the Drafting Committee, the question might be presented in the form of an alternative and the Commission could then draw the attention of the General Assembly to the importance of the choice to be made in that regard. As a matter of fact, drawing the groundwater issue to the General Assembly's attention

[3] See 2213th meeting, footnote 12.

would be necessary even if the Drafting Committee did agree on a single solution. It might also be useful for a reason which went beyond the present debate and which was connected with the very great importance of water resources from the viewpoint of the law of the environment and development. The environment should not be protected at the expense of development. As it happened, the Commission was committed to making a contribution to the conference which would take place on that topic in Brazil in 1992. The working document which was being prepared for that purpose under Mr. Barboza's guidance should place as much emphasis as possible on the problem of the groundwater regime.

22. Mr. THIAM thanked the Special Rapporteur for his very instructive report and, in particular, for the scientific information it contained. With regard to the proposals that had been formulated, he agreed with the idea of reversing the order of the first two articles so as to define the scope of the draft before dealing with the definition of terms. The "system" concept appeared to be self-evident and it was therefore unnecessary to define it explicitly. He accordingly preferred alternative B of the article which was proposed: the drafting was clearer and thus less likely to lead to confusion than that of alternative A.

23. The key issue dealt with in the report—whether groundwater was sufficiently autonomous to be the subject of a separate codification or whether it should be covered in the draft convention—was a question that was difficult for persons new to the subject to answer because the distinction between confined and free waters was not easy to understand. Moreover, the Special Rapporteur himself was very cautious on that point because he was proposing to include groundwater in the draft while considering the possibility of a separate codification for groundwater which was really independent, in other words, not related to surface water. The solution was an elegant one and would make it possible not to take a decision on a very technical question, to which it was difficult to give precise and definitive answers without having very broad knowledge. The fact that the Special Rapporteur had preferred to formulate general principles without going into certain questions in depth was a matter not only of caution, but also of necessity, for States would not accept a text which, although it was presented as a framework agreement, tried to bind them in too constraining a manner.

24. He once again congratulated the Special Rapporteur on the work which he had done: it would be very useful to the countries of the third world, and in particular the countries of the Sahel, which were especially poor in water resources.

25. Mr. DÍAZ GONZÁLEZ congratulated the Special Rapporteur on his report, which contained a great deal of interesting documentation, particularly from the technical point of view. He said that it was essential, when formulating legal rules, to take account of concrete realities. The Commission's work must, however, be primarily of a legal nature: in the present case, it had to define the legal meaning and content of concepts to which it wanted to give the form of legal rules, but those concepts were in the process of changing and the terms to be used to express them had to be defined precisely. That was not, however, the only objective of the Special Rapporteur's report, which in fact summed up all the work done so far so that the Commission could decide what it was supposed to study and, consequently, what the scope of the draft articles should be.

26. The most important question in that regard was that of the definition of the "system" concept. That of groundwater, as the Special Rapporteur indicated, had already been the subject of many meetings and agreements or draft agreements, such as the Bellagio Draft. As Mr. Thiam had said, the members of the Commission did not have the necessary scientific knowledge to study the question in depth, but they did know that groundwater represented 90 per cent of the water consumed by mankind, accounted for most of the world's water resources and was even the sole source of fresh water in some countries, such as those of the Sahel. The decision whether or not to include groundwater in the draft articles should thus not be taken lightly. Such a vital question must be discussed in depth so that the Commission could adopt a well-reasoned position.

27. Needless to say, everything would depend upon the definition of the term "watercourse". The "system" concept was not new; it had been implicit in the term "hydrographic basin" or "river basin", which many United Nations bodies and international law organizations had considered more suitable. Clearly, a watercourse often consisted of a number of components situated in several States, each with its own legal system. Hence the concept of the international character of a watercourse, the case of the Danube being an excellent example. It was thus essential to regulate the use of those watercourses and that was why the Commission had been entrusted with the task of drafting a set of articles to provide an appropriate legal framework in the form of general provisions that could serve as a guide to States for concluding agreements or treaties on the use of shared watercourses. In those conditions, he was inclined to agree with the Special Rapporteur that the concept of the "relative international character" of a watercourse could be deleted. Furthermore, if the concept of "watercourse system" or "hydrographic basin" was adopted, it was clear that the use of all the components constituting that "system" or "basin" must be regulated in such a way that it would have no effect on other watercourse States or on the watercourse regime itself. The concept of relativity would be valid only if it could be demonstrated that certain wells or watercourses situated in a given State were used in that State in a manner that did not cause any harm to another State or to the watercourse itself.

