Document:-
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Summary record of the 2335th meeting

Topic:
<multiple topics>

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

from the Special Rapporteur of the reason behind the proposal.

45. Although the Special Rapporteur had spoken of articles 5 and 7, in his introduction to the report, the report itself was silent about them. Those two articles were central to the draft, and the delicate balance struck between them must be maintained. They set out serious obligations and they stood in need of further discussion before they were referred to the Drafting Committee. Mr. Yankov had just reminded the Commission that a decision had yet to be taken on whether the term "significant" or "appreciable" was to be used.

46. Mr. ROSENSTOCK (Special Rapporteur), said that the term "energy" he was proposing for inclusion in article 21, paragraph 3, referred to thermal energy, which was well known to have pernicious effects on watercourses. As to articles 5 and 7, he thought that they had been discussed thoroughly, indeed exhaustively, in the Drafting Committee at the previous session, and that it was not necessary to go into them again.

The meeting rose at 4.35 p.m.

2335th MEETING

Tuesday, 10 May 1994, at 11 a.m.

Chairman: Mr. Vladlen VERESHCHETIN

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

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

[Agenda item 5]

SECOND REPORT OF THE SPECIAL RAPPORTEUR (*continued*)

1. Mr. BOWETT said that he found the Special Rapporteur's conclusion that the draft articles should be extended to cover unrelated confined groundwaters quite compelling. It followed that the requirement of a "common terminus" should be dropped because it certainly did not work in the case of confined groundwater. The two points which concerned him, however, were the impasse in which the Drafting Committee found itself over articles 5 and 7 and the question of the settlement of disputes. With regard to the first point, the Commission appeared to have made two propositions which were *a priori* irreconcilable. Under article 5, States must utilize watercourses in an equitable and reasonable manner; and, if they did so, they could not be held liable for harm caused to others even if such harm was significant. Under article 7, States had an obligation not to cause significant harm, which implied that a utilization which caused such harm must be inequitable and unreasonable. That contradiction was perhaps not so insoluble as it might seem if it were recognized that, in certain situations, and even without liability, an obligation to compensate could arise. A provision could therefore be incorporated in article 6 stipulating that any use which involved an imminent threat to human health and safety could not be equitable and reasonable and article 7 could then be broken down into a series of propositions that would allow for greater flexibility. First, it would provide that States had an obligation to use due diligence not to cause significant harm, and a breach of that obligation would give rise to international responsibility. Secondly, if, despite the use by the State of due diligence, significant harm was caused, then, on the one hand, the other riparian States affected by such harm could require immediate consultation with a view to an agreed ad hoc adjustment of the use of the watercourse and, on the other, compensation might be agreed for harm caused or likely to result despite the ad hoc adjustment agreed. That was the concept of compensation even where there was no liability which lay behind the "polluter pays" principle.

2. The second point of concern to him related to article 33, which dealt with the settlement of disputes. Paragraph 2 (*c*) of the article provided that, where neither fact-finding nor conciliation had resolved the dispute, any of the parties could submit the dispute to binding arbitration by any permanent or ad hoc tribunal that had been accepted by all the parties to the dispute. There would be no difficulty with that wording if the dispute was referred to ICJ, but, in the case of arbitration, there had to be a *compromis d'arbitrage*, in other words, an agreement defining the issue to be litigated. That was the problem the Commission had faced in connection with the Model Rules on Arbitral Procedure, proposed by the Commission in 1958,[2] when it had decided that, in the absence of an agreement by the parties defining the matter in dispute, the arbitral tribunal could itself undertake such a definition on the basis of the written pleadings of the parties. That system had not received the support of States which had regarded it as a dangerous intrusion into their freedom of action. Another attempt should therefore be made to resolve that particular difficulty with arbitration, perhaps by adding a clause to article 33 to supplement the initial agreement to arbitrate by a clear commitment by the parties to the new convention that it should be read as an agreement to refer all disputes arising from the interpretation or application of the new convention to the

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

[2] *Yearbook . . . 1958*, vol. II, document A/3859, p. 83, para. 22.

arbitral process. It could take the form of an additional paragraph of article 33, which would read:

> "3. Where the parties have accepted reference to the International Court of Justice or to arbitration as a means of resolving legal disputes by means of an agreement which does not already embrace disputes arising from the present Convention, this Convention shall be deemed to supplement such agreement and the parties hereby agree that their acceptance of judicial settlement or arbitration shall extend to any dispute as to the interpretation or application of the present Convention."

