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Summary record of the 2311th meeting

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

Extract from the Yearbook of the International Law Commission:-
1993, vol. I

2311th MEETING

Thursday, 24 June 1993, at 10.10 a.m.

Chairman: Mr. Julio BARBOZA

Present: Mr. Al-Baharna, Mr. Al-Khasawneh, Mr. Arangio-Ruiz, Mr. Bennouna, Mr. Calero Rodrigues, Mr. de Saram, Mr. Eiriksson, Mr. Fomba, Mr. Güney, Mr. Idris, Mr. Kabatsi, Mr. Mahiou, Mr. Mikulka, Mr. Pambou-Tchivounda, Mr. Sreenivasa Rao, Mr. Razafindralambo, Mr. Robinson, Mr. Rosenstock, Mr. Shi, Mr. Thiam, Mr. Tomuschat, Mr. Vereshchetin, Mr. Villagrán Kramer, Mr. Yamada, Mr. Yankov.

The law of the non-navigational uses of international watercourses (*continued*)* (A/CN.4/446, sect. E, A/CN.4/447 and Add.1-3,[1] A/CN.4/451,[2] A/CN.4/L.489)

[Agenda item 4]

FIRST REPORT OF THE SPECIAL RAPPORTEUR (*continued*)*

1. Mr. TOMUSCHAT expressed appreciation to the Special Rapporteur for a succinct report which dealt with all the issues without unnecessary circumlocution. He agreed with the Special Rapporteur that the Commission owed a great deal to the previous Special Rapporteur, Mr. McCaffrey, under whose guidance the draft articles had taken shape within a relatively short time.

2. He had a clear preference for a draft convention rather than model rules. That was because many of the provisions dealt with procedural mechanisms which could become fully effective only within the framework of a treaty. Moreover, the draft articles could realize their full potential only if they were embodied in an instrument having binding force.

3. He agreed with the Special Rapporteur that no change was needed in article 1.

4. With regard to article 2, subparagraph (*b*), he had no objection to the "flowing into a common terminus" and did not understand why the Special Rapporteur had suggested that they should be deleted. He agreed, however, that the definition of pollution in article 21[3] should be transferred to article 2. Indeed, if his recollection was correct, that had always been the intent.

5. A more serious issue concerned the proposed replacement of the word "appreciable" by the word "significant". It had always been his conviction that the word "appreciable" did not indicate the desired threshold. In the first place, it was marred by a certain ambiguity. Also, as had already been suggested, it could be taken to mean "not negligible". A word which carried that meaning did not correctly designate the point at which the line should be drawn. That line was crossed when significant harm was caused—harm exceeding the parameters of what was usual in the relationship between the States that relied on the use of the waters for their benefit. While he thus agreed that the word "appreciable" should be replaced by the word "significant", he considered that the reference in article 3 to "extent" should stand. He was also not fully persuaded by the argument that articles 3 and 7 should be harmonized.

6. He did not endorse the suggested amendment to article 3, paragraph 3, since, in his view, there was no need to refer to existing watercourse agreements. If the parties to an existing agreement were to ratify the future convention, they would have to be convinced that the two instruments were fully consistent. There was no need to tell them that they might have to review their earlier agreement. The Special Rapporteur was well aware of the position, as was apparent from the statement made in paragraph 16 of his report.

7. He did not feel that the Special Rapporteur's proposed rewording of article 7 would improve the quality of the rule it laid down. That article could be criticized for being far too rigid, particularly since a superficial perusal might lead to the conclusion that the occurrence of harm could of itself make the use unlawful. That, however, would be the wrong interpretation. What article 7 required States to do was to exercise due diligence, the requirements of which varied according to the degree of danger inherent in a given activity. Accordingly, he could endorse the first part of the Special Rapporteur's proposed reformulation, reading: "Watercourse States shall exercise due diligence to utilize an international watercourse in such a way as not to cause significant harm to other watercourse States". The remaining, and additional, elements merely qualified the rule in a manner he found confusing. It was clear to him that equitable and reasonable utilization would always remain below the threshold of significant harm. No coordination between articles 5 and 7, by means of an explicit reference, was necessary.

