Document:-
A/CN.4/SR.2336

Summary record of the 2336th meeting

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

Extract from the Yearbook of the International Law Commission:-
1994, vol. I

consequence, the "common terminus" requirement would be deleted from article 2, subparagraph (*b*). With regard to article 3, he had no objection to the word "appreciable" being replaced by the word "significant" (*sensible* in French). On the other hand, there was no point, in his view, in redrafting article 7 in the way suggested by the Special Rapporteur. In the first place, the French version of the article did not make for clarity. The words *font preuve* should be replaced by *doivent faire preuve* or *feront preuve* because what was involved was not a statement of fact, but a prescription. The remainder of the article was no clearer. The effect of the proposed new wording seemed to be to exempt States which used an international watercourse in an equitable and reasonable manner from the obligation not to cause significant harm to other States on the watercourse except in the case of pollution; and even then, if there was a clear showing of special circumstances indicating a compelling need for ad hoc adjustment and if there was no imminent threat to human health and safety, the utilization was not presumed to be inequitable or unreasonable. In his view, article 7 as adopted on first reading[12] was less open to controversy. With regard to the question of pollution, he agreed with the proposal that article 21, paragraph 1, which defined pollution, should be transferred to article 2. New article 33 was mainly designed to extend the scope of the settlement measures provided for in article 17 to the draft articles as a whole by supplementing them, in the absence of prior agreement between the parties, by a more detailed mechanism which would consist of three phases: consultations and negotiations, recourse to impartial fact-finding or conciliation and, lastly, binding arbitration by a permanent or ad hoc tribunal. The Special Rapporteur did not provide for recourse to judicial settlement, and rightly so: as submission to binding arbitration was optional, the parties could always agree that the arbitral award could be the subject of a remedy before an international court. He appreciated the difficulties, to which Mr. Bowett had referred, inherent in the consensual nature of a referral to arbitration, but wondered whether it would be realistic to go beyond the option provided for by the Special Rapporteur in article 33.

31. He again thanked the Special Rapporteur for his very detailed second report, which would facilitate the Drafting Committee's task and would enable the Commission to adopt quickly the draft articles on second reading.

Organization of work of the session (*continued*)*

[Agenda item 2]

32. The CHAIRMAN drew the attention of the members to the programme of work which had been circulated to them. He said that when preparing it, the Enlarged Bureau had tried to take account of a large number of factors, but in particular of the mandate the General Assembly had entrusted to the Commission and of the wishes of the Special Rapporteurs. The programme was, of course, tentative and would be implemented in the most flexible manner. He said that if there was no objection, he would take it that the Commission was prepared to adopt it.

It was so agreed.

The meeting rose at 12.35 p.m.

2336th MEETING

Wednesday, 11 May 1994, at 10.10 a.m.

Chairman: Mr. Vladlen VERESHCHETIN

Present: Mr. Al-Baharna, Mr. Al-Khasawneh, Mr. Arangio-Ruiz, Mr. Bowett, Mr. Calero Rodrigues, Mr. Crawford, Mr. de Saram, Mr. Eiriksson, Mr. Fomba, Mr. Güney, Mr. He, Mr. Idris, Mr. Kabatsi, Mr. Kusuma-Atmadja, Mr. Mikulka, Mr. Pambou-Tchivounda, Mr. Sreenivasa Rao, Mr. Razafindralambo, Mr. Rosenstock, Mr. Szekely, Mr. Thiam, Mr. Tomuschat, Mr. Vargas Carreño, Mr. Villagrán Kramer, Mr. Yamada, Mr. Yankov.

The law of the non-navigational uses of international watercourses (*continued*) (A/CN.4/457, sect. E, A/CN.4/462,[1] A/CN.4/L.492 and Corr.1 and 3 and Add.1, A/CN.4/L.493 and Add.1 and Add.1/Corr.1 and Add.2)

[Agenda item 5]

SECOND REPORT OF THE SPECIAL RAPPORTEUR (*continued*)

1. Mr. TOMUSCHAT thanked the Special Rapporteur for his second report (A/CN.4/462) whose succinctness and clarity had already received praise. The fact that no major changes were proposed with regard to the draft articles adopted on first reading[2] was particularly welcome. The rules proposed by the Special Rapporteur's predecessor had undergone close scrutiny, so that little room was left for improvement, as the wide approval of the draft articles in the Sixth Committee demonstrated (A/CN.4/457, para. 380). The question now was whether the amendments proposed by the Special Rapporteur could enhance even further the quality of the draft articles adopted on first reading in 1991.

