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Summary record of the 2231st meeting

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

Extract from the Yearbook of the International Law Commission:-
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71. Mr. TOMUSCHAT said that, since the Special Rapporteur would have to reply fully to the points raised, the debate should be adjourned until the next meeting.

72. Mr. BARSEGOV supported that proposal, adding that the Commission could continue its discussion later in the day.

73. The CHAIRMAN suggested that the discussion should be held over until the next meeting.

It was so agreed.

The meeting rose at 1.20 p.m.

2231st MEETING

Thursday, 27 June 1991, at 10.10 a.m.

Chairman: Mr. Abdul G. KOROMA

Present: Mr. Al-Qaysi, Mr. Arangio-Ruiz, Mr. Barsegov, Mr. Beesley, Mr. Calero Rodrigues, Mr. Díaz González, Mr. Eiriksson, Mr. Francis, Mr. Graefrath, Mr. Hayes, 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 Corr.1 and Add.1, ILC(XLIII)/Conf.Room Doc.2)

[Agenda item 5]

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

1. The CHAIRMAN, recalling that, at the previous meeting, article 32 had been left pending, since no agreement had been reached despite an extensive debate, suggested that the Commission should deal first with article 33, which had already been introduced by the Chairman of the Drafting Committee.[2]

ARTICLE 33 (Non-discrimination) (*concluded*)

2. Mr. PAWLAK (Chairman of the Drafting Committee) said that the basic purpose of the article was to oblige watercourse States not to discriminate between their own citizens and foreigners in granting access to their courts in respect of harm or threat of harm arising from watercourse activities carried out in their territories. In that connection, the Drafting Committee did not consider that the practice in the domestic law of some countries of requiring foreigners to post a bond in order to be given access to the courts was discriminatory. The article merely prohibited discrimination on the basis of nationality or residence. The wording adopted by the Committee was much simpler than that of article 4 (Equal right of access) which had been proposed by the Special Rapporteur in the annex to his sixth report.[3] Article 33 now consisted of only one paragraph and the reference to "the watercourse State of origin" had been omitted.

3. Article 33 had been adopted by the Drafting Committee with a reservation by one of its members, but it had not been placed in square brackets.

4. Mr. McCAFFREY (Special Rapporteur) said it was clearly understood that watercourse States were required to grant nationals or residents of other States access to judicial procedures only where such access was provided for their own nationals. There was no question of requiring them to amend their internal law to enable individuals from other countries to obtain easier access to their courts.

5. The principle of non-discrimination, which was already part of State practice, had been formally enshrined in almost all modern-day instruments adopted in the environmental field. For instance, article 2, paragraph 6, of the Convention on Environmental Impact Assessment in a Transboundary Context, adopted in 1991 by ECE, stipulated that:

> The Party of origin shall provide ... an opportunity to the public ... to participate in relevant environmental impact assessment procedures ... and shall ensure that the opportunity provided to the public of the affected party is equivalent to that provided to the public of the Party of origin.

Another example was to be found in the Guidelines on responsibility and liability regarding transboundary water pollution, which had also been prepared by ECE and which provided that victims of pollution had the right to institute proceedings in the competent courts of the place where the harm had occurred.[4] The Protocol on Liability and Compensation for Damage Resulting from the Transboundary Movements and Disposal of Hazardous Wastes and Other Wastes, which was currently under consideration and would be annexed to the Basel Convention on the same subject, also provided for equal access to the courts of the State of origin.

6. The basic idea contained in article 33 should not prove too controversial.

7. Mr. SHI said that it would certainly be a valuable achievement if the Commission could adopt article 33 on first reading. In a spirit of cooperation, he would therefore withdraw the proposal he had made at the 2230th meeting that the article should be deleted altogether. He was willing to accept it as it was.

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

[2] For text, see 2230th meeting, para. 6.

[3] See 2229th meeting, footnote 3.

[4] See document ENVWA/R.45, annex.

