Document:-
A/CN.4/SR.2337

Summary record of the 2337th meeting

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

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

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,

Mr. Kusuma-Atmadja, Mr. Mahiou, Mr. Mikulka, Mr. Pambou-Tchivounda, Mr. Sreenivasa Rao, Mr. Razafindralambo, Mr. Rosenstock, Mr. Szekely, Mr. Thiam, Mr. Tomuschat, 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. KABATSI expressed his congratulations to the Special Rapporteur on his clear and precise second report (A/CN.4/462) and on his introduction, which had demonstrated his in-depth understanding of the subject-matter. The Special Rapporteur had been wise to take account of the work done by his predecessors and the Commission by restricting his endeavour almost entirely to "fine-tuning" with a view to the early completion of the Commission's work on the topic, preferably at the current session.

2. As to the changes proposed by the Special Rapporteur, he said he wished to make five comments.

3. Referring to the inclusion of unrelated confined waters, he said that, having regard to the fact that virtually all countries shared a groundwater system with one or more other countries and the fact that groundwater was the largest source of fresh water available in storage on earth, he shared the view of the Special Rapporteur and of the proponents of the development of the emergent international environmental law that the most sensible and viable way of attaining the proper utilization and management of water was through integrated management of all water resources above or below the surface of the earth. A regulatory regime that would help States in that endeavour and help them settle disputes peacefully would be extremely welcome. The Special Rapporteur had attempted to meet that need by eliminating the concept of a "common terminus" in the definition of an "international watercourse" in article 2 and by adding the words "transboundary aquifer" or "aquifers" wherever the terms "international watercourse" or "watercourses" appeared in the articles. Looking at the report as a whole, that approach seemed compellingly persuasive and the Special Rapporteur should be congratulated on his brave attempt. However, by the Special Rapporteur's own admission, State practice concerning transboundary groundwaters was generally scanty and only a few treaties dealing with shared water resources included groundwater. The main reason was inadequate understanding of the hydraulic cycle and other factors relating to groundwater and it was precisely for that reason that caution had to be exercised in approaching the subject. It might well be that the subject of unrelated confined groundwaters would be fully dealt with by the method of inclusion advocated by the Special Rapporteur, but he personally was not convinced at the present stage. Mr. Bowett's idea (2336th meeting) of choosing one out of three or possibly more solutions was in itself indicative of the complexity of the subject and of the need to study it more fully and separately, as an independent topic.

4. He personally would have liked to see a comprehensive regime dealing with the non-navigational uses of all transboundary waters above and below the ground and he therefore found the Special Rapporteur's idea of including unrelated confined groundwaters attractive, but, like a number of other members of the Commission, he felt that the proposed inclusion was premature. He would prefer, although reluctantly, to see the subject of unrelated confined groundwaters treated separately and independently.

5. Secondly, with regard to the phrase "flowing into a common terminus", he noted that the main reason advanced for its proposed deletion was the Special Rapporteur's view that it connoted an oversimplification in the definition of "watercourse" from the hydrological point of view. The Special Rapporteur was, however, quick to accept that the inclusion or deletion of the phrase was not a critical issue. His own view was that maintaining it would better convey the concept of the system of surface waters and groundwaters as a "unitary whole". The solitary example of unusual seasonal flows of the Danube into Lake Constance and the Rhine suggested, rather, an occasional overflow to which most rivers were subject from time to time and which did not detract from their natural and usual directional flows. He was therefore in favour of maintaining "flowing into a common terminus" in the definition of "watercourse" in article 2, subparagraph (*b*).

6. Thirdly, he found it unacceptable that the proposed new paragraph 2 of article 16 sought to penalize notified States for non-response or late response to the notification. Since planned measures must at all times be in conformity with articles 5 and 7, he could not agree to a provision which introduced an element of estoppel in the event of a breach of those requirements solely because the victim State had failed to respond to the notification. For a variety of reasons, including technological ones, a notified State might be unable to react in a timely manner. The notifying State should not take that inability as a licence to do whatever it wished in total disregard of its obligations under general international law and under articles 5 and 7. In that connection, he failed to see how the notifying State might suffer injury as a result of the notified State's failure to react in good time or at all. Any planned measure had to be in conformity with articles 5 and 7 and subsequent operations also had to conform to those provisions. Therefore, if the planned measures or operations had to be abandoned, that could be only because of fault on the part of the notifying State and not because of silence on the part of the notified State.

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

7. Fourthly, he agreed with the Special Rapporteur's proposal that the definition of pollution in article 21 should be transferred to article 2 on the use of terms. On the other hand, the addition of "energy" to article 21, paragraph 3, was, in his view, superfluous, since energy was already covered by the definition of pollution now contained in article 21, paragraph 1.

8. Lastly, he accepted the Special Rapporteur's proposals for a new article 33 on the settlement of disputes. Provided that no new binding obligations were envisaged, referral to ICJ could be mentioned in paragraph 2 (*c*) of that article.

9. Mr. EIRIKSSON said he was prepared to accept the Special Rapporteur's recommendation that the scope of the articles should be expanded to include aquifers not related to watercourses. That would be somewhat daring in that it would implicate a number of States which had not been specifically affected by the articles as previously envisaged. At the least, it would oblige a great number of States to consider the effects of activities not previously covered. That, was, however, just as well, particularly in the light of considerations concerning pollution, which certainly called for bold measures, and of disappointment at the banal results of the United Nations Conference on Environment and Development, held at Rio de Janeiro from 3-14 June 1992, referred to in the annex to the second report.

