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Summary record of the 2313th meeting

Topic:
<multiple topics>

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

their rights. It did not seek to define any new rights not found in the Convention on the Rights of the Child, but to establish the modalities for the exercise of the rights set forth therein.

67. The European Committee on Legal Cooperation had also decided to begin work on a convention on questions of nationality. The Convention on the Reduction of Cases of Multiple Nationality and on Military Obligations in Cases of Multiple Nationality, adopted by the Council of Europe, was in fact out of date in some respects. The demographic situation in Europe had changed, especially as a result of immigration, and a considerable number of persons had dual nationality and the problems that went with it. The Committee considered that the future convention should be flexible and take into account the interests of both States and individuals and that it should not place obstacles in the way of, or require States to accept, multiple nationality. The work was to begin during the second half of 1993.

68. Following the political upheavals in Europe, the Council had established a threefold programme of cooperation with the countries of Central and Eastern Europe. In constitutional matters, the European Commission for Democracy through Law, the so-called Venice Commission, was collaborating with those countries in the drafting of fundamental rules compatible with democratic principles. Japan had requested to attend the Venice Commission as an observer and South Africa had also asked to participate in its work. Where legislation was concerned, an ambitious programme of cooperation, Demo-Droit, which had been operating for several years, was designed to help national authorities formulate new rules compatible with democratic principles. The third part of the programme, Themis, was concerned with training for the legal professions: it was not enough to devise rules; it must also be possible to apply them.

69. Mr. EIRIKSSON thanked Mr. de Sola and noted that he himself had had the honour of representing the Commission at the fifty-eighth session of the European Committee on Legal Cooperation in Strasbourg in December 1992. On that occasion, he had submitted a document on the work of the Commission at its forty-fourth session and had seen that the members of the European Committee followed the Commission's work with close interest. He had been most impressed by the range of legal topics discussed within the framework of the Council of Europe and he had been particularly interested in the results of the work on the Convention on Civil Liability for Damage Resulting from Activities Dangerous to the Environment. He had been invited to participate in the final negotiating session on the Convention and had thus been able to supply first-hand information to the Commission's Special Rapporteur on the topic of international liability for injurious consequences arising out of acts not prohibited by international law.

70. Since the Commission's Planning Group had recommended the inclusion in the Commission's programme of work of the question of State succession and questions of nationality, it might be possible to establish cooperation in those fields with the European Committee on Legal Cooperation, for the Committee had decided to prepare a draft convention on questions of nationality.

71. As legal adviser to his Government, he participated regularly in the meetings of the Committee of Legal Advisers on Public International Law of the Council of Europe and, at the meetings held in late 1992, he had presented a document on the Commission's work, which was traditionally discussed at length during those meetings.

72. He was pleased that the discussion of legal questions under the auspices of the Council of Europe was indeed becoming pan-European with the attendance of lawyers from the countries of Central and Eastern Europe, whose contributions he had appreciated in recent years. Lastly, he thanked Mr. de Sola and, through him, his colleagues in the legal sections of the Council of Europe for their hospitality and the professional assistance which they had given him and the Commission's previous observers in Strasbourg.

73. The CHAIRMAN said that the members of the Commission did indeed follow with very great interest the work of the European Committee on Legal Cooperation and appreciated its quality and diversity. On more than one occasion, that work had been a source of inspiration for the Commission, as was the case today with the Convention on Civil Liability for Damage Resulting from Activities Dangerous to the Environment, which had much in common with the topic of international liability for injurious consequences arising out of acts not prohibited by international law. The adoption of the Convention by the Council of Europe augured well for a possible instrument creating a regime of liability applicable not to individual activities, but to the whole array of activities which constituted a danger.

74. He hoped that the cooperation and exchanges of information between the Commission and the European Committee on Legal Cooperation would continue.

The meeting rose at 1.05 p.m.

2313th MEETING

Tuesday, 29 June 1993, at 10.10 a.m.

Chairman: Mr. Julio BARBOZA
later: Mr. Gudmundur EIRIKSSON

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

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

[Agenda item 4]

FIRST REPORT OF THE SPECIAL RAPPORTEUR (*continued*)

1. Mr. SZEKELY said he could not agree with the Special Rapporteur's personal verdict on the draft articles. Even though less than 10 per cent of the members of the international community had submitted written comments, the comments were on the whole unfavourable and a similar reaction was apparent in the specialized academic community. Nevertheless, while admitting to that situation, the Special Rapporteur had urged that all that was needed was some "fine tuning" of the draft articles. Actually, the external reaction to the draft seemed to advise a deep overhaul and reconsideration of the articles.

2. The first report of the Special Rapporteur (A/CN.4/451) pointed out that the draft articles had survived the United Nations Conference on Environment and Development, held at Rio de Janeiro in 1992, something that was not at all difficult to achieve in view of the low level of the legal output of the Conference, which had failed to produce the promised "Earth Charter" or the urgently needed convention on forests and had only yielded two weak treaties which minimized the legal obligations of States.

3. He could not agree with the Special Rapporteur's view that the draft articles need not be fundamentally reconsidered in order to take account of the very important developments since the completion of the first reading, such as the Convention on the Protection and Use of Transboundary Watercourses and International Lakes and the Convention on Environmental Impact Assessment in a Transboundary Context. The draft should be brought up to date precisely to reflect the progress made in those instruments.

4. The Special Rapporteur had confined himself to some minimal and cosmetic changes, with two notable exceptions. The first was the proposed deletion from the definition of a watercourse of the words "and flowing into a common terminus", something that would have a positive effect by correcting a lamentable error in the original draft. The second substantive proposal was, unfortunately, a lamentable step backwards, which was to replace the concept of "appreciable harm" by "significant harm", in article 3 and, what was worse, in article 7. The proposal went much further than the necessary distinction between inconsequential harm that could not even be measured or identified on the one hand, and consequential harm on the other. If adopted, it would raise the threshold in such a way as to have very adverse effects, since the subjectivity inherent in the term "significant" left the potentially victim State defenceless, contrary not only to its interests but to protection of the watercourse itself. The result would be to ignore the cumulative effects of lesser harm, which could be substantial, especially in combination with other elements.