8. It was gratifying to note that the Special Rapporteur had, on the whole, deferred to the decisions of principle taken by the Commission on first reading. It remained to be seen whether, in so far as the Special Rapporteur wished to introduce any innovations, he could convince the Commission that his own wisdom was to be preferred to the collective wisdom underlying the adoption of the draft articles on first reading.[4]

9. Mr. CALERO RODRIGUES said that the form of the Special Rapporteur's first report, which was short and did not invoke authorities and instruments in support of self-evident truths, was very refreshing. It did not try to disturb the delicate balance that existed between the various concepts reflected in the articles and would greatly facilitate the Commission's second reading. The articles had in general been well received by the General Assembly and the Commission was on the right track. The Special Rapporteur was following in the steps of Mr. McCaffrey, the previous Special Rapporteur, to

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* Resumed from the 2309th meeting.

[1] Reproduced in *Yearbook... 1993*, vol. II (Part One).

[2] Ibid.

[3] See *Yearbook... 1991*, vol. II (Part Two), p. 68.

[4] See *Yearbook... 1991*, vol. I, 2231st meeting, para. 71.

whom the Commission was much indebted for the way in which he had conducted the first reading.

10. The Special Rapporteur had raised two general questions in his report, the first of which was whether provisions should be included in the draft on the settlement of disputes. In that connection, he would point out that the fact that such provisions had not been included in the draft on first reading did not mean that the Commission had rejected the idea. In point of fact, they had been included in Mr. McCaffrey's sixth report,[5] but there had not been sufficient time to examine them. For his own part, he favoured the inclusion of provisions on the settlement of disputes. There was no need for an elaborate system. It would suffice to indicate at some point that there was an obligation to accept a third-party procedure. There would, of course, be a choice between conciliation, arbitration and judicial settlement, each of which had advantages and disadvantages. The Special Rapporteur would, however, not even have to draft provisions, since those prepared by Mr. McCaffrey, who had wisely opted for mandatory conciliation, could serve as a basis for the Commission's work.

11. The second general question raised by the Special Rapporteur was whether the draft should take the form of a framework convention or model rules. Although the Commission had not taken a formal decision on the matter, his own understanding was that it had always worked on the basis that there would ultimately be a framework agreement. The framework agreement approach had also been broadly endorsed both in the Commission and in the Sixth Committee of the General Assembly. None the less, the Special Rapporteur had put forward two possible arguments in favour of model rules, but without endorsing that approach. The first of those arguments was that there would be little point in advocating the framework convention approach, without some expectation of widespread acceptance. That was not a very convincing argument, for States had indeed demonstrated a widespread acceptance of the articles as the basis of a framework agreement. The Special Rapporteur's second observation was that the model rules would require very strong endorsement by the General Assembly. Such endorsement would, however, be no stronger than the support given to the framework convention. The Special Rapporteur also stated that model rules would facilitate including more specific guidance but that seemed problematic given the wide variety of rivers and situations involved. Only a general instrument could provide general guidance.

12. Turning to the draft articles, he disagreed with the Special Rapporteur that they set a standard which was more an aspiration than achievable, but agreed that what was necessary at that stage was, in large measure, fine tuning. Since most of that fine tuning could be done in the Drafting Committee, he would confine his comments to five main points.

13. In the first place, he did not agree with the Special Rapporteur's proposal for the deletion of the words "flowing into a common terminus", which appeared in article 2, subparagraph (*b*). In the Special Rapporteur's view that notion did not seem to add anything beyond possible confusion and risked the creation of artificial barriers to the scope of the exercise. As the Commission had explained in paragraph (7) of its commentary to article 2,[6] however, the requirement of a common terminus had been included to introduce a certain limitation upon the geographic scope of the articles: the fact that two different drainage basins were connected by a canal would not make them part of a single "watercourse" for the purpose of the articles. In France, for example, almost all the rivers were connected by canals. If the common terminus element were deleted, all watercourse systems in France would therefore be reduced to one; in other words, the Rhône and the Rhine would be in the same system, and that was clearly absurd. The term "common terminus" was therefore necessary in his view.