8. Mr. CALERO RODRIGUES said that he had no substantive objection to article 33, but wished to comment on its wording. As it stood, it seemed to go too far in that it did not specify that the appreciable harm in question was harm suffered in a State other than the State of origin. The article seemed to be stating a general obligation of non-discrimination, including for harm suffered within the State of origin. He did not think that a provision along those lines should be included in a draft article on international watercourses dealing specifically with the impact of harm or risk of harm extraterritorially. Perhaps an explanation should be added to the text.

9. Mr. McCAFFREY (Special Rapporteur) said that the Drafting Committee had taken account of the point raised by Mr. Calero Rodrigues, but had finally decided not to include any such specification in the article. He agreed, however, that, as matters stood, the Commission might be accused of legislating for entirely domestic circumstances and of going beyond what was required in draft articles on international watercourses. If the Chairman of the Drafting Committee had no objection, he would therefore not oppose making such a change, which was, after all, a minor one.

10. Mr. GRAEFRATH said that, if the Commission was prepared to agree to the suggestion made by Mr. Calero Rodrigues, he would accept it as well, but he did not think that the Commission should agree to it. He saw no reason to limit the scope of article 33 to transboundary harm. The draft article dealt with international watercourses in general, not only with the harm in question. He therefore thought that the present wording should be retained.

11. Mr. PAWLAK (Chairman of the Drafting Committee) said that he shared Mr. Graefrath's view. The Drafting Committee had already discussed whether the restriction suggested by Mr. Calero Rodrigues should be included in the draft article. The fact was, however, that the article enunciated a general rule. Its subject-matter was not transboundary harm—since it was not a liability clause—but access to the courts. If the Commission wished to endorse Mr. Calero Rodrigues' proposal he would not object, but, if it did so, it would be limiting the scope of the article.

12. Mr. CALERO RODRIGUES said he would not insist on his proposal, but he thought that the Commission would be going too far by granting access to the courts to any natural or juridical person who had suffered appreciable harm when the harm was confined to the State of origin. The fact that watercourses were international did not mean that they had been internationalized. Only uses which produced effects in other States were of concern to the Commission. If the internal law of a State contained a discriminatory clause relating to harm which had occurred in its own territory, that would of course be regrettable and might be contrary to a rule of human rights law, but it would certainly not be a violation of any rule of the law relating to international watercourses. As now worded, the provision was generous, but its scope was too wide.

13. Mr. Sreenivasa RAO said he agreed that the scope of article 33 was too broad. Harm to States and harm to individuals could not be placed on the same footing, even if it was appreciable harm. The right of individuals to institute proceedings should be limited, since they were already protected in other ways, especially by the remedies available under the internal law of their own countries and, frequently, under the internal law of foreign countries. The emphasis on the rights of individuals shifted the balance of the article and distorted its meaning. He could not therefore accept the article in its present form.

14. Mr. McCAFFREY (Special Rapporteur) said that he did not object to the proposal made by Mr. Calero Rodrigues, but there did not seem to be much support for it. Since the article had been proposed by the Drafting Committee, he was of the opinion that it should be adopted as it was on first reading and that the view stated by Mr. Calero Rodrigues should be reflected in the commentary.

15. Mr. BARSEGOV said that it would be wiser to accept the Special Rapporteur's proposal. In legal terms, the argument advanced by Mr. Calero Rodrigues was convincing, but it might not be reasonable to reopen the debate on article 33 at the present stage; it would be better to wait until the second reading to come back to that point. As to the procedure to be followed, he thought that, in view of the relationship between article 32 and article 33, the Commission should take a decision on article 32 before adopting article 33.

16. Mr. TOMUSCHAT said he agreed with the Special Rapporteur that article 33 should be adopted in its present form, even though the main problems that arose in the field in question were problems of transboundary harm. There was the example of the 1976 OECD Recommendation on the equal right of access in relation to transfrontier pollution,[5] which sought to solve the problems which had arisen in the past when persons living in States other than the State of origin of the harm they had suffered had wanted to obtain compensation in the courts of the State of origin. However, it was now a well-established principle of human rights law that there should be no discrimination in respect of access to judicial procedures. That principle was enunciated, in particular, in article 14 of the International Covenant on Civil and Political Rights and it must be regarded as a customary rule of international law. In those circumstances, he thought that there was no real objection to expanding the scope of the article.