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* Resumed from the 2332nd meeting.

[12] For the text of the draft articles provisionally adopted on first reading, see *Yearbook... 1991*, vol. II (Part Two), pp. 66-70.

[1] Reproduced in *Yearbook... 1994*, vol. II (Part One).

[2] *Yearbook... 1991*, vol. II (Part Two), pp. 66-70.

2. It should be recalled that article 2 (Use of terms) had been adopted at a very late stage in the drafting process. Until that time, the Commission had worked on the basis of the layman's understanding of the term "watercourse" as a river flowing through a landscape. Hence, every provision of the draft had been debated and adopted by the Commission in relation to rivers and lakes, and to canals as artificial watercourses. That was particularly obvious with regard to the articles of part four, starting with article 20. Most of the provisions of part four were actually inapplicable to groundwater. The specific problems of groundwater regimes had never been discussed in a thorough fashion. The definition in article 2 had been approved because the then Special Rapporteur had succeeded in persuading the Commission that a river flowed towards its terminus not only in its bed but also in the zones adjacent to its bed where it was plainly visible as a river. Groundwater had been dealt with as an appurtenance of the surface water system. Were groundwater to become the main or only object of legal regulation, the Commission would have to undertake an in-depth study of the specific problems raised by the utilization of that medium. While he appreciated the study annexed to the second report, he was still not convinced that members of the Commission were sufficiently well-informed of the intricacies of groundwater. The step that was being proposed was an important one, and he would not feel safe in approving an extension of the scope *ratione materiae* of the draft articles. To his regret, he therefore felt obliged to pronounce himself against the amendments suggested by the Special Rapporteur. Nor did he believe that the use of a *mutatis mutandis* formula would be helpful.

3. The next point concerned the second sentence of article 5, paragraph 1. Why, he wondered, should watercourse States be placed under a legal obligation to use and develop a watercourse with a view to attaining optimal utilization thereof? The proposition seemed incompatible with the requirements of environmental protection. In most instances, the best course of action would be simply to leave a river or other watercourse in its natural state. Every interference by man impaired a natural habitat. States should not be encouraged, still less, obliged, to subject watercourses to human exploitation. He would appreciate it if the Drafting Committee could reconsider the issue.

4. Again, he failed to understand the logic behind proposed paragraph 2 of article 16. Generally, the notified State had six months in which to make a reply, and if it did not respond to the notification during that period it could no longer object to the planned works. Accordingly, there was no room for any responsibility on account of an internationally wrongful act, unless article 15 was taken to mean that the notified State was required to reply as soon as it had completed its examination of the planned measures. That, however, should be left to the general rules on State responsibility, and there was no need to include a special rule on it in the present draft.

5. He was more inclined to agree with the Special Rapporteur in respect of proposed article 33. Since the Commission's intention was to produce a framework agreement, the rules on dispute settlement had of necessity to be framed in a cautious and somewhat loose manner. As he understood the proposed provision, no method of dispute settlement other than negotiation was to be compulsory under the watercourse agreement. The second stage of the process would involve fact-finding or conciliation, which meant that neither party could unilaterally initiate either a fact-finding or a conciliation procedure. Paragraph 2 (*c*), which presupposed that a unilateral request for fact-finding or conciliation had not met with a positive response for a whole year, none the less called for some clarification. It made mention of a "permanent or ad hoc tribunal that has been accepted by all the parties to the dispute". A distinction had to be drawn between agreement to the establishment of such a judicial body—which could be described as "acceptance"—and the acceptance of its jurisdiction, only the latter being relevant. But why was it necessary for "all the parties to the dispute" to accept the jurisdiction? Would the watercourse agreement purport to render bilateral arbitration clauses inoperative? That certainly would be going too far, all the more so as the first two stages could be interpreted as limiting, by procedural preconditions, access to an arbitration procedure that would otherwise be available. Thus, on the whole, article 33 required careful consideration.