10. His support for the Special Rapporteur's recommendation was founded not so much on the second report, including the annex, which was more of an exposition than an attempt to persuade, as on the views the Special Rapporteur had expressed in the debate, namely, that, on the one hand, all the principles contained in the draft articles which would apply to "related groundwaters" should apply equally to "unrelated groundwaters" and, on the other hand, that he could not envisage any principles which should apply to "unrelated groundwaters" that were not already contained in the draft. Even if the Commission were mistaken in the latter assumption, the necessary additions to its work could be made at a later stage by other bodies whose task, he hoped, would have been made easier by the Commission's efforts.

11. He relied on the Drafting Committee to deal with the implications of the Special Rapporteur's recommendation and would simply make a few suggestions.

12. First, he generally preferred the approach advocated by Mr. Calero Rodrigues (2334th meeting), namely, that the Commission should adopt a separate provision extending the scope of the articles. He would even envisage such a provision forming a separate paragraph of article 1, with a first sentence stating that the articles also applied to international aquifers, including their waters, not forming part of international watercourses. The phrase "including their waters", preferable to the words "and of their waters", which were meaningless in relation to aquifers, usually did not appear in texts relating to aquifers and were included only for the sake of consistency. The Drafting Committee might consider adopting the same wording in respect of watercourses in article 1, paragraph 1.

13. A second sentence could provide that, to the extent feasible, any reference in the articles to international watercourses, watercourse States and watercourse agreements would apply *mutatis mutandis* to international aquifers, aquifer States and aquifer agreements. An explanation of the words "to the extent feasible", as proposed by Mr. Calero Rodrigues (ibid.), would be given in the commentary, which would, for example, point out which provisions of the articles would not by their very nature, apply to aquifers.

14. In article 2, he would leave the existing wording unchanged, but would add two subparagraphs to define, first, the term "international aquifer" as an aquifer parts of which were situated in different States and, secondly, the word "aquifer", as already found in subparagraph (*b*) *bis* of the Special Rapporteur's proposed amendment. He would further recommend that the term "aquifer State" should be defined as a State in whose territory part of an international aquifer was situated. In that connection, he would prefer, for the sake of consistency and after consulting one of the recognized experts in the field, to use the term "international aquifer" rather than the term "transboundary aquifer" and, in general, to follow the model of the terms already used in article 2 for watercourses.

15. If the Commission went along with that recommendation, the title of the articles would, of course, have to be changed.

16. Also with regard to the use of terms, he would caution against the inclusion of the word "management" in article 1, paragraph 1, and in article 5, paragraph 2, since that might disturb the concept of "conservation", as referred to in paragraph (3) of the commentary to article 1,[2] and the term "use" in general, in view of the special use of the word "management" in article 26, paragraph 2.

17. It would also be inadvisable, in his view, to move the definition of pollution, which appeared in article 21, paragraph 1, to article 2, just as it would be to move any other term which was used in only one article, such as "emergency" in article 25 and "regulation" in article 27.

18. He was not convinced by the reasons the Special Rapporteur had given for the deletion of the "common terminus" concept, but trusted that some satisfactory solution could be found in the Drafting Committee.

19. Turning to article 16, he said that, in his view, the proposed new paragraph, whereby any rights of a notified State which had failed to reply might be "offset by any costs incurred by the notifying State" would be going further than the Commission intended. The articles of part three still provided a procedural framework by instituting a system of notification and possible consultation, but they remained silent so far as the results of any consultations or the consequences of failed consultations were concerned. The consequences of a notified State's failure to reply were referred to in paragraph (2) of the

[2] Article 1 was initially adopted as article 2. For the commentary, see *Yearbook . . . 1987*, vol. II (Part Two), pp. 25-26.

commentary to article 13,[3] which stated that that State could reply after the six-month period had elapsed, but that such a reply would not prevent the other State from proceeding with the implementation of its plans. The commentary to article 16[4] also stated that, if the notified State did not reply within the required period, it would be precluded from claiming the benefits of the protective regime established in part three of the draft, which included the obligation of the notifying State to enter into consultations.

20. In that connection, he was of the opinion that the reference to "tacit consent" in paragraph (1) of the commentary to article 16 should be reviewed.

21. So far as the proposed inclusion in article 21, paragraph 3, of a reference to "energy" was concerned, it was unquestionable that the idea was already covered by the word "pollution" in paragraph 1 of the same article. He also had doubts about the need for lists of energy, as referred to in paragraph 3. That, however, would be for the Drafting Committee to decide.

22. He did not believe that article 29 should be deleted and he doubted whether its wording could be improved after the great amount of time already spent on it by the Drafting Committee during the discussion on first reading. He wondered, however, why the article did not apply to aquifers as well.

23. He agreed with the bare-bones draft provision on the settlement of disputes as contained in article 33 and with the amendments proposed by other members of the Commission during the debate.

24. Mr. ARANGIO-RUIZ said he was sure that the Drafting Committee would be able to find, together with the Special Rapporteur, the appropriate solution for the possible extension of the scope of the articles to groundwaters and transboundary aquifers, particularly on the basis of the *mutatis mutandis* approach which had been proposed by Mr. Calero Rodrigues (ibid.) and with which he sympathized, notwithstanding some reservations.