5. The draft was concerned with international rivers whose ecological balance had in most cases been badly affected for a long time, so that they had little remaining resistance to further interference. The standard proposed by the Special Rapporteur took no account of the particular conditions of each watercourse on the history of its use which could indicate different degrees of tolerance and vulnerability to harm. Accordingly, any qualification of harm ought to be preceded by still one more qualification, namely the set of particular conditions or factors of each watercourse and its resistance to harmful interference. In an environment with a relatively intact ecological balance, it would be justifiable to lower the threshold or level of protection. Few international rivers had such resistance and the least that could be said was that the already high standard of "appreciability" in the draft should be preserved, but explicitly subordinated to the particular conditions of each watercourse. In no event, however, should the standard be raised, as was being proposed.

6. Unfortunately, the comments received from Governments were not sufficiently representative and few came from lower riparian States, which had to resign themselves to harm suffered as a result of unduly high standards which rendered them defenceless. Under article 3, the interests of those States were already threatened when other riparian States were allowed to agree on uses of the watercourse which harmed them; and they did not even have the opportunity to participate in the negotiation of the agreements.

7. The Special Rapporteur did not consider it prudent or adequate to try to apply the principle of good faith or to add the concept of good neighbourliness to the instrument under discussion. Actually, those principles had their proper place in articles that sought to regulate relations between neighbouring States and included such subjective terms as "significant harm"—terms which at the very least should be subject to a good faith interpretation. Only in that way could the draft make an important contribution towards solving some of the water-related problems humankind will confront in the next few decades, as the Special Rapporteur had stated. In fact, the report helped to defeat that purpose with its proposal to alter the qualification of "harm" in a way that was bound to increase the possibilities of friction and controversy for watercourse States.

8. In order to encourage States to accept the draft, the Commission should embark on a determined effort to incorporate and define factors relevant to the qualification of harm and to include rules such as those regarding the abuse of rights. With the report's insistence on maintaining the poor side of the principles incorporated in the draft—when previous drafts were richer both in principles and in the factors relevant to the equitable and reasonable use of international watercourses—the effectiveness of the whole draft would be threatened.

Mr. Eiriksson took the Chair.

9. Mr. THIAM emphasized that for any change to be made in a text which the Commission had adopted on first reading it was essential that the relevant proposals should make for improvements and go in the direction of

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

[2] Ibid.

progress. As he saw it, the changes proposed by the Special Rapporteur hardly went in that direction. Some examples sufficed. The first was from what the Special Rapporteur termed "issues of a general character". With reference to the issue of the choice between a framework convention and model rules, it was important to remember that the matter had virtually been decided by the Commission itself. In view of the major divergences and contradictions between States on the subject of international watercourses, the Commission had agreed that it was not advisable to try and impose any mandatory rules; indeed, any such attempt would mean condemning the draft to death. Accordingly, he could not agree with the Special Rapporteur's attempt to try and reopen the debate on that issue, an approach which would merely complicate the problem.

10. The second general issue was whether the draft articles should include a dispute settlement clause. As already pointed out during the discussion, in most cases the means set forth in Article 33 of the Charter of the United Nations would always be available to the parties concerned. Hence there appeared to be no need to introduce a specific clause on the subject in the draft itself.

11. Experience in Africa had shown that most of the disputes in question could best be settled by political means rather than by adjudication. Although he was a lawyer, he could not but admit that the difficulties involved could be settled to the general satisfaction much more smoothly by political bodies. One example was provided by the Organization for the Development of the Senegal River: the various difficulties and conflicts which had arisen had usually been settled by the Conference of Heads of State or by ministerial meetings. In the light of that experience, he was not at all convinced of the advisability of including a dispute settlement clause in the draft.

12. As to the Special Rapporteur's proposals concerning the articles themselves, there was no particular advantage in drafting changes such as replacing "appreciable harm" by "significant harm". It was worth recalling that the Commission had discussed the term "appreciable" at length and found it satisfactory in conveying the intended meaning of harm that was capable of being evaluated or measured. Consequently, it was advisable to keep to the word "appreciable", which the Commission as a whole had already accepted.

13. In the matter of changes of substance, he objected to the suggestion to delete the words "and flowing into a common terminus" from article 2, subparagraph (*b*). By completely altering the definition of "watercourse" in that way, the proposal would undermine the very basis of the whole draft. He did not find in the report any satisfactory explanation in support of such a sweeping proposal. One effect of the change in definition would be to bring confined groundwater within the scope of the draft articles. Such a result, however, would conflict with the decisions already taken by the Commission which indicated that confined groundwater should be treated as a separate subject. The question was one of great interest to the less developed countries, particularly those in Africa. Confined groundwater was very important in Africa, a continent with vast desert areas; it must necessarily be treated as a distinct concept and form the subject of a topic separate from that of international watercourses. Such an approach was essential if the African countries were to make use of their confined groundwater in the future.

14. Again, he could not agree with the Special Rapporteur's suggestion that the concepts of good faith and good neighbourliness should not form part of the articles. In a draft dealing essentially with cooperation agreements on watercourses, those concepts were, on the contrary, absolutely indispensable. It was inconceivable that such cooperation agreements should be concluded in a climate of misunderstanding or in the absence of good faith.

15. The new text proposed for article 7 was unduly long and difficult to understand. In matters of codification, brevity was always the golden rule. Lastly, he urged the Commission not to accept the proposed changes, which would completely alter the substance of the draft, and to keep instead to the text adopted on first reading. The previous Special Rapporteur, Mr. McCaffrey, had produced a very clear text which had given satisfaction to the whole of the Commission.

16. Mr. AL-KHASAWNEH said he was opposed to the Special Rapporteur's suggestion that the issue of the ultimate form of the draft should be resolved or at least that a brief exchange on that point should take place before any further drafting was undertaken. Although the Commission had not taken any formal decision on the matter, it was fair to say that there had been a broad although not unanimous understanding that the draft would ultimately form a framework convention. A framework or umbrella convention ordinarily meant that it contained general residual rules that would apply in the absence of more specific agreements.

17. For his part, he had never been convinced that a framework convention was the best solution in the present case and he still held the view that a general convention specifying in detail the rights and duties of watercourse States would be a more significant contribution in an area of international relations that was increasingly topical and important. The perceived differences in the characteristics of individual watercourses did not constitute an effective bar to the real application of the law on watercourses. Moreover, the elaboration of a general convention was politically feasible. The signing at Helsinki in March 1992 of the Convention on the Protection and Use of Transboundary Watercourses and International Lakes demonstrated that it was politically and legally possible to regulate State activities relating to varied watercourses through uniform, specific and directly applicable rules. Nevertheless, the Commission had shown a distinct preference for a framework convention and he was prepared to accept that general trend, even though a framework convention fell short of the aims and purposes of codification and progressive development of the law. Accordingly, he could not accept the suggestion that the present endeavour should culminate in a set of model rules.