14. Secondly, the Special Rapporteur's statement that he would be inclined to include "unrelated" confined groundwaters in the concept of "watercourse" as defined in article 2, subparagraph (*b*), did not seem very logical. How could "unrelated" groundwaters be envisaged as part of a system of waters which constituted "by virtue of their physical relationship a unitary whole"? If there was no physical relationship, how could such waters be part of a unitary whole? The question of confined waters deserved regulation, but it called for a different set of rules. Few if any of the articles, other than those embodying general principles, could be applied to confined groundwater. Even if the study which had been proposed by Mr. Bowett[7] and approved by the Planning Group[8] concluded that the regulation of such waters should be included in a separate part of the watercourse articles, he would still favour a separate instrument. At all events, pending a further study, he was opposed to the idea of including confined groundwater in the concept of a watercourse.

15. His third point concerned the words "appreciable" and "significant". The word "appreciable" was used in no less than eight articles to qualify either the extent to which a State must be affected, the adverse effects of a particular use or the harm caused. Since it was apparent that, in all cases, the adverse effects or the harm went beyond the mere possibility of "appreciation" or "measurement", it was clear that what was really meant was "significant" in the sense of something that was not negligible, but that did not rise to the level of substantial or important. In paragraphs (13) to (15) of its commentary to article 4,[9] which had become article 3, the Commission had not been entirely successful in its attempt to clarify the position. Paragraph (5) of its commentary to article 8, which subsequently had become article 7,[10] stated that the "term 'appreciable' embodies a factual standard" and that "The harm must be capable of being established by objective evidence", but went on to add that there "must be a real impairment of use, i.e. a detrimental impact of some consequence" and that "appreciable" harm was "that which is not insignificant or barely detectable, but is not necessarily 'serious' ".

[5] *Yearbook... 1990*, vol. II (Part One), p. 41, document A/CN.4/427 and Add.1.

[6] See *Yearbook... 1991*, vol. II (Part Two), p. 70.

[7] Document ILC/WG/LTPW/93/1/Add.1.

[8] Document ILC/(XLV)/PG/R.1, para. 5.

[9] See *Yearbook... 1987*, vol. II (Part Two), pp. 28-29.

[10] See *Yearbook... 1988*, vol. II (Part Two), p. 36.

"Appreciable" therefore contained two elements: the possibility of objective appreciation, detection or measurement, and a certain degree of importance ranging somewhere between the negligible and the substantial. The problem was that "appreciable" could be understood as containing only the first of those elements. Anything that could be measured would be deemed to be "appreciable". Indeed, that notion had been adopted by Mr. Barboza, Special Rapporteur for the topic of international liability for injurious consequences arising out of acts not prohibited by international law, who had said that appreciable risk meant the risk that might be identified through a simple examination of the activity and the things involved. In his own view, however, the two elements had to be present in any qualification of harm. He, therefore, agreed with the Special Rapporteur that, throughout the draft, the word "appreciable" should be replaced by the word "significant".

16. Fourthly, there seemed no doubt that watercourse agreements which would be concluded in the future and which were expressly contemplated in the articles would take precedence over the articles. In that connection, he did not agree with the Special Rapporteur, who doubted whether such agreements should be considered valid if they were inconsistent with the articles. Given the residual character of the articles, States were free to include in watercourse agreements any provisions they regarded as an adjustment to the provisions of the articles, provided that third States were not affected. The question was perhaps more problematic when it came to watercourse agreements already in force. Would those agreements supersede the articles? As a solution to the problem, the Special Rapporteur suggested that, when States became parties to the articles, they should indicate their intent or understanding with regard to some or all of the existing agreements. While that seemed to be a logical solution, a problem would remain if the parties to an existing agreement did not all take the same position. The Special Rapporteur might wish to consider the problem further and propose a provision with a view to avoiding future difficulties. In the meantime, he agreed with Mr. Tomuschat that such a provision was unnecessary.

