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Summary record of the 2354th meeting

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

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either of those States, chosen by the nominated members to serve as chairman.

103. If the members nominated by the watercourse States were unable to agree on a chairman within four months of the request for the establishment of the commission, any of the watercourse States party to the dispute could request the Secretary-General of the United Nations to appoint the chairman. If one of the parties failed to nominate a member within four months of the initial request pursuant to subparagraph (b), any other party could request the Secretary-General of the United Nations to appoint a person who must not have the nationality of any of the States concerned and who would constitute a single member commission.

104. The fact-finding commission determined its own procedure. The States concerned had the obligation to provide the commission with such information as it might require and, if requested, to permit the commission to have access to their respective territories and to inspect any facilities, plant, equipment, construction or natural feature relevant to the purpose of its inquiry.

105. The fact-finding commission would adopt its report by a majority vote unless it was a single member commission and would submit the report to the States concerned setting forth its findings and the reasons therefor and such recommendations as it deemed appropriate.

106. The expenses of the commission would be borne equally by the States concerned, unless they agreed on other ways of sharing expenses.

107. Subparagraph (c) of article 33 provided for another form of dispute settlement, namely, by a binding decision of a third party which could be a permanent or ad hoc tribunal or ICJ. That form of settlement was also based on the consent of the watercourse States parties to a dispute, which could, by agreement, be expressed prior to the dispute and also after a dispute had arisen.

108. The Drafting Committee had anticipated that there might be situations in which there were more than two watercourse States parties to a dispute and where some of them would not agree to submit the dispute to a tribunal or to ICJ. The rights of the other States could not, of course, be affected. That point would be explained in the commentary.

109. Like subparagraph (b), subparagraph (c) introduced a temporal criterion. The dispute settlement mechanisms for which it provided could be invoked only if, after 12 months from the initial request for a fact-finding commission, mediation or conciliation or, if a fact-finding, mediation or conciliation commission had been established, 6 months after receipt of a report from such commission, whichever was the later, the parties had been unable to settle the dispute.

110. The title of the article reflected its content.

DRAFT RESOLUTION PROPOSED BY THE DRAFTING COMMITTEE

111. Mr. BOWETT (Chairman of the Drafting Committee), having completed his introduction to the draft

articles proposed by the Drafting Committee, now wished to turn to the issue of groundwater not related to an international watercourse.

112. The Commission had requested the Drafting Committee to consider how that issue might be related to the topic under consideration. The Drafting Committee had discussed the various possibilities and had come to the conclusion that the Commission could not, in the context of its work on international watercourses, ignore water resources that were of vital importance to many States. Nor, however, could it rely on sufficient practice to work out draft articles that would be on a par with those devoted to international watercourses. It had therefore opted for a draft resolution which was currently before the Commission (A/CN.4/492/Add.1). The text was self-explanatory and he would therefore confine himself to recommending its adoption by the Commission. It should, however, be noted that operative paragraph 4 had given rise to reservations and that one member had objected to the draft resolution as a whole. In the view of that member, at the present stage the Commission should merely envisage the possibility of similarities between the principles elaborated in relation to international watercourses and those that might prove to be applicable to confined groundwaters and that it should do so in the light of an in-depth study based on information provided by Governments.

113. The CHAIRMAN thanked the Chairman and the members of the Drafting Committee and the Special Rapporteur for preparing and submitting the draft articles, which would be debated at the Commission's next plenary meeting.

114. Mr. AL-KHASAWNEH said that he had one comment to make immediately. The Chairman of the Drafting Committee had stated that some articles had been moved to part four of the draft as they were too important to be "relegated" to the miscellaneous provisions. The articles which appeared under the heading "Miscellaneous provisions" were, however, not of inferior standing and were no less important than those that appeared in other parts of the draft.

The meeting rose at 12.10 p.m.

2354th MEETING

Wednesday, 22 June 1994, at 10.15 a.m.