18. He agreed with the Special Rapporteur that in the light of the nature of the issues, it would be an important contribution for the Commission to recommend a tailored set of provisions on fact-finding and dispute settlement in the event that it decided to recommend a draft treaty and, arguably, if it opted for model rules as well.

He would go further and suggest that States which agreed to become parties to a treaty should accept that their performance under that treaty be open to third-party scrutiny. The nature of the substantive rules in the draft, and not merely "the nature of the issues" made it indispensable to provide for compulsory and binding third-party fact-finding and dispute settlement procedures. Such key elements of the draft as prevention of appreciable harm and reasonable and equitable utilization were characterized by vagueness and elasticity. It was difficult to imagine that a dispute arising out of the interpretation or application of such rules could be possible without objective third-party settlement and fact-finding.

19. The Special Rapporteur had not explained what type of rule he had in mind when referring to a "tailored set" of rules. The previous Special Rapporteur, Mr. McCaffrey, had produced a tailored set of rules, in his sixth report,[3] characterized by compulsory fact-finding and conciliation. However the conciliation envisaged in those rules was described as compulsory, that is to say conciliation to which the parties to a dispute were required to resort yet whose outcome was not binding upon them. Nevertheless, regardless of its merits, that set of rules could not adequately cover the situations that might arise when the interpretation and application of the substantive rules became a matter of dispute. For such situations to be suitably covered, the dispute settlement procedure should provide for compulsory and binding arbitration and judicial settlement if negotiation and conciliation failed. There was also a role for international organizations in extending advice and in fact-finding.

20. As to article 2, Mr. Calero Rodrigues (2311th meeting) had correctly explained the drafting history of the term "common terminus". Canals connecting two or more watercourses had been built and continued to be built. It was therefore necessary to deal adequately with that aspect and the closely related one of diversion of waters from watercourses. It was not properly dealt with in the draft, except to say as a matter of presumption that the twin rules on prevention of appreciable harm and on equitable utilization would be applicable. Further examination of that issue was necessary.

21. The question of confined groundwater—with which the Special Rapporteur was eminently qualified to deal—undoubtedly merited early codification and progressive development. It did not, however, fit well in the present draft. International watercourses had been regulated for thousands of years, but the use of confined groundwater was a relatively new phenomenon. The argument of diversity, which had led to the adoption of the framework agreement approach for watercourses, was less compelling in the case of confined groundwater. Moreover, the law relating to groundwater was more akin to that governing the exploitation of natural resources, especially oil and natural gas. The best course was to treat the topics of international watercourses and the law of confined groundwater separately, in the way in which the Commission had dealt with the law of treaties or State succession.

22. In regard to article 3, the use of the adjective "appreciable" or "significant" to describe the threshold of harm had a very long history in the Commission. The choice between the two terms was more one of legal taste than of established technique. For his part, he largely preferred the word "significant", for the reasons given in the report and also explained by Mr. Calero Rodrigues (ibid.). Yet there was merit in paragraph 5 of the comments by the Government of the United Kingdom of Great Britain and Northern Ireland[4] that the threshold of harm set in article 7 should accord with the work of the Commission on the other topics. The Drafting Committee should consider aiming at broad consistency if not actual uniformity with the qualification of the threshold of harm in the draft on international liability for injurious consequences arising out of acts not prohibited by international law.

23. His doubts about the appropriateness of draft article 4 were confirmed by the Special Rapporteur's interpretation of the article. The entitlement of a watercourse State to become a party to agreements, whether those agreements applied to the whole or only part of the watercourse, was an exception to the fundamental principle whereby States enjoyed freedom to choose their treaty partners. That exception had to be narrowly construed. A watercourse agreement, even one which applied to the entire watercourse, might conceivably cause no harm, or virtually no harm, to the interests of another watercourse State. Indeed, as stated in paragraph (2) of the commentary to the article: "It is true that there may be basin-wide agreements that are of little interest to one or more watercourse States".[5] In such cases, there was no reason why the freedom to choose treaty partners should be unduly restricted by giving other unaffected or barely affected States *carte blanche* to overrule that fundamental principle. The uses by third States could and should be protected against adverse effects arising out of the conclusion by other watercourse States of watercourse agreements, but by some means that were less restrictive than was envisaged in article 4. For instance, States contemplating the conclusion of an agreement could be required to enter into consultations with third watercourse States to ensure that their uses would not be affected by the conclusion of the agreement in question. There was another reason why article 4 would benefit from revision. Under the general scheme of the draft, and particularly under the terms of article 7, a watercourse State might initiate works that could affect the whole or parts of the watercourse, provided always that there were no appreciable adverse effects on other watercourse States. Such a State would not be required, under the draft, to enter into treaty relations with other watercourse States. If, however, the same State were to initiate the same works jointly with another watercourse State, its freedom to choose treaty partners would be restricted in the sense that a third State would be entitled to become party to the agreement. If one of the main aims of the draft was to encourage the negotiation of watercourse agreements, he wondered whether that aim would not be defeated by article 4. What was more, the threshold of ap-

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

[4] See *Yearbook... 1993*, vol. II (Part One), document A/CN.4/447 and Add.1-3.

[5] Initially adopted as article 5. For the commentary, see *Yearbook... 1987*, vol. II (Part Two), p. 30.

preciable harm, which was so central to the draft, would be replaced by a much lower threshold.

24. Yet a further reason why article 4 should be looked at again was that article 30,[6] which had been adopted after article 4, contemplated a situation in which the obligations of cooperation provided for in the draft could be fulfilled only through indirect channels. That latitude, which reflected an approach similar to the one adopted in part XII of the United Nations Convention on the Law of the Sea, was a realistic acknowledgement that the mere fact that a watercourse passed through the territories of two or more States, while arguably creating a community of interests of some sort, was not the sole factor of which the law should take cognizance. The unity of purpose of the draft would collapse if States were allowed the necessary latitude with regard to the choice of methods whereby their obligations might be fulfilled, but were required to enter into direct relations in a rigid manner.

25. Presumably article 4 would not apply to cases in which a watercourse State entered into an agreement with a non-watercourse State or with an international financial institution with a view to initiating new works on the watercourse; in such cases, the relationship would be governed by the general rules of the law of treaties relevant to the interests of third States. There was no reason why the rules governing agreements between watercourse States should differ from the general rules of the law of treaties, including the fundamental rule of *pacta sunt servanda*.