6. Lastly, it was his hope that the draft articles would be finally adopted at the present session.

7. Mr. ROSENSTOCK (Special Rapporteur) said that if Mr. Tomuschat's reading of article 16 and the related articles was widely accepted—if, in other words, article 16 was universally taken to mean that a notified State which failed to reply to a notification within six months lost its right to complain about an activity which caused significant harm—he would agree that the proposed addition was unnecessary. In his view, however, it would be difficult to place such a construction upon article 16 as it now stood. The addition therefore served the purpose of avoiding a risk of undue harm to the notifying State.

8. Mr. TOMUSCHAT said that the question of the correct interpretation of article 16 should be clarified by the Drafting Committee.

9. Mr. GÜNEY said that he wished to associate himself with the congratulations addressed to the Special Rapporteur on his efforts. However, the assumption referred to in paragraph 11 of the second report, namely that unrelated confined groundwaters were to be included in the draft articles, was premature. It should be recalled that, during the consideration of the Special Rapporteur's first report,[3] several members of the Commission had not been entirely happy with the reference to "underground waters" in article 2, subparagraph (*b*). As for the proposal to include a reference to unrelated confined groundwaters, most members of the Commission, including himself, as well as most of the representatives who had spoken on the subject in the Sixth Committee, had opposed the proposal because they failed to see how unrelated groundwaters could be viewed as part of a system of waters which, by virtue of

[3] *Yearbook... 1993*, vol. II (Part One), document A/CN.4/451.

their physical relationship, constituted a unitary whole. The Commission had considered that more information was needed on the subject and had therefore requested the Special Rapporteur to undertake a study, on the question of unrelated confined groundwaters in order to determine the feasibility of incorporating it into the topic.[4] The Special Rapporteur had, in conformity with his mandate, carried out the study, but contrary to his mandate and to well-established practice had anticipated the Commission's decision by incorporating his conclusions in the draft articles, going so far as to propose the deletion of the crucial words "and flowing into a common terminus" from the definition of "watercourse".

10. The steady increase in the world's population and the depletion or pollution of surface waters did not, in themselves, warrant the codification of legal rules relating to confined groundwaters. State practice concerning transboundary groundwater, in particular, was scanty, as the Special Rapporteur himself pointed out in the annex to his second report, and State practice on the management of groundwater resources had been found to be lacking. The evaluation and proper management of an aquifer could only be achieved by investigations across the national boundaries of the countries concerned, failing which the collection of data on groundwater under different geological and hydrological conditions was well-nigh impossible.

11. For all those reasons and with all due respect to the Special Rapporteur, he felt that the proposal to include provisions on unrelated confined groundwaters in the draft articles was a mistake and both legally and technically unfounded. The general acceptability of the draft was extremely important. The proposal actually ran counter to the evidence provided in the annex by the Special Rapporteur himself, and his insistence upon a provision which was sure to arouse controversy and therefore to postpone completion of the draft as a whole was to be deprecated.

12. He saw no need for the proposed article on the settlement of disputes, in an international framework agreement, which should leave the parties the greatest possible freedom in choosing the means of settling any dispute that might arise between them.

13. Mr. VARGAS CARREÑO congratulated the Special Rapporteur on the calibre of his second report, which could serve as the basis for adopting a text at the Commission's present session. He said that the Special Rapporteur was to be commended in particular for the excellent study he had produced on the complex subject of unrelated confined groundwaters. His own brief comments would be limited to some of the proposed changes.

14. The Special Rapporteur was right to point to the need to impose some type of sanction upon a State which, having received notification, did not respond within an established time-limit. It would cause unnecessary prejudice to the notifying State if it was unable to introduce the planned measures for six months because the notified State had not replied. Accordingly, he endorsed the proposal to add a new paragraph to article 16, although the Drafting Committee should make some changes to the text, especially in the light of the interesting dialogue between Mr. Tomuschat and the Special Rapporteur. He was also in complete agreement about adding the words "or energy" after "lists of substances", in article 21, paragraph 3.