28. The terms used in the draft articles therefore had to be defined carefully. In that regard, he noted that some of the articles already adopted on first reading contained terms that did not have legal content. That was the case of the concepts of equitable and reasonable utilization, optimum utilization, adequate protection and the obligation to cooperate. What was equitable, reasonable or adequate for one was not necessarily so for another; it was also difficult to make cooperation, apart from that in favour of the peace and security of mankind, a legal obligation. Those examples proved that the text was not

ready. In that context, it should be noted that, although the Commission supposedly adopted a number of articles on first reading, in reality it neither considered the texts prior to referring them to the Drafting Committee nor did it have time to do so at the end of the session, once the Drafting Committee had taken a decision. Thus, it was the latter's decision that was adopted—in what was a completely unjustified reversal of roles.

29. It was important to decide whether or not the definition of an international watercourse should include the "system" concept and whether or not it should cover groundwater. In his view, the "system" concept should be retained because it was consistent with the concept of the hydrographic basin, which the Commission had implicitly used as a basis for so many years. The examples of the Nile, the River Plate, the Amazon and the Senegal River showed that such basins were made up of a number of components, including, it should be recalled, the human element. However, as the Commission had not yet decided on the content of alternatives A and B proposed by the Special Rapporteur, he was unable to choose between the two. As he saw it, the first reading of the draft articles had not been concluded, far from it. The Commission must avoid at all costs referring to the Sixth Committee or a diplomatic conference a draft which would then be completely recast because the terms used did not have legal content. That would be regrettable in a text that was supposed to be the work of legal experts.

30. Mr. AL-KHASAWNEH, commending the Special Rapporteur on his latest report, which enabled him to understand the theory of the water cycle, said that he had no objection to reversing the order of the first two articles on the use of terms and the scope of the articles, respectively, for the reasons explained in the report.

31. With regard to the question of groundwater, any separation of that component from surface water, except if the groundwater could be classified as confined, was bound to be arbitrary. Groundwater was not taken into account in many international agreements, such as the 1959 Egypt-Sudan agreement on the division of the Nile waters,[4] although the groundwater concerned was plentiful and of good quality. It was possible to predict, however, that, with the increasing competition for water resources due to population pressure and the greater awareness of the value of groundwater, the future would certainly see a more comprehensive approach to the question. With that in mind and in order to bring the law on the question into line with hydrographic reality, he supported the explicit reference to groundwater in the two alternatives proposed for the article on the use of terms. He was, however, duty-bound to recall that the Commission and the Sixth Committee had proceeded in a way not unlike that of the negotiators of the Egypt-Sudan agreement in that groundwater and its impact on the draft articles had not been taken sufficiently into account. Yet the number of watercourse States was likely to increase as States whose border was not crossed by an international river or other form of surface water discovered that their groundwater made them watercourse States.

32. In its 1987 report to the General Assembly[5] and in its commentaries on the articles in part I of the draft,[6] the Commission had indicated that watercourse States could be identified by simple geographic observation in the vast majority of cases. If groundwater was included in the draft, however, it would take more than simple geographic observation to ascertain which States were watercourse States. Thus, the criterion of simple geographic observation, which had been the assumption upon which the Commission and the Sixth Committee had worked, was inadequate on that point and it was regrettable that that aspect had not been considered at an earlier stage in the work on the topic.

33. Confined groundwater should be dealt with as a separate topic in the same way in which the Commission had dealt with the law of treaties or the law of the succession of States.

34. With regard to the "relative international character" of a watercourse, he had long been persuaded that, from a scientific point of view, the system approach or drainage basin approach corresponded more to hydrologic reality than the simple watercourse approach. It should be remembered, however, that the difference between them was one of degree rather than of kind. Total abandonment of relativity could be achieved only if all the waters of the Earth which constituted a unitary whole could be made subject to a single legal regime, which would clearly be unmanageable and absurd. Relativity was therefore the price that had to be paid for manageability. The system or drainage basin approaches were also likely to be opposed in the Sixth Committee because of their territorial connotations. In the present case, however, he was concerned less with the prospects for acceptability of the draft than with the question of fairness. If either approach was adopted, practically all of the territory of small States would be subject to international regulation. That in itself was unobjectionable, though the tenacity of the exclusivist tendencies of States in the matter of sovereignty should not be underestimated. The problem was, rather, that the draft, which was characterized by elastic substantive rules on equitable utilization and prevention of appreciable harm, gave prominence to negotiations and negotiations, by definition, would reflect the relations between watercourse States. It was reasonable to expect small or weak States, in other words, the majority of States, to be reluctant to accept an approach the effect of which would be to subject much of their territory to a regime which was unsuitable for determining the rights and duties of each of them and where negotiations would inevitably work against them.

35. In short, while he was not opposed to the system or drainage basin approach, he believed that its obvious merits were offset by its inherent dangers in view of the structure of the draft itself. Had it been a convention

[4] United Nations, *Treaty Series*, vol. 453, p. 64.