26. He fully agreed with the reasons cited by Mr. Calero Rodrigues (ibid.) for not tinkering with the delicate balance that existed between the duty to prevent appreciable harm, as provided for in article 7, and the rule of equitable utilization, as laid down in articles 5 and 6. There were, however, three further reasons for not doing so. First, the rule of equitable utilization was highly subjective, inasmuch as the factors relevant to equitable and reasonable utilization, as set forth in article 6, were not exhaustive and touched on virtually all aspects of life. Presumably, the Special Rapporteur hoped to mitigate the adverse effects of that rule by means of dispute settlement procedures. While it was not known whether such procedures would include binding judicial settlement, it was very important to ensure certainty in the substantive rules. The task of those called upon to decide what constituted appreciable or significant harm would be complicated still further if the rule of no harm was subordinated to the rule of equitable utilization. It was significant that, in their directives, international financial organizations, including the World Bank, tended to follow the rule on prevention of appreciable harm, which was more easily given to objective verification, rather than the equitable utilization rule.

27. Secondly, the Special Rapporteur proposed an exception in the case of uses that caused pollution and proposed a further exception to that exception in cases where there was a clear showing of special circumstances indicating a compelling need for ad hoc adjustment and the absence of any imminent threat to human health and safety. Apart from the uncertainty likely to arise in the interpretation of that rule, pollution was so widely defined under article 21[7] as to render virtually academic any distinction between activities that caused appreciable or significant harm and activities that caused pollution.

28. Thirdly, it was important to bear in mind that prevention of harm above the threshold of appreciable harm was the weakest formulation of the maxim *sic utere tuo ut alienum non laedas*. It would be virtually impossible to repair harm above that level. Any tinkering with the already narrowly defined rule would be totally unjustified.

29. Mr. Sreenivasa RAO said that he welcomed the Special Rapporteur's clear and concise report. The approach it adopted was a tribute to the efforts of previous Special Rapporteurs on the topic and particularly to Mr. McCaffrey, under whose guidance the Commission had completed its first reading of the draft articles.

30. As several more States were likely to submit comments on the topic, it would be advisable to wait at least until 1994 before the Commission began to finalize the draft articles on second reading. The comments received so far were, in general, appreciative of the Commission's work. Almost all of the States, however, approached the draft articles from their own national perspective, which meant that different preferences had been expressed about the way in which the articles should be finalized. Some States had rightly emphasized the need to integrate the law and the policy on international watercourses, where the concerns were similar, within the wider context of the global concern regarding preservation of the environment and sustainable development. While several of the comments endorsed the framework convention approach, some apparently favoured model rules or recommendations to allow States a degree of flexibility. There was also a favourable response to the idea of adopting a suitable dispute settlement provision within the overall scheme of the draft.

31. As to the draft articles adopted on first reading and the commentaries thereto, article 1, on the relationship between navigation and other uses of international watercourses, did not strike a proper balance. Any conflict involved should have been treated as a problem relating to the management of multiple uses. As article 1 was drafted, and as the matter was explained in the commentary,[8] the articles could be stretched to cover navigational uses, which clearly fell outside the scope of the draft. An attempt should be made to correct that imbalance on second reading.

32. While the definitions in article 2 focused on certain physical factors, it was clear from the commentary[9] and subsequent articles that the relationship between different watercourse States depended primarily on their common interests and on the need to avoid, and deal with, harm above an agreed threshold. In his view, to keep the scope of the articles clear, the words "and flowing into a

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

[7] Ibid., p. 68.

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

[9] Subparagraph (*c*) was initially adopted as article 3. For the commentary, ibid., p. 26. For the commentary to subparagraphs (*a*) and (*b*), see *Yearbook... 1991*, vol. II (Part Two), pp. 70-71.

common terminus", in article 2, subparagraph (*b*), should be retained. Also, groundwater should not come within the scope of the articles. In that connection, while he welcomed the Special Rapporteur's offer to study the desirability of including "confined groundwater" within the scope of the draft articles, he agreed that the Commission would be well advised to complete its consideration of those articles as soon as possible and not to add a new topic that would take time to mature. Furthermore, he had no objection to the suggestion to move the definition of pollution from article 21 to article 2 since, as the Special Rapporteur had noted, that change in no way implied agreement to, or enhanced the utility of, any change in part II or part III of the current draft. The inclusion of that definition in article 2 would be without significance so far as the proposed change to article 7 was concerned.

33. He endorsed the framework agreement concept embodied in article 3. As stated in paragraph (2) of the commentary,[10] such an agreement was intended to provide "guidelines for the negotiation of future agreements" and "optimal utilization, protection and development of a specific international watercourse are best achieved through an agreement tailored to the characteristics of that watercourse and to the needs of the States concerned". One important issue raised by article 3 concerned the definition of a threshold or standard of harm that would bring the draft articles into play. In that connection, he too believed that the word "appreciable", in paragraph 2 of article 3, should be replaced by "significant". Apart from the obvious advantages of setting a uniform and legally recognizable standard of harm, as opposed to a purely objective threshold, it was a standard that had been approved by the community of States in their endeavours to set an agenda for the protection and preservation of the environment at the United Nations Conference on Environment and Development and in the European context. Also, the establishment of an adequate threshold was crucial if worldwide acceptance was to be secured for the draft. So far as the alternative versions of article 3 proposed in paragraph 12 of the report were concerned, he was inclined to accept alternative B, for the reasons stated by the Special Rapporteur. A further issue was the impact of the article on existing agreements. In his view, no change to paragraph 3 of article 3 was needed, and the matter would best be left to the discretion of States. As the Special Rapporteur had pointed out in paragraph 14 of the report, States were in a position to avoid any unintended application of the convention in a variety of ways, including a clear statement of intent or understanding: a general statement to that effect at the time of signing or ratifying the convention would suffice. Alternatively, as already suggested, clear language should be used to specify that the articles in no way affected pre-existing treaties between States save for such changes as were deemed to be necessary by the parties to those treaties. The suggestion that articles 8 and 23 should be placed before article 3 was not, in his view, in keeping with the existing scheme of part I of the draft, which dealt only with general principles.