Chairman: Mr. Vladlen VERESHCHETIN

Present: Mr. Al-Khasawneh, Mr. Arangio-Ruiz, Mr. Barboza, Mr. Bennouna, Mr. Bowett, Mr. Calero Rodrigues, Mr. de Saram, Mr. Fomba, Mr. Güney, Mr. He, Mr. Idris, Mr. Kabatsi, Mr. Kusuma-Atmadja, Mr. Mikulka, Mr. Pambou-Tchivounda, Mr. Pellet, Mr. Sreenivasa Rao, Mr. Razafindralambo, Mr. Robinson, Mr. Rosenstock, Mr. Szekely, Mr. Thiam, Mr. To-

muschat, 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]

CONSIDERATION OF THE DRAFT ARTICLES
ON SECOND READING (*continued*)

1. The CHAIRMAN said that the Commission would consider, article by article, the draft articles on the law of the non-navigational uses of international watercourses adopted by the Drafting Committee on second reading (A/CN.4/L.492 and Corr.1 and 3), as well as the draft resolution on confined groundwater contained in document A/CN.4/L.492/Add.1.

2. An informal version of the commentaries to most of the articles had been made available to the members. In accordance with established practice, the official version would be circulated as soon as possible and acted upon in the framework of the Commission's consideration of its report to the General Assembly.

3. Mr. BOWETT (Chairman of the Drafting Committee) said Mr. Al-Khasawneh had commented that transferring the articles entitled "Management", "Regulation" and "Installations", formerly articles 26, 27 and 28, from part six (Miscellaneous provisions) to part four (Protection, preservation and management) of the draft gave the impression that the other articles in part six were of lesser importance. While members of the Drafting Committee had described the three articles in question as important, he doubted strongly that they had meant to accord less importance to the remaining articles. The rationale for transferring the three articles was that they were central to the utilization of watercourses and consequently did not belong in part six.

4. Mr. AL-KHASAWNEH asked whether it would be appropriate to make some general comments on the draft articles as a whole at that stage.

5. Following a brief discussion in which Mr. CALERO RODRIGUES, Mr. ROSENSTOCK (Special Rapporteur), Mr. IDRIS, Mr. GÜNEY, Mr. THIAM and Mr. AL-KHASAWNEH took part, the CHAIRMAN said the consensus seemed to be that members wished to begin by considering the draft articles one by one. They would then turn their attention to the draft as a whole, at which time they would have an opportunity to make general comments.

ARTICLE 1 (Scope of the present articles)

Article 1 was adopted.

ARTICLE 2 (Use of terms)

6. The CHAIRMAN said that article 2 was identical to that adopted on first reading² except that the word "normally" had been added to the definition of the term "watercourse" and the words "surface and underground waters" had been replaced by "surface waters and groundwaters".

7. Mr. PAMBOU-TCHIVOUNDA said that article 2 was not satisfactory because no attempt had been made to incorporate the concept of utilization of an international watercourse, which was one of the key concepts of the draft. While he would not oppose the adoption of article 2 in its present form, some definition of utilization, either in the article itself or in the commentary, would prove a valuable addition to the draft.

8. Mr. GÜNEY said that the term "watercourse", which was traditionally limited to surface waters, was poorly defined. In article 2, subparagraph (b), the term was so broad in scope that it was close to the concepts of drainage basins and watercourse systems that had been definitively rejected by the Commission at the start. Furthermore, as it stood, article 2 might give rise to difficulties of application. The term "groundwaters" should be deleted. On that basis and on the understanding that the word "normally", as contained in subparagraph (b), did not enlarge the scope of the definition in question, he would not oppose the adoption of the article.

9. Mr. KABATSI said that Mr. Pambou-Tchivounda's concern might be dispelled by the commentary to article 1, paragraph 1, which specified that the term "uses" covered all uses of an international watercourse other than navigational uses. It was appropriate, moreover, to have a very broad definition because technological and scientific advances might lead to other uses in the future. A precise definition of utilization might limit the scope unnecessarily.

10. Mr. AL-KHASAWNEH said that including the word "normally" in article 2, subparagraph (b) would only lead to uncertainty, something that was particularly dangerous in an article on the use of terms. The alternative was to make it clear in the commentary that the only exception to the standard definition of "watercourse", as contained in subparagraph (b), was the case in which a watercourse flowed into a delta and that the definition did not apply to cases of two parallel rivers which might be connected by groundwater.

