

Document:-
A/CN.4/SR.2371

Summary record of the 2371st meeting

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

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

*Downloaded from the web site of the International Law Commission
(<http://www.un.org/law/ilc/index.htm>)*

addition expanded the scope of the draft articles, in the sense that it avoided a restriction of their scope; what it did not do was to change two systems into one where they were linked by a canal, or to consider the Rhine and the Danube as a single system. He urged Mr. Güney to propose a brief text consistent with the recognition that the addition of the word “normally” did in a sense change the scope of the articles.

49. Mr. GÜNEY proposed inserting, in the third sentence of paragraph 6, after the word “compromise”, the words “not with the intention of expanding the geographic scope as such of the convention, but . . .”.

50. The CHAIRMAN said that, if he heard no objection, he would take it that the Commission agreed to suspend its action on the commentary to subparagraph (b) pending informal consultations between Mr. Güney and the Special Rapporteur, and to adopt the rest of the commentary to article 2.

It was so agreed.

The commentary to article 2 was adopted on that understanding.

COMMENTARY TO ARTICLE 3

51. Mr. ROSENSTOCK (Special Rapporteur) said that article 3 was the first in which the word “appreciable” had been replaced by the word “significant”. That decision was discussed in paragraphs (13) and (14) of the commentary.

The commentary to article 3 was adopted.

COMMENTARY TO ARTICLE 4

52. Mr. ROSENSTOCK (Special Rapporteur) said that the commentary to article 4 had not been changed.

53. Mr. AL-BAHARNA said it was very important to insert a comma after the words “programme or use”, in the English text of paragraph 2 of article 4.

54. After a discussion in which Mr. BOWETT (Chairman of the Drafting Committee), Mr. EIRIKSSON, Mr. AL-BAHARNA and Mr. ROSENSTOCK (Special Rapporteur) took part, the CHAIRMAN invited Mr. Al-Baharna not to press his proposal.

The commentary to article 4 was adopted.

The meeting rose at 1.05 p.m.

2371st MEETING

Tuesday, 19 July 1994, at 3.15 p.m.

Chairman: Mr. Vladlen VERESHCHETIN

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

Mr. Idris, Mr. Jacovides, Mr. Kabatsi, Mr. Kusuma-Atmadja, Mr. Mahiou, Mr. Mikulka, Mr. Pambou-Tchivounda, Mr. Pellet, Mr. Razafindralambo, Mr. Robinson, Mr. Rosenstock, Mr. Thiam, Mr. Tomuschat, Mr. Vargas Carreño, 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]

DRAFT ARTICLES AND COMMENTARIES THERETO ADOPTED BY THE COMMISSION ON SECOND READING² (*continued*)

COMMENTARIES (*continued*) (A/CN.4/L.493 and Add.1 and Add.1/Corr.1 and Add.2)

COMMENTARY TO ARTICLE 1 (*concluded*) (A/CN.4/L.493)

1. The CHAIRMAN said that, at its previous meeting, the Commission had left two matters pending, one concerning the commentary to article 1, and the other concerning paragraph (6) of the commentary to article 2. As to article 1, Mr. Pambou-Tchivounda and the Special Rapporteur had agreed to include a paragraph (5), reading:

“(5) According to one member, in the absence of a homogeneous criterion for identification, the uses of an international watercourse for non-navigational purposes could be identifiable in terms of three criteria: their nature (industrial, economic or private), the technical character of the works or the means utilized and the linkage of initiating such undertakings to the jurisdiction or control of a watercourse State.”

Paragraph (5) was adopted.

The commentary to article 1, as a whole, as amended, was adopted.

2. The CHAIRMAN said that, with regard to paragraph (6) of the commentary to article 2, Mr. Güney and the Special Rapporteur had agreed to insert, after the word “compromise”, in the third sentence of the paragraph, the phrase: “which is aimed not at enlarging the geographical scope of the draft articles as such but at bridging the gap between on the one hand those who urged simple deletion . . .”; the remainder of the paragraph was unchanged.

Paragraph (6), as amended, was adopted.

The commentary to article 2, as a whole, as amended, was adopted.

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

² The draft articles provisionally adopted by the Commission on first reading are reproduced in *Yearbook . . . 1991*, vol. II (Part Two), pp. 66-70.