34. The Special Rapporteur was right to say that no changes to article 4 were needed: any ambiguity was dispelled by the Commission's excellent commentary to the article.[11]

35. Article 5 laid down the fundamental principle whereby all riparian States were entitled to equitable and reasonable utilization of international watercourses. That entitlement was subject to the obligation of watercourse States to promote the optimal utilization and consequent benefits consistent with adequate protection of the watercourse. In that sense, the concept of optimal utilization embraced that of sustainable development. The commentary to the article[12] was generally acceptable, though it was a questionable suggestion in paragraph (3) that optimal utilization did not imply "maximum" use by any one watercourse State consistent with efficient or economical use but rather the attainment of maximum possible benefits for all watercourse States. Such an interpretation was not a proper reflection of the practice of most States which, in the absence of express agreement to the contrary, relied on their own capabilities and resources to maximize benefits, subject always to the requirements of the economy as well as to the need to protect the watercourse and to avoid causing significant harm to other co-riparian States—all of which was neatly encapsulated in the criterion of equitable and reasonable utilization of a watercourse. In addition, article 5 should concentrate on the basic principle of equitable and reasonable use as more clearly reflected in article IV of the Helsinki Rules,[13] which set forth the concept of entitlement of watercourse States in more positive terms than did paragraph 1 of article 5. Paragraph 2 of article 5 should be deleted, since the right of equitable participation was no more than a right of cooperation, which was elaborated in greater detail in article 8, on cooperation.

36. Article 6 contained an illustrative list of factors, each of which would have to be reconciled with the others in order to achieve a balance. The concept of "existing uses" had gained some currency in the practice of States as an important factor in measuring significant or substantial harm. However, the need to reconcile that factor with the equally important consideration of the development needs of States should be given the same priority.

37. Article 7, which provided that a State should not use a watercourse in such a way as to cause significant or substantial harm to other watercourse States, laid down a standard which had already been incorporated in a number of articles to trigger various procedures, such as those relating to notification, consultation and negotiation. In their comments on the article some Governments[14] justifiably took the view that, at best, the article did no more than repeat that standard and, at worst, that it would undermine the basic concept of equitable and reasonable use; in any event, it should be eliminated from the draft. He too would recommend that it should be deleted in its entirety and in that connection, he agreed with the Special Rapporteur's reasoning. Preven-

[10] Initially adopted as article 4. For the commentary, see *Yearbook... 1987*, vol. II (Part Two), pp. 27-30.

[11] See footnote 5 above.

[12] Initially adopted as article 6. For the commentary, see *Yearbook... 1987*, vol. II (Part Two), pp. 31-36.

[13] See 2312th meeting, footnote 14.

[14] See footnote 4 above.

tion of pollution and management of water resources were goals everyone shared, and an explanation of the concepts of optimal use or reasonable use, or both, should be included in the commentary to article 5.

38. Achievement of the goals of watercourse utilization and management depended on the obligation to cooperate, set forth in article 8. Those goals had to be sought not only on the basis of sovereign equality, territorial integrity and mutual benefit, as provided for in the article, but also, as noted in the commentary,[15] with due regard for good faith and good neighbourliness. Cooperation could not be imposed: it could only be cultivated on a reciprocal basis. The common interest inherent in the process of the utilization of water resources would promote the cooperation which was so necessary because the multiple and often conflicting uses called for an integrated approach. Article 9, on exchange of data and information, was essentially an extension of article 8, and gave rise to the same considerations of mutual benefit, reciprocity and sovereign equality. Much of the data exchanged would, of course, be the subject of agreements concluded between States.

39. Article 10, on the relationship between different uses, laid down the important principle that each use should be given its due weight in the attempt to reconcile different and multiple uses and different interests and factors. The problem of the management of multiple uses and conflicts was sufficiently important for States to require specific characteristics to be carefully balanced in separate agreements of their own.

40. The question of the peaceful settlement of disputes was particularly important in the context of the uses of international watercourses. As the needs of populations increased and water resources became ever scarcer, disputes were bound to arise if the issues were not tackled at the technical and professional level. Any attempt to politicize disputes was bound to be counterproductive. Accordingly, the appointment at an early stage in the dispute of joint technical commissions with a mandate to give priority to the optimal management of the watercourse should be encouraged. Wherever possible, settlement of disputes through negotiation and other means, including resort to third-party procedures, should be undertaken. While he agreed, therefore, that the draft should embody suitable provisions on the settlement of disputes, the Special Rapporteur should bear in mind that the choice of means should be freely available to States.

41. As the Swiss Government had stated in its observations,[16] if the future framework Convention was to fulfil its aim, it must be balanced and it should not favour either upstream or downstream States.

42. Mr. VERESHCHETIN said that the topic was of the utmost importance for Russia, whose longest land frontier cut across a number of watercourses, rivers, lakes and even inland seas. Some watercourses which flowed through the territories of three or more States had acquired an international character when the Soviet Union had ceased to exist and their legal regime would in all likelihood require international regulation in the near future.

43. He was grateful to the Special Rapporteur for his well-prepared first report which, though concise, gave a clear picture of the issues involved and of the positions taken by the Special Rapporteur. He trusted that, in the light of the report and of the favourable comments received from States, it would be possible for the Commission to complete its work on the draft in 1994. In that connection, the extension of the draft articles to cover confined groundwater would not be desirable, in his view. Like some other members, he saw no organic link between the two problems from the standpoint of legal regulation. He would not, however, object to the Special Rapporteur's carrying out a feasibility study, provided that such a study did not affect the deadline for the conclusion of work on the topic. While he supported the proposal that the draft articles should ultimately take the form of a framework convention, he agreed with the Special Rapporteur that there were sound arguments in favour of guidelines or model rules. As many members had pointed out, the more flexible the final document was, the more possibilities there would be for States to adapt the general rules to the regime applicable to specific watercourses and, hence, the wider the recognition that document would receive.

44. With regard to article 1, he agreed that it would be clearer hence and more in keeping with practice to use the term "transboundary waters" rather than "international watercourse". He did not, however, agree with the Special Rapporteur's proposal to delete the phrase "and flowing into a common terminus" from article 2, subparagraph (*b*), since that would extend the scope of the draft articles and would make it more difficult to implement them in practice. He had no objection to the Special Rapporteur's second proposal to move the definition of the word "pollution" from article 21 to article 2, something that would focus attention on one of the main aims of the draft, namely, to protect transboundary waters from pollution.

45. Although it was difficult in Russian to distinguish between "appreciable" and "significant", he could accept the Special Rapporteur's arguments in favour of "significant" and preferred alternative B for article 3. More thought would have to be given to the relationship between the draft articles and existing agreements, especially in the light of the Commission's decision in the future on the form and legal force of the future instrument. The proposal to place articles 8 and 26 ahead of article 3 was reasonable and would improve the structure of the text. The Drafting Committee might consider bringing all the definitions together in article 2, in accordance with the procedure followed in other international instruments.