3. Mr. CALERO RODRIGUES noted that the second report (A/CN.4/462) dealt with three separate issues: articles 11 to 32, which followed on from the first report;[3] new article 33 on the settlement of disputes; and unrelated confined groundwaters which was dealt with in an annex. With regard to the first, only articles 16, 21 and 29 had really been questioned, since the other changes, which affected seven articles, merely resulted from the inclusion of "aquifers" within the scope of the topic. That approach greatly facilitated the Commission's work and it should be possible to complete the second reading of the draft articles at the current session, as planned.

4. The Special Rapporteur had again proposed the deletion of the phrase "and flowing into a common terminus" in article 2, subparagraph (*b*), and had stated that it was a hydrologically unsound oversimplification which served no useful purpose. At the previous session, he himself had explained,[4] on the basis of the Commission's commentary on that point during its consideration of article 2 on first reading, why that phrase had been a useful complement. The Drafting Committee for its part had not felt inclined to delete that phrase. The Special Rapporteur's proposal could have been explained by a wish to extend the scope of the draft articles to confined groundwaters, but the Special Rapporteur also stated that the inclusion or exclusion of that phrase was not critical in that regard. At all events, the argument that the common terminus requirement had not been proposed by any of the preceding Special Rapporteurs was certainly not relevant. Once a provision had been approved by the Commission, as that one had been on first reading, its origin was totally immaterial. As to the new paragraph proposed for article 16, which should be paragraph 2, the Special Rapporteur explained, in paragraph 12 of his report, that the intent was to create an incentive for the State which received a notification under article 12 to reply to that notification. In his view, the second sentence of the proposed paragraph was quite acceptable, but the first gave rise to some drafting problems.

5. With regard to article 21, it seemed logical, as the Special Rapporteur proposed, to transfer paragraph 1, dealing with the definition of pollution, to article 2 (Use of terms), even though the term "pollution" appeared for the first time in article 21. Article 2 would then contain an explanation of all the terms used in the articles. The Special Rapporteur further proposed that the word "energy" should be added in article 21, paragraph 3, so that it would refer to watercourse States consulting "with a view to establishing lists of substances or energy". The Commission was not unaware that the introduction of energy into the waters of an international watercourse could be a source of pollution. It would have mentioned energy as a pollutant if it had not chosen to define pollution in general terms in paragraph 1, explaining that pollution meant "any detrimental alteration in the composition or quality of the waters . . . which results directly or indirectly from human conduct". As explained in the commentary drafted during the consideration of article 21 on first reading, paragraph 1 "does not mention any particular type of pollution or polluting agent (e.g. substances or energy)".[5] Paragraph 3 was thus not intended to indicate categories of pollutants: it merely dealt with establishing lists of what was commonly called "dangerous substances", such lists being found in a number of international instruments. The notion of dangerous substances was, moreover, explained in the commentary to the article. He could easily imagine a list of substances, but did not see very clearly what a list of types of energy could be. Perhaps the Special Rapporteur could tell the Commission whether he knew of examples of such lists in other international instruments.

6. In paragraph (1) of the commentary to article 29[6] provisionally adopted on first reading, the Commission explained that the article did not lay down any new rule and was only a reminder that the rules of international law applicable in international armed conflicts should be observed with regard to the use of watercourses and the protection of related installations. The Special Rapporteur had noted, perhaps with a certain degree of approval, that several States had considered the provision superfluous. That might be so, but the deletion of article 29 at the present stage could give the impression that the Commission was unwilling to reaffirm a non-controversial position it had adopted during the first reading.