COMMENTARY TO ARTICLE 5

The commentary to article 5 was adopted.

COMMENTARY TO ARTICLE 6

The commentary to article 6 was adopted.

COMMENTARY TO ARTICLE 7

Paragraph (1)

Paragraph (1) was adopted.

Paragraph (2)

3. Mr. BARBOZA said that a new reading of article 7 and of the commentary had raised doubts in his mind about the wisdom of leaving paragraph (2) of the commentary as it was. The first paragraph of the quotation forming paragraph (2) gave an example of what the article was about: one use of a watercourse that was obviously more "reasonable and equitable"—the construction of a dam, which provided electric energy and gave work to many people, than the use that was sacrificed—recreational fishing by a few people in the affected State. Nevertheless, the example went on to say that the State constructing the dam was not relieved of the obligation to exercise due diligence in the utilization of the watercourse in such a way as not to cause significant harm to other watercourse States. What did that mean? The harm was already decided on when the use of the river for the purposes of a dam was preferred to the use of the river by fishermen, and the damage would be effectively caused once that decision was implemented. Due diligence had nothing to do with the damage, which resulted from a decision regarding two conflicting uses of the watercourse. In actual fact, the dam was built on the understanding that such damage would inevitably ensue.

4. Did the commentary mean that due diligence should be employed not to aggravate that damage? That went without saying, but that would be damage different from the one originally contemplated, namely, loss of a certain use. For that reason, the example did not apply to "due diligence".

5. Furthermore, the third paragraph of the quotation envisaged the case of harm done notwithstanding the exercise of due diligence and said that the parties "shall consult". However, if one was talking of the damage caused by the sacrifice of one use of the watercourse for the benefit of an other, those consultations should have taken place before the construction of the dam, in accordance with the procedure established by articles 11 to 19, and the parties, in the light of the factors enumerated in article 6, would either have reached an agreement, in which case there would be no need for further consultations, or would not have reached an agreement, which would give rise to an international dispute that would have to be solved by the procedures established in the corresponding chapter of the draft. He therefore failed to see the need for new consultations.

6. He hoped that the intention of article 7 was not to exempt planned activities from the procedures established in articles 11 to 19, on the pretext that such activ-

ities corresponded to a reasonable and equitable use of the watercourse.

7. Lastly, he believed that the first paragraph of the quotation forming paragraph (2) of the commentary did not adequately illustrate an obligation of due diligence, and that the second and third paragraphs were misleading and might bring about an interpretation that planned activities were exempted from the procedure in articles 11 to 19 if the activities in question came within the concept of reasonable and equitable uses of the watercourse. He would therefore suggest, if his remarks found some echo either with the Special Rapporteur or with other members of the Commission, that paragraph (2) of the commentary to article 7 should be deleted.

8. Mr. BENNOUNA, supported by Mr. MAHIOU, said it was not appropriate for a paragraph of the commentary to a draft article to consist of a quotation, presented as such, from explanations provided by the Chairman of the Drafting Committee. As to the substance, he endorsed the remarks by Mr. Barboza.

9. Mr. ROSENSTOCK (Special Rapporteur) said it was surprising that reservations should be entered at such a late stage. It was on the basis of the explanations reproduced in paragraph (2) of the commentary that article 7 had been adopted. As to the first paragraph of the quotation, it was not a question of illustrating the concept of due diligence, but of showing that an equitable and reasonable utilization of a watercourse could none the less cause significant harm.

10. The CHAIRMAN suggested that consideration of paragraph (2) of the commentary should be postponed.

It was so agreed.

Paragraph (3)

11. Mr. ELARABY said that other obligations had prevented him from attending the meeting at which article 7 had been adopted. If he had been present, he would not have failed to express serious reservations. He entirely dissociated himself from the text that had been adopted.

12. Mr. AL-KHASAWNEH said it was surprising that the remarks he had made at previous meetings in connection with article 7 were in no way reflected in the commentary. That was true for paragraphs (2) and (4), as well as paragraph (3).

13. Mr. YANKOV, supported by Mr. BENNOUNA and the Chairman, speaking as a member of the Commission, said there seemed to be some confusion. Commentaries were supposed to express the views of the Commission. The opinions of members were set out in the summary records.