46. He shared the general view that articles 5 and 7 provided a key element of the entire draft. The use of the words "equitable and reasonable" implied that watercourses should be used without causing significant harm to other States. It would seem logical to include the requirement contained in article 7 in article 5 and to delete article 7. However, since the two articles were viewed by many members as a compromise resulting from the Commission's earlier work, he would not object to a separate article 7. As to the rewording of article 7, he

[15] Initially adopted as article 9. For the commentary, see *Yearbook... 1988*, vol. II (Part Two), pp. 41-43.

[16] See footnote 4 above.

supported Mr. Tomuschat's proposal (2311th meeting) that only the first sentence of the new text should be used.

47. He doubted, as did other members of the Commission, the value of having a section on dispute settlement in the framework convention, especially if the future instrument took the form of model rules. Because of the specific characteristics and nature of the use of different watercourses, a specific dispute settlement machinery might be required in each case: one dispute might require arbitration and conciliation, while for another it might be better to have a bilateral or multilateral commission; in other cases it might be preferable to have recourse to ICJ or to some other bodies, including regional ones.

Mr. Barboza resumed the Chair.

48. Mr. KABATSI expressed thanks to the Special Rapporteur for his first report, which showed a full understanding of the topic and followed the path laid out by previous special rapporteurs. The draft articles had prompted a generally favourable response from Governments. He agreed with several other members of the Commission that the topic had been well covered before the submission of the report and that the draft articles, in the Special Rapporteur's words, merely required fine tuning.

49. As to the form of the future instrument, there was much to be said both for a framework convention and for model rules. The Special Rapporteur seemed to favour the model rules approach, but he was more inclined towards a framework convention.

50. The Commission could certainly make an important additional contribution by recommending dispute settlement procedures. While he agreed with Mr. Sreenivasa Rao that all possibilities should remain open, he was in favour of binding arbitration and judicial procedures. The use of international watercourses was increasing and disputes would proliferate. Some of them might be serious and even end in war. It was therefore important for compulsory settlement procedures to be built into the instrument. With regard to article 5, an independent third party would certainly be needed in the event of a dispute, in order to decide whether the utilization and participation were equitable and reasonable. He did not agree that existing provisions, for example Article 33 of the Charter of the United Nations, were sufficient.

51. He did not think it advisable for the question of groundwater to be included in the draft articles at the present stage: it was not clear that groundwater had a clear relationship with the topic and its physical characteristics had not been thoroughly studied and mapped.

52. For the reasons given by other members of the Commission he was in favour of retaining the words "and flowing into a common terminus" in article 2, subparagraph (*b*). He could accept the replacement of "appreciable" by "significant" in article 3 and elsewhere in the text and he agreed with the Special Rapporteur that it was logical to move the definition of "pollution" from article 21 to article 2. He also held the view that article 7 served no purpose, as its content was covered in article 5. Article 7 should therefore be deleted.

53. Mr. EIRIKSSON noted that the Special Rapporteur proposed transferring the definition of "pollution" to article 2 because it would facilitate his proposal for article 7. In principle, however, when a term occurred only once in the draft articles it should be defined in that place. Accordingly, there was no need for the move.

54. The CHAIRMAN, speaking as a member of the Commission, said he agreed with the comment that the draft was a remarkable achievement. As the outcome of lengthy negotiation, it was a tribute to the skill and patience of all of the Special Rapporteurs, especially Mr. McCaffrey, and should not be jeopardized in any way. The current Special Rapporteur was therefore right to say that what was now necessary was fine tuning. However, some of his proposals went beyond fine tuning.

55. That comment applied in particular to one of the key elements of the draft articles, that is the relationship between equitable and reasonable utilization (art. 5) and the obligation not to cause appreciable harm (art. 7), for the obligation should be a limit on the equitable and reasonable utilization of an international watercourse. Furthermore, the Special Rapporteur's suggestion that the draft articles should take the form of model rules rather than a framework convention also went beyond mere fine tuning. The Special Rapporteur did concede that he would not insist on resolving the issue of form at the present stage, but the Commission had been proceeding on the understanding that the end product would be a framework convention, with most of its provisions codifying existing law in the matter. The compromises achieved on the draft articles reflected that understanding and took into account the compulsory nature of the provisions. In view of the form the draft articles might take, it was important to make it perfectly clear in the text that existing agreements would not be affected unless the parties thereto so decided. It should not be forgotten that there were very many multilateral conventions governing relations between the riparian States of the world's main watercourse systems.

56. He could not accept the Special Rapporteur's recommendation that the phrase "and flowing into a common terminus" should be deleted from article 2, subparagraph (*b*). In any event, the Special Rapporteur would have to produce more extensive arguments than the ones contained in paragraph 11 of his report in support of what he seemed to regard as a kind of evident truth. He had no objection a priori to the inclusion of "unrelated" confined groundwaters in the article, for the principles applicable to watercourse systems could be extended to groundwater systems shared between several States. However, the topic was entirely new in international law and, if it was to be included, the Special Rapporteur would have to carry out a feasibility study and deal with the topic at greater length than in his report. The Commission would need to be informed about the physical conditions governing confined groundwater, about the kind of relationship between the different parts of what might be a system of transboundary groundwaters, and about the role played by groundwater in the general water cycle. It would also have to be determined whether the notion of "watercourse" was applicable to groundwater.

57. The Special Rapporteur's proposal to replace "appreciable" with "significant" in article 3 and through-

out the text was based on the comments of certain Governments concerning the practice followed to date in more or less comparable instruments in which the concept of "appreciable" was ambiguous because it had two very different meanings: capable of being detected; and indicating a level in excess of the mere inconvenience which should be tolerated between States in keeping with the principle of good neighbourliness.

58. Different kinds of issues were involved, not to mention the complications of translation. There was in fact no ambiguity in the meaning of "appreciable" but rather two meanings, both of which could be applied to harm to watercourses. There was nothing wrong in requiring that the harm should be capable of being measured, but no one believed that in the many existing instruments the word "appreciable" simply signified capable of being measured without indicating a threshold of harm. The issue of a threshold of harm was, of course, more important. A former Special Rapporteur, Mr. Schwebel, had argued in favour of "appreciable" in his third report, maintaining that it meant more than "perceptible" but less than "serious" or "substantial".[17] In any event, it did seem that "appreciable" implied a lower threshold than "significant". The Special Rapporteur was thus proposing to raise the threshold of harm established in the draft articles, something that was much more than tuning the piano: it meant changing the entire keyboard.