11. Inclusion of the word "normally" would broaden the scope of the draft articles to such an extent that a smaller country's entire territory might be covered. That would make the draft less acceptable to States.

12. Mr. SZEKELY said that, in earlier discussions on the matter, some members had objected strongly to the expression "common terminus" on the grounds that it was inaccurate in hydrological terms. In introducing the report of the Drafting Committee, the Committee's Chairman had explained that the word "normally" had been added to article 2 specifically to avoid hydrological

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

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

inaccuracy by covering cases where surface waters and groundwaters constituting an international watercourse did not flow into a common terminus, cases which did not include deltas alone. The commentary would explain clearly the instances in which the word "normally" did not apply. The article would not, therefore, create any uncertainty.

13. Mr. IDRIS said that he shared Mr. Al-Khasawneh's views regarding the word "normally". Moreover, he did not consider the expression "common terminus" to be inaccurate from the hydrological standpoint, but rather that the assertion of inaccuracy could not be proved. In any event, the expression had an important legal impact. In a spirit of compromise, the Commission might wish to adopt article 2 as it stood and clarify matters in the commentary.

14. Mr. AL-KHASAWNEH said that he would have to vote against article 2 in its present form. The explanation offered by Mr. Szekely was unacceptable. Scientific accuracy, if it could even be achieved, was not the deciding factor in the situation. If the word "normally" had the effect of expanding the scope of the draft articles in a way never envisaged by the Commission, he would have to oppose the adoption of the article.

15. Mr. ROSENSTOCK (Special Rapporteur) said that the words "flowing into a common terminus" had been added at the forty-third session in 1991, at the time of the first reading, in order to exclude from the scope of the draft a case in which two rivers were connected by an artificial canal. That point would be reinforced in the commentary. The commentary would also make it clear why the word "normally" was needed. Without it, major river systems would be excluded from the scope of the articles, producing a situation of absurdity.

16. With regard to Mr. Al-Khasawneh's concerns, he would point out that, if the treatment, handling or development of waters affected a particular river system, then the articles would apply; if they did not affect a particular river system, the articles would not apply. The purpose of including the word "normally" was not to enlarge the scope of the draft articles but to preserve the scope as originally envisaged, while at the same time continuing to exclude cases of rivers connected by a canal.

17. Mr. AL-KHASAWNEH said that he was not satisfied with the Special Rapporteur's explanation. The groundwaters criterion was not one which the Commission had used in the past. The whole question of watercourses connected by groundwaters should be dealt with in greater detail.

18. Mr. VILLAGRÁN KRAMER suggested that Mr. Al-Khasawneh should submit an amendment so that the Commission could vote on it.

19. Mr. ROSENSTOCK (Special Rapporteur) read out paragraph 5 of commentary to article 2.³ He had said nothing at the present meeting which was inconsistent with that paragraph. He suggested that the Commission should not allow draft articles to pile up on the shelf and should proceed to a decision on article 2.

20. The CHAIRMAN said that there was no question of shelving draft articles indefinitely. Perhaps the Commission should revert to article 2 after members who experienced difficulties with it had studied the passage of the commentary cited by the Special Rapporteur. He further suggested that the Commission should request Mr. Al-Khasawneh, Mr. Calero Rodrigues, Mr. Szekely, the Special Rapporteur and the Chairman of the Drafting Committee to act as friends of the Chairman and meet informally to find a solution to the problem.

It was so agreed.

The meeting was suspended at 11 a.m. and resumed at 11.10 a.m.

21. Mr. ROSENSTOCK (Special Rapporteur), reporting on the informal consultations, said it had been agreed that article 2 could be accepted with one minor change to the commentary so as to make it clear that watercourses such as the Danube and the Rhine would not form one large system but would retain their existence as two separate systems.

Article 2 was adopted on that understanding.

ARTICLE 3 (Watercourse agreements)

Article 3 was adopted.

ARTICLE 4 (Parties to watercourse agreements)

Article 4 was adopted.

ARTICLE 5 (Equitable and reasonable utilization and participation)

22. Mr. GÜNEY said that, in view of the twofold obligation on States contained in paragraph 1, paragraph 2 was quite superfluous and should therefore be deleted so as to produce an article of a general character. The same applied to the words "and participation" in the title of the article.

