Document:-
A/CN.4/SR.2005

Summary record of the 2005th meeting

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

Extract from the Yearbook of the International Law Commission:-
1987, vol. I

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displaying a spirit of co-operation meant endeavouring to achieve that objective.

17. It was also worth noting in regard to the obligation to negotiate that, quite often, negotiations were easier under a bilateral agreement than under a multilateral agreement. For that reason, the draft articles could call, in the absence of multilateral negotiations, for respect for equity in conducting a number of bilateral negotiations, so as to avoid any discrimination and maintain some balance between each set of bilateral negotiations.

18. Lastly, while he approved of the ideas reflected in draft article 10, he none the less thought that obligations of result should be separated from obligations of conduct.

19. Mr. McCAFFREY (Special Rapporteur), responding to a point raised by Mr. Shi, said that the purpose of the materials presented in chapter II of his third report (A/CN.4/406 and Add.1 and 2) was merely to provide members with information about modern, sophisticated régimes for the management of watercourses. He had not intended to suggest that the draft articles should be directed at integration on the local, regional or any other level. It had been suggested that a model institutional régime for the planning, management and development of international watercourses could be included in an annex to the draft; but in his view it would be virtually pointless to try to incorporate such a régime in the draft articles themselves. A system for the integrated management of watercourses might admittedly facilitate relations among States, but at the present stage in the development of international watercourse law it could not be said to be a requirement of international law.

20. Mr. Reuter had noted that, fundamentally, the obligation to co-operate meant doing something together, and had asked whether that was the true meaning of co-operation under draft article 10. Again, it had not been his intention as Special Rapporteur to suggest that States should form collective institutions in order to act through an integrated mechanism of some kind. Co-operation, within the meaning of draft article 10, denoted a general obligation to act in good faith with regard to other States, and in that particular case to fulfil certain specific obligations in using an international watercourse. There was no abstract obligation to co-operate. A general obligation to co-operate should be incorporated in the draft because, if equitable allocation of uses was to be achieved and maintained, constant dealings between States would be required, dealings that should be conducted in good faith and in a co-operative manner. Mr. Reuter's idea of a spirit of co-operation was something less than an obligation to co-operate as he understood the expression, although he had no initial objection to the idea. Possibly article 10 should open with the words "States shall co-operate", which appeared in several articles of the 1982 United Nations Convention on the Law of the Sea.

21. Draft article 10 obviously needed further refinement, but he believed that, in the light of the constructive comments made, a formulation could be found to make it clear that the obligation of co-operation was a fundamental obligation designed to facilitate the fulfilment of more specific obligations under the draft articles.

22. Mr. KOROMA said that, like Mr. Arangio-Ruiz (2003rd meeting), he found the exchange of views taking place among members extremely useful.

23. It would have been helpful if the Special Rapporteur could have explained at the outset that draft article 10 was predicated on the need to comply with the principle of equitable utilization of a shared natural resource, namely water. The true intent of the article would then have been more readily apparent. That remark was to be construed not as a criticism of the Special Rapporteur, but rather as an encouragement to future special rapporteurs to attempt to explain the intent of the articles they proposed.

24. As far as the text of article 10 was concerned, he considered that, since the main purpose of a definition was to articulate a mode of conduct, the article required refinement and should be placed in another part of the draft.

25. Mr. FRANCIS, stressing the special relevance of sovereignty to draft article 10, said that, in his view, only the source State in a watercourse system, in other words the State in whose territory the watercourse originated, exercised sovereignty over the waters passing through its territory. That sovereignty was, however, qualified to the extent that, like all the downstream States, that State's use of the waters must not cause harm to other riparian States. All other States in the watercourse system exercised no more than sovereign rights over the waters passing through their respective territories; they had sovereignty only over the river-bed beneath such waters.

26. He did not think that co-operation, within the meaning of article 10, should constitute a legal obligation. For the purposes of the draft, a form of wording should be found which imposed a firm obligation, on the clear understanding that a breach of the obligation would not give rise to State responsibility. If co-operation was not forthcoming and harm occurred, there would be liability under the principle *sic utere tuo ut alienum non laedas.* The notions of equity and reasonableness could, however, be achieved only if the riparian States co-operated in the proper manner, and were both willing and able to do so.

The meeting rose at 11.20 a.m.

2005th MEETING

Wednesday, 27 May 1987, at 10 a.m.

Chairman: Mr. Leonardo DÍAZ GONZÁLEZ

Present: Mr. Al-Baharna, Mr. Arangio-Ruiz, Mr. Barsegov, Mr. Calero Rodrigues, Mr. Eiriksson, Mr. Francis, Mr. Graefrath, Mr. Hayes, Mr. Koroma, Mr. McCaffrey, Mr. Njenga, Mr. Ogiso, Mr. Pawlak, Mr. Sreenivasa Rao, Mr. Razafindralambo, Mr.