25. He had two brief comments to make, in the form of a question to the Special Rapporteur and a proposal to amend article 33, and specifically paragraphs 1 and 2 (*c*).

26. He wondered whether paragraph 1 performed any real normative or regulatory function. In using expressions such as "peaceful settlement of international disputes" and "settlement of disputes by peaceful means" the obvious fact was overlooked that the word "peaceful" did not perform any real function within a dispute settlement instrument. The use of any non-peaceful means of dispute settlement was clearly unlawful under the Charter of the United Nations. The proposed article 33 was an arbitration clause and, as such, should indicate in more or less mandatory terms one or more means of settlement, which was what it did in paragraph 2. He would therefore ask the Special Rapporteur whether it was necessary to refer in paragraph 1 to the peaceful nature of the means to be used and whether it was not pleonastic to do so. The prohibition on resort to war and on armed reprisals was sufficiently clear from Article 2, paragraphs 3 and 4, of the Charter of the United Nations. It therefore did not seem appropriate to reiterate those prohibitions in a watercourse convention. It also seemed odd that peaceful means of settlement should be prescribed particularly for watercourse disputes, as though States displayed a particularly bellicose attitude in that area.

27. Thus, if the Special Rapporteur agreed that paragraph 1 was indeed pleonastic, he would propose that it should be deleted and that draft article 33 should start, more simply, with paragraph 2, which could also be amended slightly. He would suggest, first, that the words "such disputes, the disputes ..." should be replaced by the words "their watercourse disputes, such disputes ..."; and, secondly, that the last part of subparagraph (*c*) of paragraph 2 beginning with the words "submit the dispute ..." should be replaced by the following: "... propose that the dispute should be submitted to binding arbitration by an ad hoc tribunal. Failing the establishment of an arbitral tribunal within six months from the proposal, either party may submit the dispute by application to the International Court of Justice."

28. His proposed amendment and, in particular, the deletion of paragraph 1 was not simply a matter of style or aesthetics. To persist in using the vague language which was typical of so many dispute settlement instruments was not the best way to enhance the effectiveness of dispute settlement obligations. Care should be taken, in particular, not to justify the belief of some that, in order to comply with those obligations, it sufficed to refrain from war and armed reprisals.

29. Mr. VILLAGRÁN KRAMER expressed appreciation to the Special Rapporteur for the work he had carried out in submitting the draft articles, which contained important changes that called for close examination.

30. It would be advisable to include definitions in article 2 that were perfectly clear, such as the definition of the term "confined groundwaters" which covered the waters of aquifers, and, consequently, to delete the "common terminus" requirement.

31. Commenting on general principles, he said that he would like the Commission to strengthen the principle of the equitable utilization of and reasonable participation in the waters of international watercourses by extending it to subjacent waters and groundwaters. That principle would unquestionably enable disputes in the matter to be settled, and more easily as there would be no undue pressure or tension. And it was in that sense that the imposition of mandatory time-limits might complicate matters. He was not opposed to the provision submitted by the Special Rapporteur in article 16, far from it. It was a useful provision, but, if the criterion of equity applied in resolving all the problems of participation in and use of waters, it should also apply to participation in the risks and responsibilities. It was not right that a watercourse State should undertake a major project on an international watercourse, make investments, look for the best possible solutions and then one day encounter the refusal of other watercourse States and so have to bear all the expenditure should the project be discontinued. The Spe-

[3] *Yearbook ... 1988*, vol. II (Part Two), p. 49.

[4] Ibid., p. 51.

cial Rapporteur provided for a six-month period for reply to notification of planned measures. That period could not be enforced everywhere, however, since speed of action was by no means a universally shared trait. Furthermore, international case-law held that silence on the part of a State should be deemed to be consent, consent could lead to estoppel and estoppel could result in acceptance of consequences to which no objection had been raised. That meant that the State concerned could not back down and that estoppel would come into play. As a result, the State would lose a right of objection and would have to bear the consequences of its silence. Admittedly, those consequences arose under any legal system, national or international, but it might be advisable to increase the prescribed period to one year. The Drafting Committee might wish to reflect on the matter.

32. With regard to the settlement of disputes, the Commission should adopt the course followed when the draft articles on the law of treaties and on diplomatic relations had been formulated, in other words, it should include provisions on the settlement of disputes in the draft articles under consideration. In so doing, however, it should depart from rigid models, including Article 33 of the Charter of the United Nations, and concentrate on the Special Rapporteur's viable and timely proposal, inasmuch as the criterion of equity was also present in the mechanism for the settlement of disputes (art. 33, para. 2 (*a*)). His only doubt was whether that equity criterion could be applied to the settlement of a dispute that arose over the interpretation of the articles.

33. Mr. SZEKELY said he was pleased to note, from the footnote to article 3, paragraph 2, in paragraph 20 of the report, that the replacement of the word *appreciable* by the word *sensible*, in the Spanish text, would not have the effect of "seeking to raise the threshold". The Spanish translation of the footnote was, however, not a faithful rendering of the English original and he therefore requested that the words *y sus derivados* and *y no derivados* should be deleted from the footnote.