15. It was indispensable to include a dispute settlement provision. As a general rule, all international conventions should have provisions of that kind. The text proposed by the Special Rapporteur represented the bare-bones requirement. However, it would be more appropriate for article 33, paragraph 2 (*c*), to include a reference not only to binding arbitration by any permanent or ad hoc tribunal but also to judicial settlement, which would afford greater latitude and would explicitly provide for access to ICJ if the States parties to the dispute recognized its jurisdiction.

16. Lastly, he shared the concern expressed by many members of the Commission to include unrelated confined groundwaters in the draft articles in order to adopt an integrated approach. However, the subject at issue was complex, as was recognized by the scientific world. Further studies were therefore needed to obtain a better grasp of the subject. Accordingly, given the importance of transboundary groundwaters for States and the need for such groundwaters to be regulated by international law, it would be better for the definition of "watercourse" not to cover unrelated confined groundwaters for the time being. When it proved appropriate, any reference to such groundwaters should be made as necessary in the articles concerned, case by case. That alternative, which the Special Rapporteur himself regarded as preferable to adoption of a strained definition of a watercourse, was more suitable, although the application of a general regime to groundwater must be carefully studied for each situation. In that regard, Mr. Calero Rodrigues (2335th meeting) had proposed a valid course: that it be stated in a general provision that the draft articles were also applicable, where necessary, to unrelated confined groundwaters. In his view, that alternative should also be given careful consideration in the Drafting Committee.

17. Mr. CRAWFORD said that, notwithstanding the reservations expressed by some members of the Commission, he thought the Special Rapporteur had made a case for the inclusion of unrelated confined groundwaters in connection with transboundary aquifers. The usual, if not invariable, situation was that the aquifer, unlike an oil deposit, which was not replenished in historic time, was replenished by interaction with the environment. That implied the need for cooperation in the sustainable use of the resource, and, combined with the compelling data on the significance of transboundary aquifers for the water supply of populations around the world, it made a *prima facie* case for including unrelated groundwaters in the draft. He understood the reticence of some members with respect to what was undoubtedly an extension of the scope of the draft articles at so late a stage, but on the other hand it would surely be unfortunate if the framework agreement produced by the Commission left out of account one of the world's most important sources of water supply. He would urge the Drafting Committee to consider whether some accept-

[4] *Yearbook... 1993*, vol. II (Part Two), paras. 441-442.

able way might be found, possibly along the lines suggested by Mr. Calero Rodrigues (ibid.), of incorporating that category of transboundary waters within the scope of the draft. He agreed with the Special Rapporteur that, whatever the Commission's decision on the question of confined groundwaters, the words "and flowing into a common terminus" should be deleted from article 2, subparagraph (*b*).

18. He continued to have doubts about article 7 in its present form, and associated himself with the comments made on that score by Mr. Bowett (ibid.). The Drafting Committee should investigate possibilities of making the wording of the article clear enough to encompass all situations in which unforeseen but significant harm was being caused. A reasonable solution in some cases might be to allow the harm to continue in the short or even in the medium term, provided that compensation was paid to the State suffering the harm. In a sense, the topic might be said to contain an element of the problem of liability for injurious consequences arising out of acts not prohibited by international law.

19. He agreed with Mr. Tomuschat that the words "optimal utilization" in article 8 might lend themselves to misinterpretation; the Drafting Committee should consider whether the words "sustainable utilization" might not be more appropriate in the context. He did not interpret article 16 as excluding the possibility of responsibility notwithstanding the failure of a State to respond to a notification. If that were the case, he would be opposed to the article. He accepted that the notifying State was entitled to rely upon the notification in the absence of a reply, so that some system of adjustment of the position in the interim was reasonable. Article 16 as it stood did, in his view, make it clear that the notifying State's activity was subject to obligations under articles 5 and 7, which were of a continuing character. Some clarification in the commentary might be appropriate.

20. As to proposed article 33, he agreed with the Special Rapporteur about the desirability of including provisions on the settlement of disputes. It was true that States continued to be reticent about regulating the settlement of disputes involving natural resources, but it was also true that international law needed to be developed in a progressive manner and, still more important, that the very serious and continuing disputes which arose over the use of common resources should not be left to be resolved merely by the exercise of competing power. Some form of independent settlement, preferably by ICJ, was desirable. The Drafting Committee should certainly look into the matter. In any event, article 33 as proposed by the Special Rapporteur should apply only if there was no other means of peaceful settlement applicable to the particular dispute between the parties in question. If such a means did exist, article 33 should not derogate from it.