59. In the law relating to watercourses, the applicable threshold seemed in general to have been established at a level lower than that implied by the term "significant". In a number of early and contemporary treaties, such as the Convention of 15 April 1891 between Italy and Great Britain,[18] the Convention of 26 October 1905 between Norway and Sweden,[19] the General Convention concerning the hydraulic system of 14 December 1931 between Romania and Yugoslavia,[20] the Act of Santiago of 26 June 1971 concerning hydrologic basins, between Argentina and Chile,[21] the Convention relating to the Status of the Senegal River, and the Statute of the Uruguay River, adopted by Uruguay and Argentina on 26 February 1975,[22] the terms used were closer to the English "appreciable" (*ouvrage qui pourrait sensiblement modifier*; *entraves sensibles*; *changement sensible du régime des eaux*; *perjuicio sensible*; and *projet susceptible de modifier d'une manière sensible*). In that connection, he wished to draw attention to the comment by the Government of Greece[23] that the term "perceptible harm", implying a lower threshold than that of "appreciable harm", would have been preferable and, to the comments of the Governments of Hungary and Poland,[24] which shared the view that the threshold of harm should be reduced. Hungary had rightly pointed out that the maxim of *de minimis non curat praetor* tacitly formed part of every legal instrument; consequently, if the articles made express reference to a minimum level of harm it was because that level was greater than *de minimis*, meaning that a not inconsiderable threshold had already been reached, and should be reduced.

60. The translation issues involved were fairly complex. While many of the agreements cited used the Spanish word *sensible* to refer to the threshold of harm, the English word "significant" was currently being translated as *importante* in Spanish and as *sensible* in French. Whatever the Commission's final decision about replacing the word "appreciable" by "significant" in the English text of article 3, the word used in the Spanish text could not be *importante*. It had to be another word indicating a lower threshold; perhaps the Spanish word *sensible* could be used so that the Spanish and French versions would correspond.

61. Some members had maintained that the Commission should be consistent in its use of terminology in the various instruments it elaborated. In the articles on international liability for injurious consequences arising out of acts not prohibited by international law, the Drafting Committee had provisionally approved the use of the word "significant" to refer to the relevant harm. The Special Rapporteur had bowed to what appeared to be a majority opinion among the members of the Commission with respect to replacing the original word "appreciable" by the word "significant" because the articles in question covered, in general, all activities involving risk. The justification for such a change in terminology was that, in such a general instrument, the threshold had to be somewhat higher in order to restrict the instrument's scope and with it the number and type of activities that would be subject to the prevention obligation. It had been felt that, otherwise, Governments would have too heavy a burden imposed on them.

62. That did not mean that the threshold would have to be raised in those areas where the law had already been determined or where a different regulation had been deemed appropriate.

63. Mr. ROBINSON, commenting on the question of replacing the word "appreciable" by the word "significant" in article 3, said he did not agree that the Commission had to use the same terminology for every instrument. The choice of wording should be determined by the Commission's approach to a particular topic, namely, whether it was undertaking the codification or the progressive development of international law. If the Commission considered that that topic of international watercourses was particularly amenable to codification, then he would favour using the word "appreciable", which had clearly been preferred in practice.

64. The relationship between articles 5 and 7 was a difficult issue. Article 5 established the criterion of equitable and reasonable utilization and article 7 established the obligation not to cause appreciable harm. That raised the question of whether use which gave rise to appreciable harm was inequitable. In his opinion, article 7 should be deleted, unless the relationship between the

[17] *Yearbook... 1982*, vol. II (Part One), pp. 98-100, document A/CN.4/348, paras. 130-141.

[18] G. F. de Martens, ed., *Nouveau Recueil général de Traités*, 2nd series (Göttingen, 1893), vol. XVIII-1, p. 737.

[19] Ibid. (Leipzig, 1907), vol. XXXIV, p. 710.

[20] League of Nations, *Treaty Series*, vol. CXXXV, p. 31.

[21] OAS, *Ríos y Lagos Internacionales (Utilización para fines agrícolas e industriales)*, 4th ed. rev. (OEA/Ser.I/VI,CIJ-75 Rev.2) (Washington, D.C., 1971), pp. 495-496; *Yearbook... 1974*, vol. II (Part Two), p. 324, document A/CN.4/274, para. 327.

[22] *Actos Internacionales, Uruguay-Argentina, 1830-1980* (Montevideo, 1981), p. 593.

[23] See footnote 4 above.

[24] Ibid.

two articles could be satisfactorily dealt with in the commentary, which was not currently the case.

Cooperation with other bodies (*concluded*)

[Agenda item 7]

STATEMENT BY THE OBSERVER FOR THE INTER-AMERICAN JURIDICAL COMMITTEE

65. The CHAIRMAN extended a warm welcome to Mr. Rubin, Observer for the Inter-American Juridical Committee, and invited him to address the Commission.

66. Mr. RUBIN (Observer for the Inter-American Juridical Committee) said that the Inter-American Juridical Committee tended to place its emphasis on matters of immediate relevance to the inter-American community. Matters of particular concern included unification of the American republics, trade issues, financial data flows, freedom of information and humanitarian issues, including human rights. At the same time, the Committee, which operated in a hemisphere that included Spanish, English and French-speaking countries and was influenced by their various philosophical heritages, always returned to universal issues.

67. The agenda for the Committee's August 1993 meeting included items relating to continuation of its important work on juridical aspects of the Enterprise for the Americas Initiative, environmental law, and the judicial process and its implications in the administration of justice. The Committee would also be considering such fundamental topics as concepts of legitimacy and of human rights, including social and economic as well as civil and political rights, and the relation of those rights to the Charter of OAS[25] and the doctrines of the right to self-determination and of non-intervention.

68. The first item on the agenda, a proposed convention on traffic in children, illustrated one important function of the Committee—the preparation of draft conventions for consideration by various organs of the inter-American system. Other important areas of concern to the Committee included intra-regional economic cooperation and identification of obstacles to regional integration; aspects of public and private international law as related to the development and evolution of the Americas; the juridical aspects of environmental standards; and consideration of the role of an inter-American court of criminal jurisdiction or of a chamber of the existing Inter-American Court of Human Rights, in the light of recent work on the relationship between the principle of "legitimacy" and the principles of non-intervention and self-determination.