34. Turning to the Special Rapporteur's proposed articles, he expressed his continued regret at the fact that the obligations with regard to notification, as provided for in articles 11 to 16, derived more from article 12 than from article 11, inasmuch as the effect would be for the nature and possible extent of the effects of a planned measure on other watercourse States to be determined by an essentially unilateral act on the part of the State that took the measure rather than by a prior joint decision taken by all the riparian States concerned. That defect was further compounded by the absolute character and quasi-punitive connotation of the obligations the other States on the watercourse were required, under articles 13 to 16, to perform within a mandatory time-limit. Those articles did not take account of the fact that the nature of the planned measure could be such that the notified States would have great difficulty, owing to a lack of resources perhaps, in making their own assessment and in being able to give a properly documented and well-founded response within the prescribed time-limits. By contrast, the notifying State would perhaps have had more than six months to make its own assessment of the possible effects of the planned measure. Article 16 as adopted on first reading[5] had already disregarded those considerations, so that the notified State might have seen the measure applied unilaterally without really having had the possibility of exercising its right of reply effectively.

35. The new paragraph which the Special Rapporteur proposed to add to article 16 was even more severe, since, in the event of the notified State's failure to reply, it provided for very serious consequences concerning reparations for damage suffered by that State; in particular, it provided for those consequences as a kind of penalty, as though failure to reply could be due only to negligence or irresponsible indifference on the part of that State.

36. The Special Rapporteur's proposal would be less open to question, and even acceptable, if the period for replying to the notification were more flexible. In that connection, he proposed that a second paragraph should be added to article 13, reading:

> "2. The notified States may inform the notifying State that the special nature of the planned measure is such that they have particular difficulty in giving a properly documented and well-founded reply in time and that they therefore request a reasonable extension of the period for replying. If that communication is not satisfactory to the notifying State, the parties shall engage without delay in consultations and negotiations with a view to agreeing on a reasonable period for reply."

37. In the absence of any objection, that proposal—or any other proposal along the same line—could be examined by the Drafting Committee. The new paragraph, which the Special Rapporteur proposed to add to article 16, could even be developed to make it clear that, in the interests of equity, the notifying State could claim compensation for the expenditure made with a view to commending the implementation of the planned measure in cases where the notified State had not exercised its right to reply to the notification or its right to request an extension of the period for reply and where it sought to oppose the measure once the two periods had elapsed, on the ground that there might be damage, even if such damage had not yet occurred, in other words, even if there was still no damage to make good.

38. Having heard the various opinions on the words "or energy" that the Special Rapporteur proposed to add to article 21, paragraph 3, he proposed that those words should be replaced by the words "or other elements".

39. He fully supported the Special Rapporteur's proposal that the words "flowing into a common terminus" in article 2, subparagraph (*b*), should be deleted because they meant nothing in hydrology.

40. Turning to the possible inclusion of transboundary confined groundwaters (aquifers) in the scope of the draft articles, he recalled that he had already expressed concern (2336th meeting) about the last-minute inclusion of such an important resource as the waters of

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

unrelated transboundary aquifers, which were the largest source of fresh water available in storage on earth and, owing to their geological characteristics, established a legal interrelationship between riparian States that differed from the one created by watercourses. To his credit, the Special Rapporteur had tried to defend that addition on the grounds that the specific characteristics of aquifers did not seem to preclude it. Yet it raised substantive problems which were precisely the result of those specific characteristics of aquifers and which made it impossible to deal with the legal regime for the use of unrelated transboundary aquifers and the legal regime for the use of international watercourses in exactly the same way. To try to do so would hamper the progressive development and future codification of the regime. It would therefore be unacceptable to extend the scope of the draft articles to transboundary confined groundwaters by a simple stroke of the pen.

41. The inclusion of a reference to aquifers would inevitably create drafting problems. In article 2, subparagraph (*a*), for example, it was obviously incorrect and a contradiction in terms to state that the expression "international watercourse" covered aquifers as well, even though the waters in aquifers were confined waters and, by definition, could not form part of an international watercourse. That was, however, simply a problem of form with which the Drafting Committee could easily deal. He was more concerned about insufficient awareness of the fact that, in the case of confined groundwaters all riparian States were in a position to act as "upstream riparian States", contrary to what happened in the case of a watercourse, and that, inevitably, any step taken by one of those States, irrespective of its geographical position would affect the formation as a whole, at the expense of all other riparian States. The fact that such groundwaters were confined meant that their exploitation, utilization and preservation took on a completely different dimension than that of unconfined waters flowing permanently across a border or along the border between two or more States. Digging a well alongside an aquifer could affect structures, spaces and water flow patterns all along it and could prevent other wells from being dug at other points. Opportunities for the joint development of the waters of an international watercourse were not the same as those for the joint administration and management of a formation in which the waters were a relatively stable unit and over which riparian States had rights that were more community-based than territorial and dependent not solely on the surface area of the aquifer found under their territory. The introduction of pollutants downstream in an international watercourse would hardly affect riparian States upstream, whereas, in the case of an aquifer, all riparian States would inevitably suffer harm. By their very nature, a number of unilateral measures that would be viable in the case of a watercourse should be prohibited by law in the case of confined groundwater and should be taken only jointly or by consensus. It was even possible that the development of the waters of an aquifer might be advisable only on one side of the aquifer, in the territory of one of the riparian States, owing to the specific nature of and conditions in underwater geological formations or the risk of pollution, and that the distribution of water volumes in an integral and equitable manner among other riparian States would have to be achieved by extracting water from foreign territory.