17. His fifth and last point concerned a far more substantial question, namely, the interplay between articles 5 and 7 and the concepts of equitable and reasonable utilization, on the one hand, and harm, on the other. The Special Rapporteur had rightly stated that articles 5 and 7 provided a key element of the entire draft and that the articles were not without ambiguity. That ambiguity, however, arose out of the compromise between those who believed that "equitable and reasonable" use, as provided for in article 5, should be the main consideration, implicit in which might be the right to cause some harm, and those—like himself—who gave predominance to harm on the ground that no use could be regarded as "equitable and reasonable" if it resulted in harm to another State. He was, of course, thinking of harm above a reasonable threshold. The Special Rapporteur now proposed that article 7 should be redrafted so as to impose on States only an obligation to "exercise due diligence", not an obligation not to cause harm and, where the use was equitable and reasonable, some harm would be allowable, with the result that equitable and reasonable would become the overriding consideration. By way of an exception to the general principle, only harm resulting from pollution would render a use inequitable and unreasonable, although, even then, the harm might be permitted if there was no imminent threat to human health and safety and if there was a clear showing of special circumstances and a compelling need for ad hoc adjustment. Needless to say, he was opposed to that redrafting, since it would completely upset the delicate balance achieved on first reading. The concept of *alienum non laedas* would become subordinated to the imprecise notion of "equitable and reasonable" use, which did not offer an objective standard and could not be accepted by itself as the basic principle for regulating problems arising out of the uses of watercourses that might cause transboundary harm. The fact that the concept of equitable and reasonable utilization was supported by many authorities and appeared in many international instruments did not make it a good substitute for the basic principle that the overriding consideration was the duty not to cause substantial harm to other States. He had agreed to article 5 on the understanding that article 7 as now drafted would be included in the draft. The second reading of the articles would be very difficult if there was any insistence on upsetting the existing balance between the two articles.

18. Mr. IDRIS expressed his congratulations to the Special Rapporteur on his preliminary report and paid a tribute to Mr. McCaffrey, the previous Special Rapporteur, for his contribution to the development of the text of the draft articles. The report provided a succinct treatment of the fundamental issues laying at the heart of the topic.

19. He agreed that the Commission's proposals should take the form of a framework agreement or convention which would guide States in the drafting of specific agreements on common watercourses. However, the Special Rapporteur was right to say that the framework convention approach implied some expectation of widespread acceptance by States. In drafting specific agreements, States would of course retain full freedom to follow the Commission's guidance or not. It was in any event too early to judge the outcome of the Commission's work.

20. The Commission should certainly propose provisions on dispute settlement, for that would enhance the text's credibility and encourage its acceptance by States. However, the Commission should complete its work on the draft articles themselves before turning to dispute settlement.

21. The present wording of article 1, paragraph 2, was ambiguous and could create confusion. It should therefore be given further study in the Drafting Committee.

22. Article 2, subparagraph (*b*), which defined the term "watercourse", would be clearer if it referred to a system of waters including several elements: rivers, lakes, surface water and groundwater, canals and reservoirs. He also disagreed with the Special Rapporteur's recommendation that the words "flowing into a common terminus" should be deleted because they expressed a fact and their deletion could lead to interpretations completely at odds with his own understanding of that fact.

23. With regard to article 3, he supported the Special Rapporteur's recommendation that the word "appreci-

able'' should be replaced by the word ''significant''. Notwithstanding the analysis of the two words just given by Mr. Calero Rodrigues, the amendment would not affect the content of the article. In the light of the Commission's study of the question in the past, it was clear that ''significant'' meant ''important''. The framework convention would not necessarily affect existing international watercourse agreements unless the States parties to such agreements decided otherwise. As Mr. Calero Rodrigues had suggested, that point should be included, perhaps in article 3. The same amendment should, of course, be made in article 4.

24. The content of the principle of equitable and reasonable utilization dealt with in articles 5 and 6 would be determined by States, but article 5 should indicate model forms of utilization, concerning, for example, the division of a watercourse among States, for that would facilitate the settlement of disputes. There were already many useful agreements on the topic. Article 7 would then become redundant because it would constitute an exception to the principle of utilization of private property without harming others. Under article 7, the harm would be assessed subjectively rather than objectively and thus weaken the text.