21. Mr. VILLAGRÁN KRAMER said that he was worried that when a period of six months elapsed and the State concerned had not replied it might lead to a situation of estoppel, that is to say, the State affected would lose every right to lodge a complaint. The Commission must be careful if it intended to impose severe rules, particularly in such a sensitive matter as that of groundwater. If a State did not reply in the brief period of six months on the use that was to be made of such waters, the result would be that the other State would be deprived of the benefit of that natural resource. He was not sure that the Commission was fully aware of the entire significance of the Special Rapporteur's proposal in that regard. The developing countries did not have such a rigid notion of general international law, and there was currently no such rule in international law that bound States to reply within a given period. The Commission must show flexibility in introducing a rule for it to be acceptable to all States.

22. Mr. ROSENSTOCK (Special Rapporteur) said the point made by Mr. Tomuschat and Mr. Crawford was that the Commission, in producing relatively weak dispute settlement provisions, must make sure that existing agreements were not affected adversely. That was certainly the intention of article 33, paragraph 2, in the absence of an applicable agreement. Perhaps drafting changes were needed to make that clearer. It seemed obvious to him that, if States A and B had a more rigorous arrangement than the one in paragraph 2 (and such an arrangement could hardly be less rigorous), there would be no risk of the paragraph taking precedence over that more rigorous agreement. He would not object to a strengthening of article 33.

23. With regard to article 16, it seemed to be a matter of policy whether or not the Committee determined, as Mr. Tomuschat suggested, that failure to reply stopped all claims on the part of the notified State. That was not his interpretation of the article and he sympathized with Mr. Villagrán Kramer's opinion that that should not be the case. However, it was unacceptable for the notifying State to be harmed as a result of failure of the notified State to reply. A case of that kind was unlikely to concern a developed country giving notice to a developing country, one side being more capable of making the scientific judgement than the other, thereby causing prejudice in some sense. It was more than likely that in all but a few cases two developed or two developing countries would be involved. If there was concern that the developing country could be placed at a disadvantage by the consequences of a failure to reply, there must also be concern that the notifying developing country should not suffer harm as a result of such failure. He had proposed inserting an additional paragraph to article 16 in order to mitigate the consequences of failure to reply to notification, so as not to burden unduly a notified State which failed to reply and not to disadvantage unduly a notifying State that acted when no reply was forthcoming.

24. Mr. THIAM said that the setting of a time-limit for the notified State to reply had been the subject of long discussions, in which it had been pointed out that if the notified State was a developing country, it did not have the technical means to produce a reply within the requisite period. It had been concluded that a period of six months was too short. The Commission would be too strict if it introduced sanctions for failure to reply. The Commission should either make the period longer or refrain from introducing sanctions. As it stood, the article was unacceptable.

25. Mr. HE said that the key issue raised in the Special Rapporteur's concise yet lucid second report was whether unrelated confined groundwaters and transboundary aquifers should be included in the draft articles. He could agree with the proposal made by Mr. Calero Rodrigues (2335th meeting). The advantages of the "compromise proposal", so called by the Chairman, was that it kept the original text and title intact but added an article that the provisions or principles of the draft articles could also be applied in inter-State relations in connection with transboundary aquifers. In that way, it could meet the Special Rapporteur's wish for transboundary aquifers to be included in the articles. The second advantage of the compromise proposal was that the phrase "and flowing into a common terminus" could still be used. In dealing with international watercourses, it was important to have a certain scope which included both surface water and groundwater to form a unitary whole. The concept of "watercourse" encompassed broad geographic areas, and keeping the phrase "flowing into a common terminus" could introduce limitations on the geographic scope of the draft articles. The Special Rapporteur quoted the views of the ILA Committee on International Water Resources Law that the concern voiced on that point would be better met by a statement excluding broader interpretation. In his view, a clear provision in the article itself would carry more weight than an explanation in the commentary or elsewhere. In that way, the phrase "flowing into a common terminus" could be retained, while at the same time the same principles could be applied to transboundary aquifers, which was the Special Rapporteur's intention.