23. The Drafting Group had decided not to reopen the discussion which had taken place on article 5 on first reading. He would abide by that decision, provided his views were reflected in the summary record of the meeting.

24. Mr. TOMUSCHAT said that, during the discussion of the Special Rapporteur's second report (A/CN.4/462), he had opposed the use of the term "optimal utilization" in paragraph 1 (2336th meeting). The present formulation appeared to impose an obligation on States to work to achieve optimal utilization with a view to squeezing the last drop of use out of a watercourse. The term "sustainable development" would be more appropriate, since it included the notion of long-term utilization. He proposed that "optimal" should be replaced by "sustainable"; alternatively, the phrase should read "optimal and sustainable utilization".

25. Mr. ROSENSTOCK (Special Rapporteur) said that Mr. Tomuschat's proposal would destroy the balance of the article. It must be remembered that paragraph 1 added the qualification "consistent with adequate protection of the watercourse" and that article 24 referred to "planning the sustainable development of an interna-

³ Yearbook . . . 1991, vol. II (Part Two), pp. 70-71.

tional watercourse''. The proposed change to article 5 would create an imbalance to the detriment of the economic development of watercourses.

26. Mr. YANKOV said that he supported Mr. Tomuschat's proposal. He appreciated the Special Rapporteur's reasoning, but could not see how inclusion of "sustainable" would destroy the balance of the article. "Optimal utilization" did not reflect the new approach taken by States to the use of natural resources. At the United Nations Conference on Environment and Development, "sustainable development" had been a key expression in the texts on the use of natural resources.

27. Mr. CALERO RODRIGUES said that he supported the Special Rapporteur. Mr. Tomuschat was wrong in thinking that "optimal utilization" meant use of the last drop of water. Paragraph 1 did link utilization to adequate protection. Furthermore, although the term "sustainable development" was in wide use at present, it might not necessarily be of universal application in the future. It was not even clear what the term actually covered. In any event, the draft commentary already made the situation perfectly clear.

28. Generally speaking, whenever an amendment was proposed the Commission should vote on it. If the amendment was not carried, all members should accept the majority view. He suggested that a vote should be taken to discover whether there was a majority in favour of Mr. Tomuschat's proposal.

29. The CHAIRMAN said that it would be preferable not to take a vote at the present stage, in the hope that a consensus would emerge.

30. Mr. Sreenivasa RAO said members who supported Mr. Tomuschat's position could be assured that the concept of sustainable development was intended to guide the activities of States as far as possible. But, as had been correctly pointed out, the concept was evolving, and in any event it applied essentially to the use of renewable natural resources. Water was not exactly a renewable resource and was not sustainable in the same sense as fisheries resources.

31. The present version of article 5 was the result of lengthy discussions, and it would be wrong to change it now. He agreed with the Special Rapporteur that the text struck the correct balance between utilization and protection and he urged Mr. Tomuschat not to press his amendment. Sustainable development was generally a matter for individual States acting with regard to their domestic resources, whereas the draft articles were concerned with the management of a shared resource. The question of sustainability became relevant to the draft articles only if it affected such sharing. The aim was not to prescribe domestic arrangements for States. Moreover, if the proposed amendment was adopted, it would be hard to secure a consensus on article 5 in the General Assembly and elsewhere.

32. Mr. IDRIS said that he appreciated the points made by the Special Rapporteur and Mr. Sreenivasa Rao and thought that the text should not be changed. The two concepts were quite different in their implications, and in any event it was difficult to reflect the concept of sustainable development in a complicated legal text. If

Mr. Tomuschat pressed for his amendment, it would be better to add "and sustainable" to the present formulation. The situation could be made clear in the commentary.

33. Mr. FOMBA said that there was, in fact, no fundamental contradiction between the two concepts. Sustainable development was implicit in the notion of optimal utilization subject to adequate protection. If the adequate protection requirement was met, the watercourse could be utilized on a sustainable basis. There was no real need for an express mention of sustainability in the text, which should remain unchanged.