17. Mr. EIRIKSSON said that he did not share Mr. Calero Rodrigues' view and would prefer in general to keep the article as it stood.

18. The CHAIRMAN, speaking as a member of the Commission, said that it would have been better not to base the principle of non-discrimination solely on nationality or residence. In his view, that unduly restricted the scope of the principle; it should have been emphasized that all victims must be granted access to the courts.

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[5] Adopted on 11 May 1976. Text reproduced in OECD, *OECD and the Environment* (Paris, 1979).

19. Speaking as Chairman, he suggested that the Commission should adopt article 33, on the understanding that Mr. Sreenivasa Rao's objection and Mr. Calero Rodrigues' suggestion would be reflected in the summary record of the meeting and that the Commission could come back to them during its consideration of the article on second reading.

20. Mr. Sreenivasa RAO said that, since his objection was fundamental and was likely to change the entire structure of the article, it should also be reflected in the commentary.

It was so agreed.

Article 33 was adopted.

ARTICLE 32 (Recourse under domestic law) (*concluded*)

21. Mr. PAWLAK (Chairman of the Drafting Committee) said that the question dealt with in article 32 was so complex that it had not really been possible to work out a generally acceptable text. However, the Special Rapporteur had a new version to propose to the Commission but, if it turned out to be unacceptable, the Commission would have to act accordingly.

22. Mr. BARSEGOV said that the Commission was proceeding in a very odd manner. He recalled that he had accepted article 33 on the condition that article 32 would not be called into question. If the Commission was going to agree to an amended version of article 32, why had it adopted article 33 first? He was one of the members of the Commission who considered that articles 32 and 33 should either be placed in square brackets or deleted.

23. The CHAIRMAN said that the Commission could listen to the Special Rapporteur's new proposal without necessarily having to take a decision on it.

24. Mr. McCAFFREY (Special Rapporteur) assured the members of the Commission that his new proposal was not a Trojan horse designed to sneak article 32 in with article 33. The procedure currently being followed was the result of the fact that the Commission had had to decide on article 33, which had been recommended by the Drafting Committee for adoption without square brackets, and then come back to article 32, on which some reservations had been formulated in the Drafting Committee. He had made minor changes in the revised text that he had read out at the preceding meeting[6] in response to the comments of several members of the Commission who had feared that article 32 might give rise to interpretations going well beyond its intentions. He was aware that those changes would not magically transform the article into a text certain to be widely accepted by the Commission, but he did think that they might clarify the intent of the article. If the Commission decided to bring the matter to the attention of the General Assembly, either by placing the article in square brackets or by referring to the issue in the commentary, it should try to describe the situation clearly so that the General Assembly would have a precise idea of the question.

25. The new version that he was proposing read:

"Article 32. Right to relief under domestic law

"A watercourse State shall ensure that a right to compensation or other relief is available under its legal system for appreciable harm caused in other States by activities within its territory related to an international watercourse to the same extent as for harm caused within its territory by such activities."

26. He pointed out that the article dealt with the substantive right to relief and not with procedural issues, which were the subject of article 33.

27. Mr. NJENGA recalled that, at the preceding meeting, he had noted that, if the Commission were to adopt article 32, then article 33 would no longer be relevant, since both articles dealt with the same problem. Discrimination was not prohibited only in respect of procedure. If a person was granted the right to apply to the courts of a country, it was obvious that he expected to obtain relief and would also benefit from the remedies available in that country. Thus, article 33 also dealt with the "relief" aspect of the issue. Article 32 should be withdrawn.

28. Mr. SEPÚLVEDA GUTIÉRREZ, supported by Mr. THIAM, said that he did not see how the Commission could consider a text which had not yet been made available in his working language.