26. He could accept the provisions suggested for dispute settlement. However, Mr. Bowett and other members had proposed the insertion of an additional provision for referral of a dispute to ICJ for judicial settlement. He did notobject to the suggestion, but would point out that the jurisdiction of ICJ was also based on voluntary acceptance by States. Hence, if there was a need to add such a provision, it should be followed by another to the effect that States parties could express reservations on the jurisdiction of ICJ. In that way, the draft articles would command broad acceptance.

27. Mr. ROSENSTOCK (Special Rapporteur) said he had not been suggesting that the Commission had acted wrongly in changing the text. It had merely been his intention to point out that those who had delved most deeply into the matter had not found the inclusion of the "common terminus" concept necessary. He could think of no situation in which deletion of the phrase "and flowing into a common terminus" would have an adverse effect on any State's obligation or rights. If two separate systems were connected by a canal, that did not make them a single system under article 2, whether the term "common terminus" was retained or not. However, when two systems were connected by a canal and, as a result, the quality of the water was adversely affected in one system, then the provisions were applicable. He could not understand the fear that it would lead to the two systems being considered as one, and even if that fear were valid, he did not see how it could limit or adversely affect any of the rights of the State that had not been part of the original water system. If a plant were built upstream and polluted the canal and the other system, rights and responsibilities would be affected, whether or not the term "common terminus" was retained. To allay the fears of colleagues, something could be added to the commentary, but he regarded it as superfluous to do so.

28. Mr. BOWETT said there were three possible ways of including unrelated confined groundwaters in the draft. The first way, which was the one the Special Rapporteur had adopted, was to amend each article to include such waters. The second, suggested by Mr. Calero Rodrigues (ibid.), was to have one general provision that would apply *mutatis mutandis*. The advantage of that second technique was that it would be easier, should States wish to accept a convention but not the obligations regarding groundwater, to enter reservations to one particular article rather than have to pick particular words or phrases out of a number of articles. The third possible method was to have a separate protocol on unrelated confined groundwaters. It could be quite short and could simply lay down the basic obligations. States would then be free to accept the main convention with or without the protocol.

29. As far as the settlement of disputes was concerned, ICJ had recently established a special chamber for environmental disputes. In his view, to show some recognition for that initiative in its report, the Commission should include a reference to the Court in article 33. A quite separate point concerned the nature of the obligation to be included in article 33. In that connection, he had not meant to suggest that some kind of compulsory jurisdiction should be introduced. His concern was merely to ensure that the existing commitment on the part of States to accept either judicial or arbitral settlement would extend to disputes arising out of the new convention: some device would therefore be required to link the convention to that pre-existing commitment.

30. Mr. Sreenivasa RAO expressed his congratulations to the Special Rapporteur on a well-prepared report, which was, however, perhaps a little too brief in some respects. Because of that brevity he experienced some difficulty in accepting the Special Rapporteur's recommendation that the very important matter of unrelated confined groundwaters should be included in the scope of the articles. His hesitation on that score stemmed from the historical evolution of the draft and the fact that, from the outset, unrelated confined groundwaters had never really entered into the scheme of things. Those members who favoured the inclusion of unrelated confined groundwaters in the draft had proceeded on the assumption that such an important body of water, on which much of mankind depended for its daily needs, must be subject to regulation. But it was for those very reasons that the matter must first be the subject of a separate and thorough study. It seemed as though an attempt was being made to expedite matters simply by a fine-tuning of the articles; but a major undertaking such as the regulation of unrelated confined groundwaters could not be achieved in that way.

31. The compromise proposal which had been put forward was also unacceptable. Not a single piece of State practice had been studied, nor had any conclusion been reached as to the problems that really exercised the

minds of the decision-makers. In many areas of human activity, of course, scientific facts provided the basis for the initial projection of policies. But scientific facts had to be subordinated to other policy guidelines in the interests of optimum resource management within a given region, and the final choice depended not only on scientific facts but on other equally important considerations. The problem was further compounded because scientists held widely differing views on certain subjects. Hence there were no hard and fast rules on the basis of which a conclusion could be reached rapidly.