42. In such circumstances, it would be unthinkable, as envisaged in articles 3 and 4, for aquifer agreements to be concluded between some riparian States only and not among all of them. The concept of the equitable and reasonable development, utilization and protection of a transboundary aquifer, which was a general principle that all riparian States would have to respect under article 5, and that of the optimal or lasting utilization of the aquifer could have a radically different meaning than the one they would normally have in the case of a watercourse. The consultations provided for in article 6, paragraph 2, would have to be compulsory for all riparian States. The "due diligence" referred to in article 7 and the reservation which was provided for in that article and which was still causing the Commission so many problems even in the case of watercourses might be completely inadequate in the case of confined groundwaters, for which unilateral measures or measures not agreed on in advance would be virtually useless in most cases. The entire system provided for in articles 11 to 16 ultimately amounted to the obligation provided for in article 11—and not in article 12—and the time-limits for replying to notification must be set by all of the parties, on a case-by-case basis.

43. Having said that, he in no way rejected the principles that had guided the Special Rapporteur or the alternatives proposed during the discussion by Mr. Calero Rodrigues (2334th meeting) and Mr. Bowett (2335th and 2336th meetings). As long as it was not claimed that the draft articles were a legal regime governing the use of international watercourses identical to the one required for transboundary aquifers and as long as the possibility was not ruled out of engaging in future in the progressive development and codification of the law of the use of the waters of aquifers, he would not object to the idea of including a provision at the end of the draft articles, or in an optional protocol, stating essentially:

> "Nothing in the present articles shall affect the right of an unrelated transboundary aquifer State to agree, either in its instrument of ratification or accession or in a separate instrument, to extend to the use of the waters of said aquifer, *mutatis mutandis*, some or all of the provisions of the present articles, either on a permanent basis or pending the conclusion of bilateral or multilateral agreements on the progressive development or codification of the law of the use of the waters of transboundary aquifers."

44. Mr. KUSUMA-ATMADJA said that the original topic, namely, the law of the non-navigational uses of international watercourses, had been supplemented first by groundwater related to such watercourses and now by unrelated confined groundwaters. That shift had been inevitable if only because of environmental concerns, which had resulted in priority being given to the rational, global and sustainable use of water resources. The third and final component of the topic had been investigated at the request of the Commission and the Special Rapporteur had shown how important it was. The Commission could therefore not take the view that it was not relevant. On the other hand, its incorporation in an appropriate

manner, including by changing the title of the topic, as Mr. Eiriksson had proposed, would require in-depth and time-consuming study, but the Commission wanted to move ahead rapidly. Mr. Bowett's proposal to make unrelated confined groundwaters the subject of an optional protocol might be a good solution, but the Commission should discuss it fully before taking a decision.

45. The Special Rapporteur was proposing that the expression "flowing into a common terminus" should be deleted from the list of definitions, but that concept might be extremely useful in cases involving contiguous States which had a watercourse as a common border. Emphasis had always been placed on situations where a watercourse ran through several States in succession and the attention devoted to groundwater in general logically led to the proposal that the phrase in question should be deleted. Nevertheless, the notion of a common terminus might prove to be important in border demarcation cases between contiguous States. The Special Rapporteur's other major proposal dealt with dispute settlement. The article he proposed was conciliatory in tone, focusing as it did on peaceful settlement, but that tone was somewhat at variance with the provisions relating to notification (art. 13) and the sort of penalty clause introduced by article 16, paragraph 1. The Special Rapporteur was, of course, trying to strike a balance between the interests of the notifying State and of the notified State, but it should be kept in mind that the developing countries did not necessarily have the resources in terms of information particularly scientific information, to respond to notification within the period set by article 13. It was to be hoped that wording more in line with the interests of all States would be found by the Drafting Committee.

46. Mr. MIKULKA said that if the Special Rapporteur had found that there was a recent trend towards integrated approaches to water resource management and concluded that it was useful and timely to include confined groundwaters in the scope of the draft articles, the Commission could not reject his conclusion only because it was now on the second reading of the draft. The problem was, rather, to see how the new element could be incorporated in or associated with the draft articles. The Special Rapporteur proposed that the concept of a "common terminus" should be deleted and Mr. Calero Rodrigues had pointed out (2334th meeting) that the purpose of that concept was to avoid an unduly broad interpretation of the term "watercourse" in the event that there was an artificial link between two watercourse systems. However, "common terminus" was not a legal term: it had been borrowed from the vocabulary of the natural sciences. If it was being abandoned by the natural sciences the Commission could very well do likewise. The risks that the concept was intended to mitigate could be avoided by an explicit provision ruling out situations where two systems were artificially linked for navigational purposes only, or by dealing with the problem in the commentary.