29. Mr. CALERO RODRIGUES, supported by Mr. EIRIKSSON, said that, in his view, the text that the Special Rapporteur had just read out was as satisfactory as the previous version. In order to make the text of article 32 available to the members of the Commission in their working languages, he had proposed at the preceding meeting that the article should be referred back to the Drafting Committee, but the Commission had not endorsed his proposal. Mr. Njenga had, moreover, rightly pointed out that it would be useless to give a person a procedural right if he had no substantive right to defend, but, as it had been adopted, article 33 did not deal with substantive rights. It had originally been designed to supplement article 32. The attempt made at the preceding meeting to merge the two articles had not been very successful, but article 33 would have no autonomy or would have only very limited scope in the absence of a provision on substantive rights. The Commission should make it clear that the victim of harm caused by an activity related to a watercourse was entitled to the same substantive rights as the victim of the same harm in the territory of the State of origin. In his view, article 32 was essential and the Commission should either agree on one of the Special Rapporteur's procedural proposals or adopt his revised version of article 32.

30. Mr. BARSEGOV said that, before the meeting, he had told the Chairman he feared that the adoption of article 33 was being used as a means of pushing through the adoption of article 32. That fear was about to become reality. His approval of article 33 should accordingly be considered null and void.

31. Mr. Sreenivasa RAO said that he shared the views of Mr. Njenga and Mr. Barsegov. He too thought that the

[6] See 2230th meeting, para. 11.

Commission should have taken a decision on article 32 before adopting article 33. If it absolutely had to adopt article 32, it should do so in line with the proposal made by Mr. Graefrath at the preceding meeting. Substantive rules could not be imposed upon States, particularly since some of them, such as Canada at the time of the *Trail Smelter* case,[7] were not in a position to offer foreigners the right to seek relief through their courts. An important aspect of that type of provision was the need for inter-State cooperation in that regard. He could not accept the procedure now described.

32. Mr. HAYES suggested that the decision on article 32 should be deferred until the text proposed by the Special Rapporteur had been translated into all the working languages. At the preceding meeting, he had not taken a position on the substance, but he found that there was a difference between articles 32 and 33 inasmuch as the first dealt with the substantive right to relief and the second with the right of access to the courts. He did not believe that an article which provided for the right of access to the courts guaranteed anything other than the right to use available remedies. The right of access to the courts in no way implied that the specific remedy which a person was claiming would be made available to him; hence the need for article 32. At the current stage, it was only logical that the Commission should adopt article 32 along with article 33. If it decided to do so, he would make a minor drafting suggestion relating to the Special Rapporteur's proposed text.

33. Mr. TOMUSCHAT said that several obstacles had arisen in the course of the discussion: the lack of language versions other than English and the very strong opposition to the latest attempt to have the text of article 32 adopted. The Commission should therefore either eliminate article 32 or place it in square brackets, since it clearly did not want to adopt it. He personally attached more importance to article 33 than to article 32 and thought that it was much better for article 33 to be based on a broad consensus than to place both articles in square brackets. He urged the members of the Commission not to go back on their endorsement of article 33 and to put aside article 32, which went well beyond article 33 and might be reconsidered on second reading. The main thing was to prohibit any discrimination between persons of different nationalities: that was the principle embodied in article 33.

34. Mr. BARSEGOV said that, since many members of the Commission had stressed the close links between articles 32 and 33, it would be logical to go back to the suggestion made at the preceding meeting that both articles should be placed in square brackets, all the more so since he was certainly not the only member who had been talked into accepting article 33.

35. Mr. PAWLAK (Chairman of the Drafting Committee) said that he personally supported article 32, of which he preferred the latest version. He would also like the Commission to refer to the General Assembly a set of articles without any square brackets. He therefore proposed that article 32 should be withdrawn in the light of the discussion in the Commission and that the commentary should reflect as faithfully as possible the positions adopted during the discussion on the need to include substantive rules on remedies, the importance of such rules in future framework conventions and the impossibility at the current stage of drafting a text on the question which was acceptable to the Commission.