34. Mr. BOWETT (Chairman of the Drafting Committee) said that "optimal utilization" did not mean "maximum utilization".

35. Mr. HE said that article 5 was clear: its core meaning was that watercourses should be utilized in an equitable and reasonable manner leading to the higher goal of optimal utilization. He endorsed the point made by Mr. Bowett and thought that the requirement of optimal utilization subject to adequate protection implied the notion of sustainable development. Accordingly there was no need to include a reference to sustainability. If other members of the Commission insisted, however, the point could be covered in the commentary.

36. Mr. THIAM said he agreed that the text should remain unchanged and an explanation given in the commentary.

37. Mr. SZEKELY said Mr. Tomuschat's concern was that the present wording gave the impression of inviting, prompting or obliging States to make optimal use of watercourses in the sense of maximum use—to the detriment of the conservation of the resource. The commentary should clearly state that that was not the case.

38. Mr. TOMUSCHAT said that, if it was the general view in the Commission that optimal utilization encompassed sustainable development, that could be explained in the commentary. There was, however, another point on which he had perhaps not made himself quite clear. Article 5 as now worded seemed to impose an obligation on States to develop an international watercourse, but that was not the only option open to them. Another option would be to leave the international watercourse in its natural state. The commentary should also explain, therefore, that States were under no strict obligation to develop an international watercourse. It was particularly important not to restrict the freedom of States in any way. Provided that those points were reflected in the commentary, he would be satisfied.

39. Mr. YANKOV said it was plain that the matter should be dealt with in the commentary in the interests of arriving at a consensus. Reference should also be made in the commentary to the chapter in Agenda 21⁴ dealing with water resources. He had taken note of Mr. Bowett's comment, but the basic issue was that the optimal utilization required at the present time might not

⁴ Report of the United Nations Conference on Environment and Development, Rio de Janeiro, 3-14 June 1992 (A/CONF.151/26/Rev.1 (Vol. I, Vol. I/Corr.1, Vol. II, Vol. III and Vol. III/Corr.1)) (United Nations publication, Sales No. E.93.I.8 and corrigenda), Vol. I: Resolutions adopted by the Conference, resolution 1, annex II.

be the optimal utilization required in the future. In the past, the optimal use of resources such as energy and water had in fact proved not to be the most reasonable in terms of what would be required in the future. The new trend in contemporary environmental law was to look at the whole matter in a fresh light: a more environmentally-oriented approach was therefore needed.

40. Mr. BARBOZA said that the commentary to the article⁵ was quite explicit. The relevant part of paragraph (3) of that commentary read:

Attaining optimum utilization and benefits does not mean achieving the 'maximum' use, the most technologically efficient use, or the most monetarily valuable use. Nor does it imply that the State capable of making the most efficient use of a watercourse—whether economically, in terms of avoiding waste, or in any other sense—should have a superior claim to the use thereof. Rather, it implies attaining maximum possible benefits for all watercourse States and achieving the greatest possible satisfaction of all their needs, while minimizing the detriment to, or unmet needs of, each.⁶

Some wording along those lines, with the incorporation of a reference to the idea of sustainable development, might perhaps meet the points raised by Mr. Tomuschat and Mr. Yankov.

41. Mr. IDRIS said it appeared Mr. Tomuschat considered that "optimal" implied "sustainable" utilization. He could not agree, nor did he think that that was the opinion of the Commission. Sustainable development could, however, be referred to in the commentary to interpret the sense of the article.

42. The CHAIRMAN said that, if he heard no objections he would take it that the Commission wished to adopt article 5, on the understanding that a reference to sustainable development would be made in the commentary.

Article 5 was adopted on that understanding.

ARTICLE 6 (Factors relevant to equitable and reasonable utilization)

43. Mr. GÜNEY, referring to paragraph 1 (c), said that it would be preferable to use well-established terminology. He therefore suggested that the wording of the subparagraph should be amended to read "the population dependent on the waters", to bring it into line with the wording of article V of the Helsinki Rules on the Uses of the Waters of International Rivers, adopted by ILA in 1966.⁷ There had been no objection in the Drafting Committee to incorporating such an idea in the article.