[5] *Yearbook ... 1987*, vol. II (Part Two), pp. 18 *et seq.*

[6] Ibid., pp. 25 *et seq.*

with detailed substantive rules, that approach would have had his total support.

36. He expressed gratitude to the Special Rapporteur not only for his latest report, but also for his earlier ones. Any progress made on the topic was due solely to the efficiency and perseverence of Mr. McCaffrey who, as Special Rapporteur, would leave a very definite and long-lasting imprint on the law of the non-navigational uses of watercourses.

37. Mr. RAZAFINDRALAMBO said that the Special Rapporteur's seventh report was of undoubted scientific merit and marked the culmination of a major endeavour. In his view, the Commission's consideration of that report would not alter appreciably the conclusions the Special Rapporteur had drawn from international agreements and from the work of various international bodies on the subject. He agreed that the order of the first two articles should be reversed and that the definitions at present to be found in a number of different articles should be brought together in the article on the use of terms.

38. In his opinion, the solution to the problem of having to choose between the terms "watercourse system" and "international watercourse" lay in the determination of the scope of the draft. The scope of the subject that was the crux of the study had broadened over the years. Initially, it had been confined to the legal problems involved in the use of "international rivers". Then the term "international watercourses" had been introduced. After the work of a previous Special Rapporteur, Mr. Schwebel, the Commission had opted for the term "international watercourse", at the same time adopting, albeit only provisionally, the term "international watercourse system". The Commission's intention had apparently been to broaden its study so as to cover a group of hydrographic components which were characterized by their physical interdependence and thus constituted a unitary whole. That was how the Commission had come to abandon the working hypothesis based on the study of international rivers alone and how that term had come to be replaced by the term "international watercourses". Although in everyday language the difference might appear to be merely one of drafting, that choice seemed to meet with general agreement. At any rate, no one appeared seriously to question the composition of the hydrographic components of watercourses or the forms they could take. To the extent that only surface waters were concerned, there was therefore virtually unanimous agreement. In his view, the word "system" best expressed the idea of hydrographic unity, the word "basin" apparently having been dropped, more for terminological than for legal reasons. Also, the words "international watercourse", used on their own, would not altogether cover certain components of the unitary whole such as lakes and glaciers.

39. It remained to be seen whether groundwater should also be considered as forming part of the system. Many members of the Commission refused to accept that idea, since they feared that it would be tantamount to making the whole, or almost the whole, of the territory of some States subject to the draft, which would then apply to all water resources and not just watercourses. In cases where none of the hydrographic components of the system was predominant and took precedence over the others, that fear was not totally unfounded; and watercourse systems composed solely of surface waters were conceivable. What would be the position, however, if the converse were the case, namely, where a system was composed solely of groundwater? The Special Rapporteur gave a partial reply to that question in his report and quoted an OECD recommendation which was accompanied by the following explanatory note:

> Underground and surface waters constitute a closely interrelated hydrologic system . . . .

That was the general position. In his view, however, even in the, doubtless rare, case in which there was apparently no such interaction (he was thinking, for instance, of confined aquifers), there should be no problem, as the States where such confined groundwater existed would probably not ratify the convention.

40. In the interest of clarity, however, it would be advisable to deal separately with groundwater and to make it clear that the application of the draft to groundwater was dependent on the existence of a close link with the other components of the system. To that end, the last part of paragraph (*a*) of both of the alternatives proposed for the article on the use of terms could be formulated as a condition, and not a fact, to read: ". . . provided that they are linked together physically and constitute a unitary whole". Otherwise, it might not be possible to meet the legitimate concern of those who feared that the scope of the draft would extend to virtually all countries and even to islands connected to the mainland by the continental shelf.

41. The Special Rapporteur also raised the question whether watercourses should be regarded as having a "relative international character", as justified by the fact that parts of the waters in one State might not be affected by or did not affect uses of waters in another State. The Special Rapporteur considered that the concept of "relative international character" should be abandoned because it was incompatible with the hydrologic reality recognized in the Commission's working hypothesis, namely, that the hydrographic components of a watercourse system constituted by virtue of their physical relationship a unitary whole. However, as he himself had already stated, the physical relationship should not be a mere fact: it should be a prerequisite for a unitary whole. Once that was so, the "relative character" would follow the same logic: some parts of the waters would be excluded because they did not satisfy the prerequisite for a unitary whole, there being no physical link. Perhaps the emphasis should not be placed on the uses, but on the link that existed before the use. None the less, the idea of relative character was, in his view, a valid one.