36. Mr. BEESLEY said that he wished to reiterate his position of principle concerning article 33: he supported the purpose of articles 32 and 33. He was aware of the procedural difficulties involved, but noted that Mr. Barsegov had suggested the solution of placing those two articles in square brackets. Although that solution did not meet his own concern, it was an interesting possibility inasmuch as opinions were still divided. He proposed that the order of articles 32 and 33 should be reversed and, if the text of the present article 32 continued to give rise to objections, that those two articles should be placed in square brackets, since they were so closely linked.

37. Mr. SHI said that the Commission had to find a way of breaking the deadlock. Since articles 32 and 33 were closely related and the Commission had adopted article 33, it could place article 32 in square brackets so as to leave the decision to Government representatives in the General Assembly.

38. Mr. McCAFFREY (Special Rapporteur) said that, in the light of the comments just made, it would be best to retain article 33, which had just been adopted, and to withdraw article 32, on the understanding, of course, that the discussion would be reflected in the commentary to the article. That would make it possible to preserve its underlying idea both for Government representatives in the General Assembly and for the Commission when the time came to consider the draft on second reading. He thought that the main obstacle was that the new version had not been distributed in all working languages. He had not heard any convincing argument against the need for article 32. Unlike Mr. Tomuschat, he believed that that article did not go as far as article 33 and provided simply that, if there was a remedy in the event of harm caused in the territory of the State of origin, there should also be a remedy in the event of harm caused in other countries.

39. Mr. BARSEGOV said that he was prepared to accept that proposal because he was certain that the Special Rapporteur would do everything he could to draft an objective commentary. His own objection to article 32 was not the result of the fact that he saw no need to compensate harm caused in a foreign country. He recalled that, at the preceding meeting, he had said that, in his view, that text prejudged the solution which would be found to other problems that were still pending. It also seemed to him that the adoption of that provision would be contrary to the nature of the instrument under consideration because it would basically require States to amend their legislation and that might lead to discrimination against their own nationals in relation to foreigners. All those questions had to be considered in depth in the context of other topics so that the Commission might adopt a more general text.

[7] See 2222nd meeting, footnote 7.

40. The CHAIRMAN said that, if he heard no objection, he would take it that the Commission adopted the proposal by the Chairman of the Drafting Committee and the Special Rapporteur that the text of article 32 should be withdrawn.

Article 32 was withdrawn.

41. Mr. EIRIKSSON, supported by Mr. BEESLEY, said that, for a number of reasons, he had no objection to the withdrawal of article 32. In his view, articles 32 and 33 gave only a partial picture of what a regime of civil liability should be. An instrument such as the one now being formulated should include such a regime, quite independently of the subject dealt with. That would be to the advantage of States, since the result would be fewer disputes between them. However, the regime which the Commission was trying to establish had become much too incomplete because of the amendments made during the discussion. As he had stated at the preceding meeting, the articles should contain enough indications to let States know that they had to envisage a regime of civil liability. He had questioned whether the Commission should submit to the General Assembly two articles in square brackets or a single article accompanied by a very detailed commentary. His understanding was that the Special Rapporteur would draft a detailed commentary on the question, although it was not customary to have a commentary on an article which had not been adopted. In that way, the discussion could be resumed in the General Assembly, as well as in the Commission on second reading. The commentary should therefore include, in square brackets, the text initially adopted by the Drafting Committee, as well as the latest version which had been proposed. It was regrettable that it had not been possible to distribute the text of that version in all working languages.

42. Mr. CALERO RODRIGUES said that, in order not to delay the Commission's work, he had also not expressed any objections, but he had very serious reservations to formulate. The solution which had been adopted was very incomplete and regrettable, for the Commission should have dealt at the same time with substantive rights and procedural rights. He fully shared Mr. Eiriksson's view on the commentary relating to an article which had neither been adopted nor even placed in square brackets.