Reuter, Mr. Roucounas, Mr. Sepúlveda Gutiérrez, Mr. Shi, Mr. Solari Tudela, Mr. Thiam, Mr. Tomuschat, Mr. Yankov.

The law of the non-navigational uses of international watercourses (*continued*) (A/CN.4/399 and Add.1 and 2,[1] A/CN.4/406 and Add.1 and 2,[2] A/CN.4/L.410, sect. G)

[Agenda item 6]

THIRD REPORT OF THE SPECIAL RAPPORTEUR (*continued*)

CHAPTER III OF THE DRAFT:[3]

ARTICLE 10 (General obligation to co-operate)[4] (*continued*)

1. Mr. TOMUSCHAT said that the wealth of material presented by the Special Rapporteur in his three reports provided an excellent foundation for the Commission's work.

2. The Rhine, a river he crossed twice a day, had once been a symbol of purity but was now seriously polluted. He mentioned that fact because his country, as both an upstream and a downstream State, was in a special situation, and because its experience suggested that no single interest should be emphasized in a one-sided fashion. Clearly, formulations that struck a perfect balance should be found for the draft under consideration.

3. Draft article 10, which laid down a general obligation to co-operate, could be understood only in the overall context of the draft, which, it was generally considered, should ultimately consist of rules that could be applied on a world-wide scale. It was therefore important not to lose sight of the universal character of the proposed normative structure. The rules would not only have to apply as between nations bound together by ties of friendship and a common political ideology, but must also be suitable for application as between nations that did not regard each other with particular sympathy. Hence the choice between a minimum standard approach and an optimum standard approach was not too difficult to make and, as one member had pointed out, the Commission should not be guided by an unduly optimistic or Utopian vision. It could, however, legitimately aim at preventing States from exceeding their equitable share in the utilization of an international watercourse and, to that end, it should establish procedures for co-operation. He would hesitate to accept an objective optimum utilization as called for particularly in article 3 of the Charter of Economic Rights and Duties of States, mentioned by the Special Rapporteur in his third report (A/CN.4/406 and Add.1 and 2, para. 51), although he appreciated that optimum utilization was a criterion also used in draft article 7.

4. Accordingly, the precedents assembled by the Special Rapporteur required careful examination. Admittedly, the example of the Convention establishing the Organization for the Development of the Senegal River, cited by the Special Rapporteur (*ibid.*, footnote 35), was particularly encouraging, but in that case States had co-operated in a general spirit of solidarity in the interests of achieving a number of common goals on which they had fundamentally agreed. A world-wide agreement, on the other hand, should be far less ambitious and should define a set of balanced interests acceptable to all States, irrespective of their political relations with their neighbours.

5. The second issue raised by draft article 10 was whether it should set forth a rule of substantive law or a procedural rule. The general context of the article indicated that the Special Rapporteur had had in mind simply a procedural rule, since the title of chapter III of the draft referred to the duty to co-operate as well as to notification and the provision of data and information. Mr. Reuter (2004th meeting) had rightly pointed out that the duty to co-operate was an *obligation de comportement* (obligation of conduct), whereas the other two duties were *obligations de faire* (obligations of result): it was important for the Commission to be fully aware of the choice to be made in that connection. Furthermore, if article 10 were moved to chapter II, where it would take on the character of a general rule of substantive law, he would agree with those members who considered that the duty to co-operate was unduly comprehensive.

6. In its present form, the article could be taken to mean that a State making any use of an international watercourse within its territory could never act alone and always had to act in conjunction with other States adjacent to the watercourse. Such an interpretation would place an undue restriction on territorial sovereignty. The basic approach should be that States could act on their own initiative, even in regard to an international watercourse, but that, owing to their interdependence, the limits on their sovereign powers were reached much earlier than in other fields of activity. A link should therefore be established between the duty to co-operate and the earlier articles, which set forth the substantive legal régime of international watercourses. It should be made perfectly clear that States were not enjoined to take joint action just because they happened to have an international watercourse in common, and that co-operation was one of the tools designed to ensure that States remained within the limits of the equitable share to which they were entitled and did not cause appreciable harm to their neighbours.

7. Thus the duty to co-operate should be qualified in a way that specified the conditions which triggered the relevant mechanisms of co-operation. That could be done, for instance, by giving an indication of instances in which a specific use was likely to have substantive repercussions on other watercourses States. Alternatively, it might be sufficient to include a specific ref-

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[1] Reproduced in *Yearbook . . . 1986*, vol. II (Part One).

[2] Reproduced in *Yearbook . . . 1987*, vol. II (Part One).

[3] The revised text of the outline for a draft convention, comprising 41 draft articles contained in six chapters, which the previous Special Rapporteur, Mr. Evensen, submitted in his second report, appears in *Yearbook . . . 1984*, vol. II (Part One), p. 101, document A/CN.4/381.