47. The crucial issue was in fact something else: the Special Rapporteur's hypothesis that the principles and rules applicable to watercourses under a framework convention were also applicable to unrelated confined groundwaters. That hypothesis was indubitably valid for articles 3 to 19 and for article 26, but, in articles 20 or 22 of part four, for example, or in part six, simply including the term "transboundary aquifer" in the original text gave rise to a number of problems. Could reference be made to ecosystems, alien species or flows in respect of groundwaters that were completely enclosed and might, for all practical purposes, be independent of any surface water system? The method adopted by the Special Rapporteur highlighted *a contrario* the difficulties involved in adapting special rules to unrelated confined groundwaters and might give rise to an extremely long debate in the Drafting Committee. The protocol solution that was favoured by Mr. Bowett would solve the drafting problems, but failed to do away with the problem of deciding which specific articles would be listed in that protocol. And the phrase that Mr. Calero Rodrigues proposed to include in the future framework convention might be a solution if it could be considered that the notion of application *mutatis mutandis* would be enough to create a legal framework governing the use of confined groundwaters. All in all, he was not opposed to the inclusion of the third aspect in the scope of the draft articles, but he would prefer the solution proposed by Mr. Bowett, as long as the Drafting Committee could very carefully examine the extent to which the rules contained in the draft could be applied by analogy to confined groundwaters and as long as the protocol to be drafted would incorporate both references to the articles in the framework convention and amended provisions, in other words, the specific provisions that the Drafting Committee might have been able to identify.

48. Mr. de SARAM, referring to the question whether the concept of a "common terminus" should or should not be retained in article 2, paragraph 2, said that it seemed that the definition of "international watercourse" in that paragraph was intended to serve a dual purpose: first, to take into account the physical relationship of surface and underground waters (the definition's first part); but, secondly (the definition's second part), to have regard as well to the relations between riparian States. The common terminus qualification in the definition, as he saw it, sought to limit the extraordinarily wide scope, in terms of the riparian States, that an exclusively physical definition of "international watercourse" could otherwise have. It was unquestionable that if the definition was considered in its entirety from the exclusively physical point of view there was an inconsistency apparent in its terms: between the physical and the political component. Yet would the Commission prefer a definition formulated exclusively from the physical point of view? He said he did not think so. It seemed clear that in international watercourse usage a great deal depended on satisfactory and full exchange of information, consultation, accommodation of divergent interests, and above-all amicable relations between the riparian States. It seemed to him that if there were not the common terminus limitation there might well be the possibility of an unreasonably large number of riparian States to be consulted on a matter of watercourse usage. It seemed to him that this might be one of the reasons why introduction of the common terminus limitation, in the otherwise exclusively physical definition of "international watercourse" was deemed necessary by the Commission

when the draft articles were adopted on first reading.[6] There were also, of course, the organizational and procedural considerations that had been raised by earlier speakers against an amendment of the definition of watercourse at this late stage in the Commission's consideration of the draft articles.

49. He said that the Special Rapporteur quite rightly raised the problem of a natural or artificial interconnection which might unite two otherwise separate international watercourse systems, a situation for which the draft articles did not provide, but there was no information on that question, including on the exact number of cases of that kind. Such information might be obtained through a questionnaire sent to Governments and the relevant international agencies, but, for the time being, the Commission might take note of that type of situation in the commentary, for example, in the one on the scope of the draft articles, perhaps making the point that, in such a situation, it was for the riparian States affected by that interconnection of two systems to consult and settle any such problems in the light of the applicable provisions of the draft articles.

50. The second main question raised by the Special Rapporteur concerned transboundary groundwaters unrelated to surface waters. The fact that such unrelated transboundary aquifers also contain water, and that, conceivably, the principles presently stated in the draft articles might in large measure be found applicable to the utilization of transboundary aquifers might well be true. Yet it seemed to him that the physical characteristics of such transboundary aquifers, the relatively recent history of their utilization and the sparseness, therefore, of information on State practice made it more sensible that the Commission should allow some further time for consideration of such a new subject. He shared the Special Rapporteur's concern, however, that the question of transboundary confined groundwaters, to which all or many of the principles of the draft articles may well apply, should be considered in relation to the Commission's work on international watercourses. The suggestion that the Commission should request the Special Rapporteur to prepare a protocol on transboundary confined groundwaters, in the light and as a continuation of the Commission's work presently being completed on the draft articles on the law of the non-navigational uses of international watercourses, might achieve such a purpose. It would, of course, be useful if the Commission were also to have before it as much information as might be available as to the present and proposed uses of transboundary confined groundwater. It was customary in Commission practice, where subjects with technical ramifications were considered, for a questionnaire to be sent to Governments and relevant international organizations.

51. The provisions of article 5 (Equitable and reasonable utilization and participation) and article 7 (Obligation not to cause appreciable harm) were of much importance. The Special Rapporteur had not proposed that they should be considered in plenary debate at that time as they were then under consideration in the Drafting Committee. A few members had, however, referred to those articles. He said he would like it to be noted that it was his understanding that the articles were not under discussion in plenary at that time, that they also had relevance to the topic of international liability for injurious consequences arising out of acts not prohibited by international law, and they would be discussed, at the appropriate time and once the Commission had received the report of the Drafting Committee.

52. The provisions of articles 13 and 16, paragraph 1, adopted on first reading,[7] seemed to have a rigidity (particularly because of the introduction of time requirements) which many countries (unsophisticated in water resource management and development—where environmental considerations were now one of the predominant aspects) might find unsympathetic to their needs. One example was the requirement that a watercourse State, notified by another watercourse State of a planned measure, which could be substantial, should, unless otherwise agreed, respond within a period of six months as to whether the proposed development was acceptable. Such a time-limit would certainly not suit the States that did not have a long-established sophisticated system of institutions, infrastructures and expertise in water resource management and development. Moreover, the time needed to reply to notification would also depend on the magnitude of the measure planned by a notifying State, its impact on the environment and development and the adequacy and clarity of the information provided in the first place. He shared the reservations voiced by other members as to the proposed paragraph 2 to article 16. It would establish prescribed financial consequences for a failure on the part of a notified State to respond to a notification within the time-limit in article 13. This would compound the present difficulties in articles 13 and 16, paragraph 1, to which he had referred earlier.