69. The Committee was committed to the promotion and protection of human rights. In that connection, at its next meeting it would be considering the issue of delay in the administration of justice as an aspect of human rights. By virtue of its mandate, the Committee had for several years been organizing regional seminars and cooperating with educational and other institutions. It had worked closely with associations of magistrates, judges and legal practitioners to seek ways of facilitating access to justice, particularly for the disadvantaged, and to explore alternatives to traditional litigation in both public and private disputes. Those activities had proved very successful. They had not only facilitated the elaboration of legal doctrine but had also helped incorporate the work of international jurists in community life, a development which should be encouraged. In that connection, both the Committee and the Commission could perhaps make greater efforts to bring international law to other discussion and decision-making forums. Seminars, teaching materials and lectures in public or semi-public settings would change the image of international law from a plaything of the erudite to an area of law that could make a meaningful contribution to community life. Symposia for practitioners and academics, sponsored jointly by the Commission and the Committee and perhaps other regional bodies, would be a step in that direction.

70. Recognizing that the concepts of domestic and international law were not easily separated in today's complicated and interdependent world, the Committee had embarked in recent years on a far-reaching set of related projects concerning, among other things, the peaceful settlement of disputes and issues pertaining to economic development and integration. The international community was reacting to an important new phenomenon: the diminishing economic relevance of national boundaries, which were increasingly viewed as mere obstacles to the efficient conduct of the world's business. Efforts to remove or at least to diminish trade barriers were multiplying, and it was becoming increasingly difficult to identify national origins in order to satisfy national tariff regulations. Recent legal problems in the area of financial instruments and services provided some of the most dramatic illustrations of the growing insignificance of national boundaries and the need for global standardization in areas such as liquidation of multinational corporations and corporate and securities laws.

71. The phenomenon of internationalization was also giving rise in the Western hemisphere to a re-evaluation of a considerable part of accepted doctrine. For example, for historical reasons the concept of non-intervention had acquired an almost religious significance in the Americas and was enshrined in the Charter of OAS, yet the inviolability of that principle was being called into question in the light of other concerns. The Charter of OAS also provided that the political organization of the American States required that those States be organized on the basis of the effective exercise of representative democracy. The issue of how States could reconcile their obligation to promote democracy with the principle of non-intervention still had to be resolved.

72. Mr. VILLAGRÁN KRAMER said that it was a special pleasure to welcome Mr. Rubin, who had a distinguished career in international law. Among his many activities, he was currently professor of international law at American University, in Washington, D.C., honorary editor of the *American Journal of International Law*, and participated actively in the work of the American Society of International Law. By virtue of his long service on the Committee and his extensive knowledge of and active participation in its work, Mr. Rubin could be consid-

[25] Signed at Bogotá on 30 April 1948 (United Nations, *Treaty Series*, vol. 119, p. 3); amended by the "Buenos Aires Protocol" of 27 February 1967 (ibid., vol. 721, p. 324).

ered as the dean of the Committee. His statement had reflected not only the breadth of his own and the Committee's concerns but also the new trends emerging in the Americas.

73. The Committee was composed of States operating under the common law and the civil law systems, something that gave jurists an opportunity to learn about each other's legal systems and to work together to find ways of communicating and to identify commonalities in their institutions. It was a complex task to try and bridge the gap between the dynamic common law system and the civil law system, and Mr. Rubin had played an important role in that connection.

74. The variety of concerns addressed by the Committee demonstrated an interesting trend: North America and Latin America had begun to focus on international economic law as a basis for seeking new ways to define legal relationships. As a result of the Committee's emphasis on international economics, a new approach to the Calvo clause was taking shape in the Americas; that long-standing clause was currently being reviewed in the light of new economic trends. Noteworthy, too, was the fact that the World Bank and related institutions were elaborating mechanisms for settling disputes between States in cases involving foreign investments that gave rise to conflict between public and private interests. Thus, in the field of international economic law, the Committee was making rapid strides.

75. As to the environment, the Committee's emphasis reflected the recent trend to limit consideration to environmental phenomena which were of particular relevance to the American continents; there was even talk of elaborating an American environmental law system. It was not clear whether such a system would actually be realized; in any case, current work was linked not to issues of responsibility, but rather to those relating to the environment *per se*.

76. In the field of human rights, the Committee and its lawyers were playing an expanded role in the allied field of political law. Law and politics had traditionally been associated on the street but not in legal settings. Yet, the jurists of the Committee were discussing the principle of the legitimacy of Governments based on democracy and respect for human rights, thereby recognizing that international criteria prevailed over State sovereignty. That shift of concerns and new emphasis in the Americas was noteworthy.

77. The Inter-American Juridical Committee had two very important functions. The first related to the division between public international law and private international law; in private international law, the emphasis was based not on conflict of laws but on the search for commonalities between the North American and Latin American economic systems. The second was the Committee's extraordinary efforts to disseminate knowledge about international law. Mr. Rubin had been and continued to be instrumental in promoting those efforts.

The meeting rose at 1.10 p.m.

2314th MEETING

Wednesday, 30 June 1993, at 10.05 a.m.

Chairman: Mr. Vaclav MIKULKA

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

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

[Agenda item 4]

FIRST REPORT OF THE SPECIAL RAPPORTEUR (*continued*)

1. Mr. SZEKELY said that he wished to add to his comments made on the qualification of harm at the preceding meeting and mentioned that some members of the Commission had made comments on it. The Chairman, in particular, had spoken against replacing "appreciable" by "significant" because that would raise the threshold of liability. He himself had stated that the Commission would be making a regrettable mistake if it proceeded in that way. Mr. Robinson, on the other hand, had said that the Commission was not compelled to use the same terms in the draft articles on the law of the non-navigational uses of international watercourses as in the draft articles on international liability for injurious consequences arising out of acts not prohibited by international law. The Chairman, who was the Special Rapporteur for the latter set of draft articles, had nevertheless explained why "appreciable" had been replaced by "significant" in them: it was because the range of activities was much broader than in the case of watercourses.

2. In any event, opinions were still very divided about the qualification of harm in the case of watercourses. He had himself not yet heard any convincing argument for the replacement of the word "appreciable" by the word "significant". On the previous day in the Drafting Committee, the Chairman of the Commission had said that harm which was not significant was harm which did not have to be taken into consideration. If that was the case, there would appear to be no point in making the proposed change. Or was the intention actually to raise the threshold of liability?

3. Mr. CALERO RODRIGUES said that the issue warranted detailed consideration and he emphasized the im-

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

[2] Ibid.