7. Turning to the question of dispute settlement, he noted that the statement by the Special Rapporteur in paragraph 14 of his report, that the Commission had declined, owing to lack of time or otherwise, to accept the sophisticated and complex provisions of previous Special Rapporteurs on dispute settlement, was not entirely incorrect, but it was not quite correct either. The proposals made by the previous Special Rapporteurs, Mr. Schwebel[7] and Mr. Evensen,[8] had never been fully developed enough to be considered for decision; the proposals made by Mr. McCaffrey[9] had been left aside at the last minute for lack of time, since the Commission had not wished to delay the final approval of the articles beyond the established deadline. In no case had the Commission declined to accept the articles, and the description of them as complex and sophisticated might,

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

[4] *Yearbook . . . 1993*, vol. I, 2311th meeting, para. 13.

[5] Article 21 was initially adopted as article 23. For the commentary, see *Yearbook . . . 1990*, vol. II (Part Two), pp. 61-63.

[6] *Yearbook . . . 1991*, vol. II (Part Two), pp. 76-77.

[7] *Yearbook . . . 1982*, vol. II (Part One), pp. 181-186, document A/CN.4/348.

[8] *Yearbook . . . 1984*, vol. II (Part One), pp. 123-127, document A/CN.4/381.

[9] *Yearbook . . . 1990*, vol. II (Part One), pp. 77-79, document A/CN.4/427 and Add.1.

moreover, be disputed: they were merely intended to be comprehensive.

8. The Special Rapporteur's proposals now under consideration could in no way be described as sophisticated and complex, though they did seem satisfactory, or nearly so. It was virtually impossible nowadays to innovate in matters of dispute settlement and the proposed text followed the traditional three-part scheme: consultation and negotiation; fact-finding and conciliation; and third-party settlement. The proposal actually comprised only two stages, however, because binding third-party settlement would come into play only if the parties had a previous commitment to recourse to arbitration. That was what had been proposed by the previous Special Rapporteur, Mr. McCaffrey, as well as by his predecessor, Mr. Evensen, although he had offered the parties a choice at that point between arbitration and adjudication by ICJ or another international court. The only proposal under which recourse to third-party settlement had been truly compulsory for the parties, independent of a previous commitment, had been the draft submitted by Mr. Schwebel. That text was incomplete, however, and referred to optional procedures that were to have been set out in an annex, which had never been submitted to the Commission because of Mr. Schwebel's election to ICJ.

9. That was the heart of the matter: a dispute might never be settled unless, everything else having failed, the parties were bound to accept the solution dictated by a third party, an arbitrator or a court. Yet no one was unaware that States were extremely reluctant to make such far-reaching commitments. The Commission thus had two choices now: not to go beyond what it believed States were prepared to accept or to recommend an effective system under which arbitral or judicial settlement would be compulsory if all other procedures had failed. The choice was certainly a difficult one. He would be in favour of the second option, though with considerable hesitation, and would not oppose the adoption of the more cautious approach recommended by the Special Rapporteur.

10. Referring to the crucial issue of confined groundwaters, he said that, both in the report and in the annex, the Special Rapporteur had emphasized the importance of underground waters and the Commission had recognized their importance by adopting provisionally, article 2, subparagraph (*b*), on first reading; it read:

> (*b*) "watercourse" means a system of surface and underground waters constituting by virtue of their physical relationship a unitary whole . . . .

The problem raised by the Special Rapporteur was in reality not that of underground waters in general, but the specific and limited issue of confined groundwaters or, in other words, groundwater unrelated to the system of waters that constituted the watercourse. It would be difficult to imagine that something located outside the system could be treated as if it was part of that system and that rules designed to be applied to components of the system should also be applied to something outside it.

11. The Special Rapporteur had indicated in his first report[10] that he had been tempted to change the scope of the articles by redrafting article 2 (Use of terms) in order to include unrelated confined groundwaters in the concept of "international watercourse". In the second report under consideration, he developed that idea, proposing changes in article 1 (Scope of the present articles) and article 2, as well as in 14 other articles. Those changes were indeed minor and consisted in adding a reference to "aquifers" or "transboundary aquifers". He wondered why the words "aquifer" and "transboundary aquifer" had been used instead of "confined groundwaters" and "transboundary confined groundwaters". Was it because an "aquifer" was more than the water it contained, just as a watercourse was more than its water? Strictly speaking, that would be a valid reason, but the advantages would be more than offset by the difficulty of speaking of a "confined aquifer"—which did not seem to be a commonly used term—or the need always to add the words "containing confined water" after the word "aquifer". If anything was new in the articles, it was the concept of "confined groundwaters", that is aquifers containing such waters. The concept of watercourse already included aquifers related to watercourses, as could be seen in article 2, subparagraph (*b*), provisionally adopted on first reading. The word "aquifer" even appeared in paragraph (5) of the relevant commentary—in the English version at any rate.