53. The Special Rapporteur had rightly drawn attention to the likelihood that the provisions of article 21 in their present form might not adequately alert States to the fact that significant water-temperature change in a watercourse, usually through use of the water for cooling in electricity-generating plants, could be seriously destabilizing and damaging to the ecology of the watercourse.

54. The proposals made by the Special Rapporteur in article 33 were in his view appropriate. They provided, of course, for dispute-settlement procedures. There was emphasis given to conciliation and fact-finding which was as it should be in a field where amicable relations between riparian States was of such great importance. He said he would have liked, however, to see somewhat more emphasis given in the articles to joint fact-finding possibilities prior to the stage where a "dispute" had arisen: the interposition of joint fact-finding and conciliation possibilities when differences in points of view first seemed likely—and before differences had crystallized into a "dispute". As to particular dispute settlement procedures, he said it seemed useful for a reference to be made, in a footnote or in the commentaries to the articles, to the Handbook on the Peaceful Settlement of

[6] Ibid.

[7] Ibid.

Disputes between States,[8] the preparation of which the Sixth Committee and the United Nations Office of Legal Affairs had given considerable attention.

55. Mr. BENNOUNA thanked the Special Rapporteur for his very detailed report and, in particular, the annex on unrelated confined groundwaters. It was, however, unfortunate that, at the end of the annex, the Special Rapporteur had concluded that the question should be included in the draft articles, for that meant that last-minute changes would need to be made to them. Such changes were not compatible with the very spirit of the original conception of the draft, which had not been expected to cover all water resources. He therefore did not agree with the inclusion of unrelated confined groundwaters in the draft articles in the way proposed by the Special Rapporteur. He would be in favour of another arrangement, such as an optional protocol on the question or a separate article whose exact wording might be worked out by the Drafting Committee.

56. As to the new paragraph that the Special Rapporteur had proposed adding to article 16, he thought that it was not very comprehensible as it now stood, at least in French, and it raised substantive problems which were out of place in a procedural provision. Such a mixture might well complicate the Commission's task.

57. He would like to know what the real point of proposed article 33 on the settlement of disputes was. If its purpose was merely to recall that a dispute between States must be settled by consultation, negotiation, conciliation or even arbitration, it was superfluous because it did not establish any binding obligations. It would therefore suffice to limit that provision to a few lines indicating that States parties should try to settle their disputes by using the means provided for in Article 33, paragraph 1, of the Charter of the United Nations. He was also not in favour of a compulsory dispute settlement procedure such as recourse to ICJ that was unsuitable for a framework convention, which, by definition, must be very flexible. He would prefer a general arrangement, unless the Special Rapporteur cared to specify in which case fact-finding would be necessary, what it would entail and how it would be carried out because, in cases in which the facts were in dispute, fact-finding often helped in reaching a settlement.

58. In closing, he expressed the hope that, with the Special Rapporteur's assistance, the Drafting Committee would be able to finalize the text of the draft articles so that they could be adopted on second reading at the present session.

59. Mr. THIAM said that, at the forty-fifth session of the Commission, he had already made his position known on the substantive issues raised by the draft articles under consideration, particularly with regard to confined groundwaters and the concept of a "common terminus".[9] He noted that the Special Rapporteur proposed that that concept should be deleted, probably because he did not regard it as very important, and had referred to a single example, which constituted an exception, that of the Danube, which sometimes emptied into Lake Constance and the Rhine River. It should be borne in mind that the definition of a watercourse had not been changed since 1970 and that the concept of "common terminus" had never been challenged. In fact, it was an absolutely fundamental concept that could not be rejected or amended without careful consideration; the Special Rapporteur should therefore provide more convincing arguments in support of his proposal.

60. It had not originally been planned to include unrelated confined groundwaters in the draft articles. The Commission had simply requested the Special Rapporteur to carry out a study on the question to determine whether their inclusion in the topic would be feasible. However, the Special Rapporteur went well beyond what had been asked of him because he already proposed amendments to the draft articles in order to include such waters. The Special Rapporteur had himself said that he had recast the draft articles on the assumption that such an inclusion had been necessary. The compromise solutions proposed by Mr. Calero Rodrigues (2334th meeting) and Mr. Bowett (2335th and 2336th meetings) were based on the same assumption and hence were merely technical solutions that related not to the actual substance of the problem, but only to the form of the articles. Yet 23 years of work could not be destroyed on the basis of a mere assumption. The question deserved to be studied thoroughly and he therefore requested the Special Rapporteur either to review his position so as to propose draft articles to the Commission that were consistent with the objectives sought or to justify his proposals fully.

61. Mr. MAHIOU said that the Special Rapporteur's second report contained not only the text of the draft articles already adopted on first reading with several amendments, but also two new elements, namely, the inclusion of unrelated confined groundwaters in the draft and provisions on the settlement of disputes.