[4] For the text, see 2001st meeting, para. 33.

erence in article 10 to the preceding provisions of the draft. In any event, a general and all-encompassing duty to co-operate would be too broad, particularly since no such obligation was laid down in Article 55 of the Charter of the United Nations. A close reading of the principle of co-operation as set forth in the 1970 Declaration on Friendly Relations and Co-operation among States[5] also revealed that the drafters of the Declaration had been at pains not to place States in a strait-jacket of co-operation. Co-operation in the management of international watercourses was necessary, even essential, but the conditions and purposes thereof must be spelt out. In his opinion, the duty to co-operate was an ancillary principle designed to secure substantive rules that were still to be agreed on, but it did not have the quality of an autonomous rule modifying the basic principle of State sovereignty.

8. Mr. McCAFFREY (Special Rapporteur), referring to the timetable for the Commission's further consideration of the topic, suggested that the debate on draft article 10 should be concluded within two working days. It might also be a good idea, for consideration of the remaining articles, to divide them into two groups, consisting of articles 11 to 13 and articles 14 and 15, respectively.

9. Following an exchange of views in which Mr. THIAM, Mr. YANKOV, Mr. REUTER, Mr. NJENGA and Mr. BARSEGOV took part, the CHAIRMAN suggested that the debate on article 10 should be closed on Tuesday, 2 June 1987, although it could if necessary be extended until Wednesday, 3 June 1987, on the understanding that members could also speak on articles 11 to 15 of the draft.

It was so agreed.

The meeting rose at 10.50 a.m.

[5] See 2003rd meeting, footnote 5.

2006th MEETING

Friday, 29 May 1987, at 10 a.m.

Chairman: Mr. Leonardo DÍAZ GONZÁLEZ

Present: Mr. Al-Baharna, Mr. Arangio-Ruiz, Mr. Barsegov, Mr. Calero Rodrigues, Mr. Eiriksson, Mr. Francis, Mr. Graefrath, Mr. Hayes, Mr. Koroma, Mr. McCaffrey, Mr. Njenga, Mr. Ogiso, Mr. Pawlak, Mr. Sreenivasa Rao, Mr. Razafindralambo, Mr. Reuter, Mr. Roucounas, Mr. Sepúlveda Gutiérrez, Mr. Shi, Mr. Solari Tudela, Mr. Thiam, Mr. Yankov.

The law of the non-navigational uses of international watercourses (*continued*) (A/CN.4/399 and Add.1 and 2,[1] A/CN.4/406 and Add.1 and 2,[2] A/CN.4/L.410, sect. G)

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[Agenda item 6]

THIRD REPORT OF THE SPECIAL RAPPORTEUR (*continued*)

CHAPTER III OF THE DRAFT:[3]

ARTICLE 10 (General obligation to co-operate)[4] (*continued*)

1. Mr. ROUCOUNAS said that, before considering draft article 10, it was necessary to distinguish between general co-operation and the sources, and therefore the legal effects, of co-operation. Co-operation was an intrinsic part of the process of development of international relations, in a wide variety of activities ranging from juxtaposed fields of competence to full integration. More often than not, it was synonymous with organization on an international level. It was described sometimes as horizontal, when two or more States acted in concert to achieve a particular objective, and more often as structural, when it reached a stage at which it acquired an institutional apparatus of its own. The greater the number of joint actions, the greater became the number of support structures; the more pronounced the legal personality of the international organization, the more fierce the struggle became for the allocation of fields of competence under international law, in the name of co-operation between States. It was doubtful whether, with the requisite logic, the same legal foundation could be identified for each and every form of co-operation.

2. Again, co-operation had different sources and produced different legal effects. The Charter of the United Nations unquestionably issued an appeal for co-operation and provided for a number of mechanisms in that regard; but it was preferable to scrutinize the conduct of States, for the Commission's approach in the case of international watercourse systems did not, at the present stage, provide for any institutional mechanisms. In the 1970 Declaration on Friendly Relations and Co-operation among States,[5] the fourth principle did indeed regard co-operation as a more or less strict legal obligation in a number of areas: the maintenance of international peace and security, the protection of human rights, and the economic field.

3. The Charter of Economic Rights and Duties of States[6] contained a large number of provisions on State co-operation in many fields. Alongside duties to co-operate (arts. 7, 14, 27, etc.), it enunciated rights to co-operation (arts. 5, 12, etc.). A number of legal instruments revealed the different aspects of co-operation. Some obligations to co-operate that were stipulated in the Charter of the United Nations, such as

[3] The revised text of the outline for a draft convention, comprising 41 draft articles contained in six chapters, which the previous Special Rapporteur, Mr. Evensen, submitted in his second report, appears in *Yearbook . . . 1984*, vol. II (Part One), p. 101, document A/CN.4/381.

[4] For the text, see 2001st meeting, para. 33.

[5] See 2003rd meeting, footnote 5.

[6] General Assembly resolution 3281 (XXIX) of 12 December 1974.