43. Mr. ROUCOUNAS said that he had been in favour of the inclusion of articles 32 and 33 in the draft. He did not believe that the commentary to be prepared by the Special Rapporteur should include the text of an article which had not been adopted. The only thing the Commission had agreed on was that the problem should be explained in that commentary.

44. Mr. Sreenivasa RAO said that the statements by Mr. Eiriksson, Mr. Calero Rodrigues and Mr. Beesley gave the impression that the members of the Commission who were opposed to the inclusion of articles 32 and 33 in the draft did not think that the substantive and procedural rights in question should be recognized, particularly for natural persons, whereas they had been the ones who had stressed the importance of those rights. The fact was that the regime of civil liability was so complex that it could not be dealt with in a simplistic manner.

45. Mr. PAWLAK (Chairman of the Drafting Committee) proposed that article 33 should be renumbered 32.

It was so agreed.

TITLE OF PART VI (Miscellaneous provisions)

46. The CHAIRMAN said that, if he heard no objection, he would take it that the Commission agreed to adopt the title of part VI.

The title of part VI was adopted.

AMENDMENTS RECOMMENDED BY THE DRAFTING COMMITTEE TO ARTICLES PREVIOUSLY ADOPTED BY THE COMMISSION

47. The CHAIRMAN invited the Chairman of the Drafting Committee to introduce the articles previously adopted by the Commission with the amendments recommended by the Drafting Committee (A/CN.4/L.458/Add.1).

48. Mr. PAWLAK (Chairman of the Drafting Committee) said that document A/CN.4/L.458/Add.1 contained all the articles already adopted at previous sessions by the Commission, but rearranged in what the Drafting Committee considered a more logical order. As indicated in the footnote to the document, the initial numbering of articles appeared in square brackets, cross-references had been adjusted accordingly and the word "[system]" had been eliminated throughout the draft. Furthermore, in a number of provisions, the Drafting Committee had felt that the word "international" before the word "watercourse" could be dispensed with because the context left no doubt as to the international character of the watercourse.

49. In article 3 [4] (Watercourse agreements), the Drafting Committee recommended that the second sentence of paragraph 1 should be deleted and that the words "hereinafter referred to as watercourse agreements" should be added after the words "one or more agreements".

50. In article 5 [6] (Equitable and reasonable utilization and participation), the Drafting Committee had decided to replace the word "optimum" in paragraph 1 by the word "optimal" and had amended the phrase containing that term accordingly. He drew attention to a typing error at the end of the English text of paragraph 2: the words "the present article 5" should read "the present articles".

51. In article 6 [7] (Factors relevant to equitable and reasonable utilization), the Drafting Committee had noted during its discussions that ecological concerns had not been referred to in the list in paragraph 1 (*a*); it had therefore decided that the word "ecological" should be added after the word "climatic".

52. In article 8 [9] (General obligation to cooperate), the word "optimum" had been replaced by the word "optimal".

53. In the English text of article 11 (Information concerning planned measures), the word "conditions" in the plural was a mistake. It should be in the singular.

54. In article 15 (Reply to notification), the Drafting Committee had considered that the deadline provided for in paragraph 2 for the transmission of a documented explanation should also apply to the communication of the finding itself.

55. It had therefore redrafted the second half of the paragraph to read:

> ". . . it shall communicate the finding to the notifying State within the period referred to in article 13, together with a documented explanation setting forth the reasons for the finding."

56. In article 17 (Consultations and negotiations concerning planned measures), the Drafting Committee recommended that the wording should be simplified by eliminating, from paragraph 2, the cross-reference to paragraph 1 and, from paragraph 3, the cross-reference to paragraph 2 of article 15. Other minor drafting changes had also been made to the English version of that article. In paragraph 3, the words "of making" had been replaced by the words "it makes".

57. In article 18 (Procedures in the absence of notification), an error in the English text of paragraph 2 had been rectified. The words "the two States" had replaced the words "the States concerned".