44. Mr. IDRIS and Mr. Sreenivasa RAO supported the suggestion.

45. Mr. ROSENSTOCK (Special Rapporteur) said that one alternative would be to reflect the thought expressed in his revised commentary to the article (2353rd meeting, para. 53), which spoke of both the size of the population dependent on the watercourse and the degree or extent of their dependency. The other would be to revert

to the language used in the Helsinki Rules, as suggested by Mr. Güney; in that case, the word "basin", which appeared in the Rules, would have to be replaced by "watercourse". Either alternative would be acceptable as long as the commentary reflected the notion of the importance both of the size of the population dependent on the watercourse and of the degree or extent of their dependency.

46. Mr. GÜNEY said he could accept that wording.

47. Mr. SZEKELY said that, as he had already stated in the Drafting Committee, it would be a mistake to place the emphasis on the population rather than on the degree of dependence of the population on the waters of a watercourse. He would not raise any formal objection to the proposed wording, but he found it regrettable.

48. The CHAIRMAN suggested, in the light of comments by some members, that paragraph 1 (c) of the article should be amended to read: "the population dependent on the watercourse in each watercourse State".

It was so agreed.

49. Mr. AL-KHASAWNEH said that he would suggest that paragraph 1 (e) should be changed to read: "the special importance of recognized uses" or "the special importance of existing uses", and that a new subparagraph (f) should be added reading "potential uses of watercourses". The idea behind the suggestion was to give existing uses a certain degree of importance, without, however, conferring upon the State whose uses were recognized the power to veto possible new uses. Such a change would make for a fairer solution and would enhance the prospects of the articles being accepted by States. The draft had to strike a delicate balance between the interests of upper riparian States and lower riparian States, in other words, between the need for development and the protection the law afforded to existing and recognized uses.

50. Mr. VILLAGRÁN KRAMER said that Mr. Al-Khasawneh's suggestion prompted a very strong reaction in him, for to place the emphasis on existing uses was tantamount to condemning three quarters of the third world to underdevelopment. As lawyers, the members of the Commission could not be tied down to existing uses alone. Potential uses were a vital matter throughout the American continent and he for one could not ignore the future of the population in the part of the world from which he came and whose right it was to introduce new uses of watercourses.

51. Mr. SZEKELY said he too was opposed to any change in the article. The views expressed by Mr. Villagrán Kramer had been discussed exhaustively in the Drafting Committee. To discriminate in favour of one of the factors involved would be tantamount to disqualifying the others. Article 6 stated that utilization of an international watercourse in an equitable and reasonable manner required taking into account all relevant factors and circumstances. That did not mean it was then necessary to decide whether any one of the categories in subparagraphs (a) to (g) was more important than the others. To embark on that course would be to destroy the

⁵ Initially adopted as article 6. For the commentary, see *Yearbook* . . . 1987, vol. II (Part Two), pp. 31-36.

⁶ *Ibid.*, p. 32.

⁷ ILA, *Report of the Fifty-second Conference, Helsinki, 1966* (London, 1967), pp. 484 *et seq.*; reproduced in part in *Yearbook* . . . 1974, vol. II (Part Two), pp. 357 *et seq.*, document A/CN.4/274, para. 405.

balance of article 6, and he therefore could not support the proposal.

52. Mr. AL-KHASAWNEH, in response to a question by the CHAIRMAN, said he was aware that the Drafting Committee had debated the matter in detail, but pointed out that, at the time, he had reserved his right to raise the question. His proposal to highlight the importance of existing uses must be read in the context of the article as a whole, which provided some leeway, since it specified the factors that had to be taken into account. Consequently, it would not lead to the dramatic consequences that some of his colleagues foresaw. It was true that the Commission had always sought not to give preference to any particular views. Nevertheless, as drafting had progressed, the need had been felt to give certain uses some prominence. In article 10, for example, special regard for the requirements of vital human needs had been highlighted. To highlight the importance of existing and recognized uses—albeit not to the extent that he would have liked—would not disturb the equilibrium of the draft. He was not asking for a vote. However, in view of the manner in which proposals were considered, he wished to reserve his position on the draft once consideration of it had been concluded.

53. The CHAIRMAN said that, if he heard no objections, he would take it that the Commission agreed to adopt article 6 on that understanding.