Paragraph (3) was adopted.

Paragraph (4)

14. Mr. ROSENSTOCK (Special Rapporteur) said that the word "only", in the fifth sentence, should be deleted when it occurred the first time, since it was obviously redundant.

15. Mr. TOMUSCHAT said that the sentence “It is an obligation of conduct not an obligation of result” was acceptable only if it was understood in the ordinary meaning of that distinction, and not in the rather artificial meaning attached to it by the Commission in the draft articles on State responsibility.

Paragraph (4), as amended, was adopted.

Paragraphs (5) and (6)

Paragraphs (5) and (6) were adopted.

Paragraphs (7) and (8)

16. Mr. EIRIKSSON proposed that the words “of care” should be inserted after “standard” in the first sentence of paragraph (7) and that the first sentence of paragraph (8) should be replaced by “Obligations of conduct have also been formulated in various conventions”.

17. After a discussion on the links between the concept of “due diligence” and the various instruments cited in paragraph (8), the CHAIRMAN suggested that consideration of paragraphs (7) and (8) should be deferred until the next meeting so that the members proposing various amendments in the course of the discussion could agree on a compromise text.

It was so agreed.

Paragraph (9)

Paragraph (9) was adopted.

Paragraph (10)

18. Mr. EIRIKSSON proposed that paragraphs (5) and (6) should be placed between paragraphs (9) and (10), so that the paragraphs limiting the concept of “due diligence” did not precede those defining the concept.

It was so agreed.

Paragraph (10) was adopted.

Paragraph (11)

Paragraph (11) was adopted.

Paragraph (12)

19. Mr. ROSENSTOCK (Special Rapporteur) proposed that the introductory sentence of paragraph (12) should be replaced by: “The process of reaching agreement on uses of watercourses has been dealt with by a commentator as follows:”.

Paragraph (12), as amended, was adopted.

Paragraphs (13) to (22)

Paragraphs (13) to (22) were adopted.

20. The CHAIRMAN suggested that a paragraph (23) should be added to the commentary to article 7, reading:

“(23) Two members expressed reservations concerning article 7 and indicated that they preferred the text which had been adopted for that article on first reading”.

21. Following a discussion as a result of which the words “Two members” were replaced by the words “Some members”, the CHAIRMAN said that, if he heard no objection, he would take it that the Commission agreed to adopt the text he had suggested.

It was so agreed.

Paragraph (23), as amended, was adopted.

The meeting rose at 6 p.m.

2372nd MEETING

Wednesday, 20 July 1994, at 10.10 a.m.

Chairman: Mr. Vladlen VERESHCHETIN

Present: Mr. Al-Baharna, Mr. Al-Khasawneh, Mr. Arangio-Ruiz, Mr. Barboza, Mr. Bennouna, Mr. Bowett, Mr. Calero Rodrigues, Mr. Crawford, Mr. de Saram, Mr. Eiriksson, Mr. Elaraby, Mr. Fomba, Mr. Güney, Mr. He, Mr. Idris, Mr. Jacovides, Mr. Kabatsi, Mr. Kusuma-Atmadja, Mr. Mahiou, Mr. Mikulka, Mr. Pambou-Tchivounda, Mr. Pellet, Mr. Razafindralambo, Mr. Robinson, Mr. Rosenstock, Mr. Thiam, Mr. Tomuschat, Mr. Vargas Carreño, Mr. Yamada, Mr. Yankov.

The law of the non-navigational uses of international watercourses (concluded) (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]

DRAFT ARTICLES AND COMMENTARIES THERETO ADOPTED BY THE COMMISSION ON SECOND READING² (concluded)

COMMENTARIES (concluded) (A/CN.4/L.493 and Add.1 and Add.1/Corr.1 and Add.2)

COMMENTARY TO ARTICLE 7 (concluded) (A/CN.4/L.493)

Paragraphs (7) and (8) (concluded)

1. The CHAIRMAN invited the Commission to resume its consideration of the commentary to article 7.

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

² For the texts of the draft articles provisionally adopted by the Commission on first reading at its forty-third session, see *Yearbook . . . 1991*, vol. II (Part Two), pp. 66-70.