25. The meaning of article 31[11] was unclear because the second sentence seemed to contradict the first. In any event, such vital information might be protected by national laws which would have to be observed. He agreed with the Special Rapporteur that no change was required in article 8, which had his full support.

26. He endorsed the comments made by Mr. Calero Rodrigues on the subject of confined groundwater, for groundwater appeared to have no direct connection with the topic of the draft articles. Its inclusion might cause fundamental difficulties because the issue really required a separate set of provisions.

27. Mr. CALERO RODRIGUES said that he had made a mistake in his reference to Mr. McCaffrey's proposals on dispute settlement, for they included not only conciliation, but also an obligation of recourse to arbitration.

28. Mr. ROSENSTOCK (Special Rapporteur) said that Mr. Calero Rodrigues had been right the first time. The proposals pointed in the direction of arbitration, but did not impose an obligation.

29. Mr. GÜNEY expressed his congratulations to the Special Rapporteur on his first report, which took a pragmatic approach, but displayed a spirit of accommodation. He also paid a tribute to Mr. McCaffrey for his contribution to the draft articles. The Special Rapporteur was working in a field where there were many existing international agreements containing principles which were difficult to codify in view of the different situations covered.

30. The draft articles should take the form of a framework agreement containing general recommendations which States could follow in drafting agreements adapted to their own situations. Except in the case of the United Kingdom of Great Britain and Northern Ireland, all the Governments which had commented on the topic preferred a framework agreement rather than model rules. The Commission should eventually make recommendations on the settlement of disputes, but it would be premature to do so before the draft articles themselves had been adopted.

31. He agreed with the Special Rapporteur that the definition of ''pollution'' should be moved from article 21[12] to article 2. The definition of ''watercourse'' contained in article 2, subparagraph (*b*), had been widely criticized because it extended the scope of the draft articles. The Commission would in fact be exceeding its mandate by dealing with groundwater as well as surface water. The definition in question would entail the comprehensive redrawing of maps, which at present did not indicate groundwater. That would be a burden for the developing countries and, in any event, there was insufficient data for the accurate representation of groundwater. It was also difficult to make distinctions between groundwater and surface water and disputes would arise as to whether water was confined or unconfined. Article 2, subparagraph (*b*), should therefore be redrafted to cover only surface water. There would then be no problem in deleting the words ''flowing into a common terminus''.

32. He could accept the replacement of the word ''appreciable'' by the word ''significant'' in article 3 and the other draft articles, although he would have preferred the word ''substantial''.

33. Article 5, paragraph 2, might be superfluous, since its main point—equitable and reasonable participation in the use, development and protection of an international watercourse—was already covered in paragraph 1. In his view, paragraph 2 should be deleted. He had serious doubts about the Special Rapporteur's proposal for the rewording of article 7 because the result might be to upset a precarious balance which made equitable and reasonable use a decisive element of the draft articles.

The meeting rose at 11.20 a.m.

[11] See *Yearbook... 1991*, vol. II (Part Two), p. 69.

[12] See footnote 3 above.

2312th MEETING

Friday, 25 June 1993, at 10.05 a.m.

Chairman: Mr. Julio BARBOZA

Present: Mr. Al-Baharna, Mr. Al-Khasawneh, Mr. Arangio-Ruiz, Mr. Bennouna, Mr. Calero Rodrigues, Mr. de Saram, Mr. Eiriksson, Mr. Fomba, Mr. Güney, Mr. Idris, Mr. Kabatsi, Mr. Mahiou, Mr. Mikulka, Mr. Pambou-Tchivounda, Mr. Sreenivasa Rao, Mr. Razafindralambo, Mr. Robinson, Mr. Shi, Mr. Thiam, Mr. Tomuschat, Mr. Vereshchetin, Mr. Villagrán Kramer, Mr. Yamada, Mr. Yankov.