62. With regard to the draft articles as recast, he said that, bearing in mind the earlier discussion on the question, he was prepared to accept all the proposed amendments. He was in favour of including a provision on the question of the settlement of disputes in the draft and was confident that the Drafting Committee would find the appropriate wording. The third point was the most important. In absolute terms, the ideal solution would be to provide for one convention on rivers, another on groundwaters related to those rivers and a third on unrelated confined groundwaters, although certain provisions might be common to the three instruments. He had himself wanted a separate convention to be drafted on the second category of groundwaters, given their special nature, but to avoid delaying the Commission's work too much, he would not be opposed to including those waters in the scope of the current draft articles. In his view, everything would depend on how that was done. For example, consideration might be given, on the basis of the proposal made by Mr. Calero Rodrigues (2335th meeting) or the one made by Mr. Bowett (2336th meeting), to the possibility of including a provision allowing States to decide whether certain rules might apply to that type of groundwater. Without prejudice to the reaction of

[8] *Official Records of the General Assembly, Forty-sixth Session, Supplement No. 33* (A/46/33), annex.

[9] See *Yearbook... 1993*, vol. I, 2313th meeting.

States, that would be a way to avoid adopting a position on the question that was too clear-cut or rigid, since it would be left to States to decide for themselves.

63. Mr. AL-KHASAWNEH said he shared the Special Rapporteur's opinion that groundwater was an essential source of fresh water for human consumption as well as for industrial and agricultural use. However, a distinction had to be drawn between unrelated confined groundwaters and those referred to in draft article 2, subparagraph (*b*), which were really part of the watercourse itself and whose inclusion was essential, for example, to determine whether the utilization of the watercourse was equitable and whether significant harm had resulted from a given utilization. Extending the scope of the draft to include unrelated confined groundwaters would create confusion in that regard and would not take account of the fact that the draft had been prepared on the basis of the principle that a watercourse was itself an ecosystem and that watercourse States were easily identifiable, thus making it possible to determine whether they were in fact complying with the obligations they had assumed. Such a conclusion might well have adverse effects on the acceptability of the draft by States, particularly at a time when the utilization of transboundary confined groundwaters was a relatively new phenomenon. In his view, it would be preferable to deal with the question in a separate draft which would still be closely linked to the draft under consideration.

64. With regard to the question of the settlement of disputes, he said that it should be borne in mind that, generally speaking, States that agreed to become parties to a convention should also agree that any disputes they might have would be settled through negotiation, conciliation and arbitration and that specific obligations not to cause significant harm and to ensure the equitable utilization of watercourses required the setting up of a sophisticated and effective fact-finding mechanism and a binding dispute settlement procedure. To that end, a much more precise and detailed provision should be envisaged than the minimal one proposed by the Special Rapporteur. It was for the Drafting Committee to finalize a more appropriate and effective text.

The meeting rose at 1.05 p.m.

2338th MEETING

Monday, 16 May 1994, at 3.10 p.m.

Chairman: Mr. Vladlen VERESHCHETIN

Present: Mr. Al-Khasawneh, Mr. Arangio-Ruiz, Mr. Bowett, Mr. Calero Rodrigues, Mr. de Saram, Mr. Eiriksson, Mr. Fomba, Mr. Güney, Mr. He, Mr. Idris, Mr. Kabatsi, Mr. Kusuma-Atmadja, Mr. Mahiou, Mr. Mikulka, Mr. Pambou-Tchivounda, Mr. Sreenivasa Rao, Mr. Razafindralambo, Mr. Rosenstock, Mr. Szekely, Mr. Thiam, 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. ROSENSTOCK (Special Rapporteur), summing up the debate, said he had yet to hear any convincing arguments for retaining the notion of a common terminus. He had mentioned the example of the Rhine and the Danube because it represented an annual occurrence, not an occasional event, and had arisen, not in some scientific study by a hydrologist, but in a law case, a context most relevant to the Commission's work.

2. A number of examples could be given in support of the idea of deleting the notion of a common terminus. For instance, there was a river in Paraguay that flowed into Argentina and then split into two, with one branch going underground, reappearing as surface water and then returning underground. The other branch remained as surface water and flowed directly to the sea. It was all one system—but where was the common terminus? The Irrawaddy River in Myanmar separated into a number of streams, some of which reached the sea over 300 kilometres away from the point where the others terminated. Where was the common terminus? The Ganges, the Mekong, and to a lesser extent the Nile, ran into a number of streams that reached the sea at great distances from one another, some as many as 250 kilometres away. They were each unitary systems, but did not have a common terminus. The Tonlé Sap Lake in Cambodia was a lake which at certain times of the year flowed by way of the Tonlé Sap River into the Mekong River, while at other times, the Mekong flowed into the Tonlé Sap. Where was the common terminus?

3. One member had said that no one had challenged the idea of the common terminus over the many years of the Commission's work on watercourses. That was not surprising, since the idea of a common terminus had been incorporated only at the forty-third session in 1991. He hoped the Drafting Committee would examine article 2 with a view to considering whether there was a need for any phrase other than "a system of surface and underground waters constituting by virtue of their physical relationship a unitary whole".

4. He had listened in vain for convincing arguments against the inclusion of transboundary unrelated confined groundwaters. Indeed, one harsh attack had left the impression that it was not only unrelated groundwaters,

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