12. The distinction between "confined" and "unconfined" groundwaters was essential and must be maintained if the word "aquifer" was used. According to the Special Rapporteur, "aquifer" meant a subsurface, water-bearing geologic formation from which significant quantities of water may be extracted; and the waters therein contained (see art. 2, subpara. (*b*) *bis*). That was a good definition. It would therefore seem that any formation containing groundwater was an aquifer. Yet article 2, subparagraph (*b*) *bis*, defined the expression "confined groundwaters" in the following way: "Confined groundwaters" means waters in aquifers". As that expression did not appear in the articles, it was logical to conclude that it was referred to only as a further explanation of the word "aquifer". Did that mean that an aquifer was a geological formation that contained only confined groundwaters? He did not think that that was the intention behind the redrafting of article 2, but the text, as proposed, inevitably led to that conclusion. It was ambiguous and confusing. The Special Rapporteur had undoubtedly done his best, but had encountered insurmountable obstacles.

13. The problem was not simply one of a lack of clarity or of presentation that could easily be resolved by drafting changes. It went much deeper. It was impossible to graft onto articles meant to regulate the uses of watercourses—which were perfectly definable surface and groundwater systems—provisions to regulate the totally independent systems of confined groundwaters and the aquifers containing them.

14. He was in complete agreement with the Special Rapporteur and others on the importance of confined groundwaters and the need to require States to cooperate in order to regulate the uses of those waters when they were situated below international borders. He stressed, however, that such a regulation should be established through international instruments other than the draft

[10] See footnote 3 above.

articles under consideration. Different rules were needed, even if the principles that had guided the Commission through its current exercise might be the basis for those rules. The Commission should seriously consider drafting in the not-too-distant future a new instrument on transboundary confined groundwaters and their uses, conservation and management. If, for some reason, the Commission insisted on addressing that subject immediately in the framework of the current draft, he would suggest, although he doubted that there was any point to such an approach, that, instead of engaging in a patchwork exercise that might well affect the integrity of the draft articles on watercourses without even attaining, in relation to confined groundwaters, the desired goal, it should quite simply include a provision in part six of the draft articles reading more or less in the following way:

> "Relations between States concerning transboundary confined groundwaters and their aquifers shall be guided by the principles embodied in the present articles. Where feasible, the provisions of the articles shall apply *mutatis mutandis*."

Clearly, that provision was only temporary in nature. The first sentence did not pose any problem: the principles embodied in the draft articles could certainly be applied to confined groundwaters. As to the second sentence, the reservation introduced by the expression "where feasible" was explained by the fact that, in certain cases, it would not be possible to apply some of the articles to confined groundwaters: that was, for example, the case of article 23 (Protection and preservation of the marine environment), article 24 (Prevention and mitigation of harmful conditions), article 25 (Emergency situations), article 27 (Regulation) and article 32 (Non-discrimination).

15. He fully agreed with the opinion expressed by Mr. Idris (2334th meeting) that the question whether confined groundwaters should be included in the draft articles was so important that a decision of principle on the matter should be taken in plenary. If the Commission decided to keep the original scope of the articles, the matter was closed, but, if it decided to accept the Special Rapporteur's views or if it found some merit in his own compromise proposal, the Drafting Committee might see to the actual drafting of texts. In any event, the Commission should decide in plenary.

16. The CHAIRMAN invited the members of the Commission to give their opinions, for the benefit of the Drafting Committee, on the compromise proposal which Mr. Calero Rodrigues had just made and which he would ask the secretariat to distribute to the members of the Commission in writing.