42. The Special Rapporteur, of course, expressed doubts about the practical application of that concept because he felt that it could eviscerate entire sections of the draft articles. Those concerns, if justified, fell within the context of the working hypothesis which the Special Rapporteur had called a "scaffold". As that scaffold was by definition of an external nature, it could be withdrawn without harm to the actual construction, namely, the draft. "Relative character" remained a valid explanation in so far as it referred to the physical link as a

condition *sine qua non* of the unity of the whole that constituted the system.

The meeting rose at 11.50 a.m.

2218th MEETING

Tuesday, 4 June 1991, at 10 a.m.

Chairman: Mr. John Alan BEESLEY

Present: Mr. Al-Khasawneh, Mr. Arangio-Ruiz, Mr. Barboza, Mr. Barsegov, Mr. Díaz González, Mr. Eiriksson, Mr. Francis, Mr. Graefrath, Mr. Hayes, Mr. Jacovides, Mr. Mahiou, Mr. McCaffrey, Mr. Njenga, Mr. Ogiso, Mr. Pawlak, Mr. Pellet, Mr. Sreenivasa Rao, Mr. Razafindralambo, Mr. Roucounas, Mr. Sepúlveda Gutiérrez, Mr. Shi, Mr. Solari Tudela, Mr. Thiam, Mr. Tomuschat.

The law of the non-navigational uses of international watercourses (*continued*) (A/CN.4/436,[1] A/CN.4/L.456, sect. D, A/CN.4/L.458 and Add.1, ILC (XLIII)/Conf.Room Doc.2)

[Agenda item 5]

SEVENTH REPORT OF THE SPECIAL RAPPORTEUR (*concluded*)

PART I OF THE DRAFT ARTICLES

ARTICLE [1] [2] (Use of terms)[2] (*concluded*)

1. Mr. McCAFFREY (Special Rapporteur), summing up the discussion of the seventh report, said that members seemed to have unanimously endorsed his proposal to reverse the order of articles 1 and 2, so that the article on scope would precede the one on the use of terms. Similarly, there was no objection to moving the definition of "watercourse State" from article 3 to the article on the use of terms.

2. Three main substantive issues had been addressed in the debate, namely, whether the term "watercourse" should be defined as a "system" of waters; whether groundwater should be included in the concept of an international watercourse or international watercourse system; and whether, for the purposes of the draft articles, a watercourse should be regarded as having a "relative international character".

3. On the first point, the great majority of members who had addressed the question favoured the "system" concept, some 13 members saying that it should be employed in the draft and two being in favour of using it under certain conditions. Several other members had not explicitly endorsed the concept, but had stated that they supported his proposals in that regard. Some of those who endorsed the use of the "system" concept had also suggested that the Helsinki Rules idea that the waters must flow into a common terminus should be included in order to keep the scope of the articles within reasonable bounds.

4. Two members were opposed to defining a watercourse as a "system of waters", and two others had reservations under certain conditions. Yet even one of the two members speaking in opposition to the "system" concept had not rejected it outright, and had said that an international watercourse could be treated as a system, although only in the limited sense of its uses causing appreciable harm or material injury to co-riparian States. Another of those members had said that States generally used the term "basin" rather than "system" and that the Commission should not expand the scope of the topic beyond that of watercourses, which was already broader than "rivers". As discussed in his report, the practice of States which employed the term "basin" actually supported use of the "system" concept. Furthermore, the question was not whether "watercourse" was a broad or narrow term as such, but what the term meant as far as the draft was concerned. The overwhelming support for use of the "system" concept provided a clear mandate to the Drafting Committee and the Commission to use that term in defining the expression "watercourse".

5. On the question of including groundwater in the concept of a watercourse, members were more divided, but there too, by his count, 12 were in favour, only five were against, and one member would exclude groundwater under certain conditions. The condition most often mentioned by those in favour was that the groundwater should be related to surface water; in particular, confined groundwater should not come within the scope of the draft. Several members had even suggested that confined groundwater should be the subject of a new topic on the Commission's agenda; if it was, in fact, decided not to include that form of groundwater, he would support that idea. Another proposal by several members was that, to be included, the groundwater must flow towards the same terminus as the surface water to which it was related. That was consistent with the similar proposal made with regard to the "system" concept.

6. Several arguments had been advanced against including groundwater. One or two members had said that, in discussing the draft articles over the past 5 or 10 years, they had always had rivers, and possibly lakes, in mind, but certainly not groundwater. Thus, they had not considered how some of the provisions adopted by the Commission might apply to groundwater. In that regard, he would point out that the provisional working hypothesis, first accepted in 1980,[3] expressly referred to groundwater as one of the components of an international

[1] Reproduced in *Yearbook ... 1991*, vol. II (Part One).

[2] For text, see 2213th meeting, para. 66.

[3] See 2213th meeting, footnote 12.