32. He therefore stood by his initial views. The Commission had worked on the draft articles for many years and had not included the concept of unrelated confined groundwaters within their scope; it was too late to do so now. Furthermore, a strong body of feeling, both in the Commission and in the General Assembly, was opposed to any digression into such a major subject. He, for one, would not stipulate for regulation without knowing more about what was involved.

33. The expression "common terminus", too, had always been considered on the basis of certain assumptions, one of them being that each riparian State was entitled to equitable and reasonable utilization of the water of the river concerned. The only time that one riparian State actually entered into a relationship with another was when the utilization of a watercourse had an adverse effect or where cooperative arrangements were required. The problem was one of *locus standi*, which had to exist if other riparian States were to enter the picture as far as a particular utilization was concerned. The previous Special Rapporteur had spoken of scaffolding, but that scaffolding—which some had actually regarded as a foundation—had ultimately been allowed to collapse. Now, the only link left was the one afforded by the "common terminus issue". If the fears and problems of certain countries were not taken into account, those countries would be left by the wayside, which was certainly not the intention of the Commission. He would therefore urge caution and would call upon the Special Rapporteur, at a time when the Commission was on the point of achieving a major breakthrough in a matter that involved such disparate interests, to curb his enthusiasm somewhat, failing which he would miss a great opportunity.

34. The proposed new paragraph 2 of article 16 posed no problem. If he embarked upon a project which he knew might cause his neighbour harm, he would notify that neighbour accordingly and await his reaction; he would not merely proceed with the project and argue about estoppel later. It was not just a question of one project, however, but of several projects and also of shared expectations. None the less, if the Special Rapporteur wished to introduce a certain balance between the notifying State and the notified State, he could go along with that, subject to any changes the Drafting Committee might wish to suggest.

35. The introduction of the word "energy", in article 21, paragraph 3, was directly related to the introduction of the concept of unrelated confined groundwaters. He was not sure whether the Commission could introduce that new idea on the basis of the one specific instance concerning the Hudson River, which was cited earlier by the Special Rapporteur (see 2334th meeting, para. 18). In the circumstances, and in the interests of disposing of the draft articles promptly, he would recommend that the reference to "energy" should be deleted.

36. He saw no need for elaborate provisions on the settlement of disputes in a framework convention. His own preference had always been to allow the parties to choose the forum and type of settlement with which they were most comfortable. The main thing was to endeavour to germinate the idea that disputes should be settled peacefully and not by force. Once that was rooted in the hearts and minds of States, a relaxed attitude could be adopted as to the actual modalities. After all, what purpose would be served by substituting the arbitrary decision of a third party for a decision of the two parties directly concerned? He failed to see the rationale for that.

37. Mr. SZEKELY said it was disturbing to see that the question of unrelated confined groundwaters was being dealt with almost as an afterthought, thereby diminishing the importance of a resource that accounted for almost one quarter of the world's fresh water. He was also concerned to note that, during the discussion, the question had not been given its due weight, that the differences between that resource and watercourses and their waters, including related waters, had still not been recognized and that the difference in the dynamics of the relations between riparian States, depending on the types of waters involved, had not been identified. The possibilities for modalities of cooperation and joint use were also very different in the case of unrelated confined groundwaters, as were the possibilities of interfering with, and even of doing harm to, the quality of such waters.

38. He had an open mind about the three suggestions made, by the Special Rapporteur, Mr. Calero Rodrigues (2335th meeting) and Mr. Bowett, but was concerned that all three proposals had been couched in rather definitive terms. The question of unrelated confined groundwaters could not just be omitted from the final draft articles; nor, however, could the Commission hope to cover everything pertaining to such waters by putting a last-minute touch to the draft. He would revert to the matter, which was of great importance.

The meeting rose at 11.45 a.m.

2337th MEETING

Friday, 13 May 1994, at 10.10 a.m.

Chairman: Mr. Vladlen VERESHCHETIN

Present: Mr. Al-Baharna, Mr. Al-Khasawneh, Mr. Arangio-Ruiz, Mr. Bennouna, Mr. Bowett, Mr. Calero Rodrigues, Mr. de Saram, Mr. Eiriksson, Mr. Fomba, Mr. Güney, Mr. He, Mr. Idris, Mr. Kabatsi,