17. Mr. ROSENSTOCK (Special Rapporteur) said that he would have no objection if the compromise proposal made by Mr. Calero Rodrigues was distributed, although it did not provide an appropriate solution to the problem whether unrelated confined groundwaters should or should not be included in the draft articles. In any event, the practice was that all views expressed in plenary, whether concurring or diverging, were referred to the Drafting Committee.

18. Mr. GÜNEY said he thought that it would be premature to call the proposal by Mr. Calero Rodrigues a compromise proposal, especially as it had not even been formally submitted. It was not proper to prejudice the position of the other members of the Commission: it was only at the end of the debate that a compromise wording might emerge.

19. Mr. VARGAS CARREÑO said that he supported the Chairman's suggestion: the proposal by Mr. Calero Rodrigues was one solution among many and did not prejudice the Commission's decision.

20. The CHAIRMAN said that he withdrew his suggestion, which did not seem to meet with unanimous support. The text of the proposal by Mr. Calero Rodrigues would be made available to the members of the Commission who so wished, but not as an official document of the Commission.

21. Mr. YAMADA, expressing his gratitude to the Special Rapporteur for his excellent report, stressed the need, as decided by the Commission at the forty-fifth session, to complete the second reading of the draft articles at the current session, not only so as not to lose the momentum that Mr. Rosenstock's appointment had brought to the Commission's work on the topic with which the Special Rapporteur was entrusted, but also to demonstrate the efficiency of the Commission, which had already spent a great deal of time on the topic.

22. Although he was in favour of the inclusion of unrelated confined groundwaters in the draft articles from a theoretical point of view, he understood that the question was of critical importance for the national interests of some countries and, in order not to delay the Commission's work unduly, it might be better to consider it separately. He shared the Special Rapporteur's views on the importance of groundwaters for human life and also for economic and social development and agreed with him that pollution of transboundary aquifers could be catastrophic for the countries sharing such waters. Furthermore, the Special Rapporteur demonstrated convincingly in his second report that the recent trend in the management of water resources had been to adopt an integrated approach. For all those reasons, he believed that unrelated confined international groundwaters needed regulation in some fashion and that the best way to do so would be for the Commission to draft a complete framework convention or overall model of all water resources in an integrated manner.

23. As to the changes to be made to the draft articles to include unrelated confined groundwaters in their scope, he shared the view expressed in paragraph 7 and paragraph 10 of the report that, in draft article 2, the words "flowing into a common terminus", should be deleted because they might well be misinterpreted, and that a reference to "groundwaters" should be added to the various articles, as necessary.

24. So far as the other recommended changes were concerned, particularly the question of the obligations of the notified States dealt with in paragraph 12 of the report, he agreed in principle with the Special Rapporteur's proposal that provision should be made for sanctions against a State which, having been notified, failed

to respond to the notification within the prescribed period. Some States might, however, have reasons for not responding to the notification. Some of them would not invoke the terms of article 15, paragraph 2, because they would feel that the adverse effects of the planned measures would not justify a request for the cancellation of those measures. Other States would not be able, because they lacked the scientific knowledge, to ascertain the causal link between the damage they would suffer and the operation of the planned measures. Such States must not be penalized, particularly since the introduction of the penalties provided for in new paragraph 2 of article 16 might increase the number of negative replies by notified States and place an undue burden on the notifying States. The wording of the new paragraph should therefore be reviewed and refined.

25. He shared the Special Rapporteur's view that, at a minimum, a tailored, bare-bones provision on the settlement of disputes was an indispensable component of any convention the Commission might put forward on the topic. In his view, disputes concerning the uses of international watercourses would be of a specific nature and would therefore call for specific settlement procedures, since the disputes would most probably arise with respect to the "equitable and reasonable utilization" of a particular international watercourse. Special importance should therefore be given to fact-finding procedures and to procedures for the evaluation of the uses in conflict. It would, moreover, be appropriate to provide for amicable third-party settlement with the possibility of recourse to arbitration. In that sense, the Special Rapporteur's proposal was very much to the point.