58. In article 19 (Urgent implementation of planned measures), in paragraph 1, the reference to "article 5 and 7" should read "articles 5 and 7". In paragraph 3, the words "at the request of any of the States referred to in paragraph 2" had been substituted for the words "at the request of the other States" to make it clear that each one of the States concerned could act individually.

59. In article 21 [23] (Prevention, reduction and control of pollution), the words "for the purposes of the present article" at the beginning of paragraph 1 should be replaced by the words "for the purposes of this article", following the model of article 25 [27]. A few further editorial changes made to other articles were self-explanatory.

60. He paid a tribute to all those who, over the years, had contributed to the elaboration of the draft articles. He thanked the members of the Commission and the Drafting Committee for their work, as well as the secretariat, interpreters and technical staff who had helped to accomplish a difficult but important task so that the General Assembly would have a complete text before it at its next session. He addressed his warm congratulations to the Special Rapporteur for the significant contribution he had made to that achievement.

61. Mr. EIRIKSSON pointed out that, in article 14, a comma should be added after the words "providing them". He joined in the congratulations addressed to the Special Rapporteur.

62. Mr. SHI said that, to bring the Chinese version of the draft into line with the English, a few corrections should be made which he would communicate to the secretariat.

63. Mr. NJENGA said that it was a matter of great satisfaction to him that, after so many years, the Commission had at last completed the consideration of the draft articles on first reading. He congratulated the Chairman of the Drafting Committee for his excellent work and for his efforts to reconcile opposing views. As members would recall, the Preparatory Committee for UNCED had included the question of the protection of freshwater resources on its agenda and it would perhaps be useful to forward to that Committee the text of the articles the Commission had adopted on first reading on the question so that it could take them into account at its next session, due to be held in September. It would also be useful if, during the next session of the General Assembly, the Special Rapporteur could be present at the meetings at which the Sixth Committee would consider the draft so that he could reply to any requests for clarification that might be put to him. He had already made that proposal during the discussion and trusted that it would be taken into consideration by the Bureau.

64. The CHAIRMAN said the Bureau should ensure that all of the Commission's working methods were duly respected, but it would see to it that its work was brought to the attention of the Preparatory Committee for UNCED.

65. Mr. BARSEGOV, expressing satisfaction at the fact that the Commission had brought its work on the topic to a successful conclusion, said he had no doubt that the draft articles would be adopted even more quickly on second reading, since many of the problems had already been solved. He warmly congratulated the Special Rapporteur and all those who had preceded him in his task, as well as the various chairmen who had in turn presided over the Drafting Committee and whose efforts had made it possible to achieve such a satisfactory result.

66. The title of the draft articles was, however, somewhat inaccurate, for it should relate not to international, but to multinational, watercourses inasmuch as every State always retained its sovereignty over a watercourse. He trusted that account would be taken of that comment.

67. The CHAIRMAN said that the question had indeed already been raised and the Special Rapporteur would undoubtedly give it all due consideration.

68. Mr. DÍAZ GONZÁLEZ also congratulated the Special Rapporteur on his praiseworthy efforts in connection with the consideration of an extremely difficult question, as well as the successive chairmen of the Drafting Committee who had successfully carried out their difficult task.

69. With regard to article 3, it seemed superfluous to state, at the end of paragraph 3, that watercourse States would consult with a view to negotiating "in good faith". Was it really necessary to spell that out? So far as he knew, States never negotiated in bad faith. Good faith was always presumed in international law. He therefore wondered whether it would be possible to delete those words and to say simply that States would consult with a

view to negotiating for the purpose of concluding a watercourse agreement.

70. The CHAIRMAN assured Mr. Díaz González that his request would receive favourable consideration in due course. He said that if he heard there was no objection, he would take it that the Commission agreed to adopt the amendments to the draft articles recommended by the Drafting Committee (A/CN.4/L.458/Add.1).

It was so agreed.