26. Mr. FOMBA said Mr. Rosenstock was to be commended on his excellent report and, in particular, on his study on unrelated confined groundwaters, which had convinced him of the need to take that category of international waters into account in the draft articles. The Special Rapporteur referred, in the annex to the report, to the favourable position adopted by the United Nations Interregional Meeting of International River Organizations, held at Dakar from 5 to 14 May 1981,[11] in that connection. For his own part, he would like to add to the list of instruments quoted in section IV of the annex the Convention and Statutes relating to the development of the Chad Basin, article 4 of which expressly included groundwaters for the first time among the resources to be exploited, and the African Convention on the Conservation of Nature and Natural Resources, article 5, paragraph 1, of which adopted the same approach to the question.

27. The Special Rapporteur's study showed that it was desirable to include confined groundwaters in the draft articles. For reasons with which he agreed, the Special Rapporteur was opposed to the formulation of a separate instrument for those waters. In order to include groundwaters within the scope of the draft articles, he proposed either that the words "and flowing into a common terminus", in article 2 of the draft articles, should be deleted, or that the draft should be amended by defining the expression "watercourse" so as to cover "unrelated confined groundwaters" or by adding a reference to "groundwaters" in the various articles as and when necessary. He had opted for the last solution, and had applied it to articles 1 to 11, 20 to 22 and 26 to 28. He himself had no great difficulty in accepting that approach, which seemed to be perfectly reasonable in the context of a framework agreement which was in keeping with the principle of speciality that was a feature of the subject-matter under consideration.

28. As to the other changes to the draft articles the Special Rapporteur had recommended, he agreed in principle with the proposal that new paragraph 2 should be added to article 16, but reserved his position with respect to its exact wording. At all events, it was important to ensure that the overall balance of interests of the two groups of States—the notifying States and the notified States—was respected. He was not sure that it was really necessary to add the word "energy" to article 21, paragraph 3, but was prepared to be persuaded by the Special Rapporteur's explanations. He supported the Special Rapporteur's position on the settlement of disputes according to which, in the context of a framework agreement, the Commission should confine itself to a tailored, bare-bones provision, in other words, one that was fairly general in scope. He therefore had no difficulty in accepting draft article 33 as simplified, subject to any possible changes, having regard, for example, to Mr. Yankov's proposal (2334th meeting) to provide for recourse to ICJ. Lastly, he would not oppose the retention of article 29 as worded, as the Special Rapporteur proposed, since a restatement of the principles and rules of international law or a reference to those principles and rules was common practice in treaty matters.

29. Mr. RAZAFINDRALAMBO expressed his thanks to the Special Rapporteur for a very concise and clear report. The conclusions he drew from the detailed and well-documented study of the question of unrelated confined groundwaters which was annexed to it afforded the basis on which he had reshaped the draft articles. The Special Rapporteur also proposed that the draft should conclude with provisions on the settlement of disputes, and that proposal was bound to meet with approval, since it was in keeping with the general approach to prevention and the peaceful settlement of disputes between States concerning the uses of watercourses. It was a particularly important point, given the risk that such disputes might increase in the current climate of the breakup of States, watercourse States included, and the emergence of new States which could, rightly or wrongly, make new demands in that connection. Moreover, the Commission had itself already accepted the principle of peaceful settlement in the framework of the consultations and negotiations concerning planned measures by a watercourse State as provided for in article 17 and there was therefore no reason why the application of that principle to the draft as a whole should not be allowed.

30. Turning to the draft articles as reshaped and proposed in the second report, he noted that the Special Rapporteur proposed that the words "transboundary aquifer" or "aquifer" should be incorporated in the relevant articles and that a new paragraph defining those terms should be included in article 2 (Use of terms). As a

[11] *Experiences in the Development and Management of International River and Lake Basins*, Natural Resources/Water Series No. 10 (United Nations publication, Sales No. E.82.II.A.17).

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

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

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

[Agenda item 2]

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

It was so agreed.

The meeting rose at 12.35 p.m.

2336th MEETING

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

Chairman: Mr. Vladlen VERESHCHETIN

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

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

[Agenda item 5]

SECOND REPORT OF THE SPECIAL RAPPORTEUR (*continued*)

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

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* Resumed from the 2332nd meeting.

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

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

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