ADOPTION OF THE DRAFT ARTICLES ON FIRST READING

71. The CHAIRMAN said that the Commission had thus completed the consideration on first reading of the draft articles on the law of the non-navigational uses of international watercourses. If he heard no objection, he would take it that the Commission agreed to adopt the draft articles as a whole, as amended, on the understanding that the observations made by members in the course of the consideration of the Drafting Committee's report would be reflected in the summary records.

It was so agreed.

The draft articles on the law of the non-navigational uses of international watercourses, as a whole, as amended, were adopted on first reading.

TRIBUTE TO THE SPECIAL RAPPORTEUR

72. Mr. THIAM reminded members that the Commission traditionally adopted a resolution to congratulate and thank the author of a set of draft articles. He trusted that it would do likewise in order to express its gratitude to Mr. McCaffrey for the patience, modesty and tolerance which had enabled the Commission to reach agreement.

73. Mr. SEPÚLVEDA GUTIÉRREZ said that the spirit of cooperation Mr. McCaffrey had displayed throughout the consideration of the draft articles was beyond praise. Appreciation was likewise due to successive chairmen of the Drafting Committee, all of whom had carried out their task with great tact and efficiency, and to all members of the Committee who had worked with dedication and patience.

74. Mr. BEESLEY associated himself with the expressions of appreciation addressed to Mr. McCaffrey and his predecessors and also to the Drafting Committee, whose efforts had enabled the Commission to achieve such a welcome result. He supported Mr. Thiam's proposal that the Commission should adopt a resolution expressing its gratitude to the Special Rapporteur.

75. Mr. Sreenivasa RAO expressed his deep sense of appreciation to the Drafting Committee for its excellent work and his particular thanks to Mr. McCaffrey for his energy and also for the understanding, patience and tolerance he had shown in taking account of the views of all members of the Commission and enabling them to arrive at a consensus. The Special Rapporteur and the Chairman of the Drafting Committee, which had not forgotten the objective the Commission had set itself throughout the years, were to be congratulated on that score.

76. Mr. McCAFFREY (Special Rapporteur), thanking members for their kind words, said that the efforts of his predecessors had certainly been of great value and had facilitated his task. It was thanks to them, too, that the Commission had adopted the draft and the way in which it had done so attested to the constructive and cooperative spirit shown by all its members, to whom he too wished to pay a tribute. He also thanked Mr. Pawlak and Mr. Hayes, who, during Mr. Pawlak's absence, had replaced him as Chairman of the Drafting Committee, for their competence and dedication, which had enabled the Commission to complete its first reading of the draft articles.

77. The CHAIRMAN thanked all members of the Commission and of the Drafting Committee and, in particular, the Committee Chairman, Mr. Pawlak, for their contribution to the work which had led to the adoption of the draft articles. He also expressed gratitude to all members of the secretariat for their dedicated cooperation. The Commission and the Drafting Committee could be proud of having thus achieved one of the goals they had set for themselves. That accomplishment was due in large measure to the efforts of the Special Rapporteurs who had successively dealt with the topic and, in particular, to Mr. McCaffrey, who had been responsible for the most decisive phase of the exercise. He therefore proposed that the Commission should adopt a draft resolution to read:

"*The International Law Commission,*

"*Having adopted* provisionally the draft articles on the law of the non-navigational uses of international watercourses,

"*Expresses* to the Special Rapporteur, Mr. Stephen McCaffrey, its deep appreciation for the outstanding contribution he has made to the treatment of the topic by his scholarly research and vast experience, thus enabling the Commission to bring to a successful conclusion its first reading of the draft articles relating to the law of the non-navigational uses of international watercourses."

The draft resolution was adopted.

The meeting rose at 12.10 p.m.

2232nd MEETING

Friday, 28 June 1991, at 10.10 a.m.

Chairman: Mr. Abdul G. KOROMA

Present: Mr. Al-Qaysi, Mr. Arangio-Ruiz, Mr. Barsegov, Mr. Beesley, Mr. Calero Rodrigues, Mr. Díaz González, Mr. Eiriksson, Mr. Francis, Mr. Graefrath, Mr.