Article 6 was adopted on that understanding.

ARTICLE 7 (Obligation not to cause significant harm)

54. Mr. BARBOZA said he wished to place on record his interpretation of article 7. As he saw it, paragraphs 1 and 2 of the article referred to two different primary obligations which bore no relation to one another. The obligation under paragraph 1 was autonomous: it could easily be the subject of a different and separate article from the obligation under paragraph 2. The obligation set out in paragraph 1 was an obligation of due diligence. He therefore saw two consequences. First, it was a hard obligation, not by any manner of means a soft one. Secondly, being a due diligence obligation, it was not an obligation of result. That meant that a result—namely, significant damage—was not necessary in order to constitute a breach of that obligation. The State was obliged only to make an effort to prevent the occurrence of significant harm; if that effort was not made, the obligation was breached, even before any result had occurred. The effort must fit the technical and scientific standards commonly accepted by the States; that, in a nutshell, was the content of a due diligence obligation, according to Pisillo-Mazzeschi.⁸ Again, the breach of such obligation carried all the consequences of international law, namely: (a) cessation of the act or omission causing the harm if it was a continuous act; (b) restitution in kind, namely, return to the *status quo ante*; (c) if pertinent, compensation; and (d) satisfaction and guarantees of non-repetition.

⁸ "Forms of international responsibility for environmental harm", *International Responsibility for Environmental Harm*, F. Francioni and T. Scovazzi, eds. (London, Graham and Trotman, 1991), pp. 15-36.

55. The obligation in paragraph 2 was no longer one of due diligence. It arose when there had been significant harm despite the exercise of due diligence by the State of origin. Apparently that obligation was in the nature of liability, and moreover, of *sine delicto* liability. There was no breach of obligation, since due diligence had been complied with.

56. What were the consequences of significant harm? Paragraph 2 brought a procedural consequence: consultations with the affected State. But that was only procedural. What were the substantive consequences of harm? The State of origin had to prove the extent to which the use was equitable and reasonable. The burden of proof lay with that State, as the Chairman of the Drafting Committee had said (2353rd meeting) and as was apparent from the text, namely, such use had proved equitable and reasonable. If that State had not proved it, then no due diligence would be accredited and one fell back on the case of paragraph 1: breach of an obligation of due diligence.

57. If the State of origin proved the extent of its due diligence, the use must be adjusted (subparagraph (b)) in such a manner that the harm would be eliminated or mitigated, and, where appropriate, the question of compensation would arise. He submitted as his interpretation that "where appropriate" could have no meaning other than "whenever there had been a compensable damage". Lastly, if no satisfactory agreement was reached, the dispute should be settled in the ways prescribed in the corresponding part of the draft.

58. Mr. TOMUSCHAT said it had always been his position that the obligation under article 7 was a due diligence obligation. However, the words "has proved" in paragraph 2 (a) were somewhat awkward, and paragraph 2 (a) would read better if they were replaced by "may be considered". It was not only a question of proof. The first question was whether such use was equitable and reasonable; only then did the question arise whether and how that could be proved. It was possible that the Drafting Committee had at some stage wished to give some indications as to the burden of proof, and had therefore resorted to the word "proved". In his view, however, it would be more consistent with the general idea underlying the provision to use the words "has been" or "may be considered".

59. Again, the obligation to consult with the State suffering the harm was imposed on the wrongdoing State. The Commission should also be concerned with the rights of the State suffering the harm. Hence it should be explicitly specified, either in the text or in the commentary, that, in addition to that obligation, the State suffering the harm was entitled to demand consultations.

60. Mr. ROSENSTOCK (Special Rapporteur) said he saw no problem concerning the proposal to specify that the party to whom the duty was owed might ask for that duty to be complied with. As to the wording of paragraph 2 (a), subject to the approval of the Chairman of the Drafting Committee, who had drafted the words in question, he saw no great difference in using either of the two formulations and would be prepared to consider whichever wording attracted the widest support.

61. Mr. BOWETT (Chairman of the Drafting Committee), said it was his personal view that paragraph 2 dealt with a situation where there had been due diligence and where there was therefore no breach. It dealt with a situation where a scheme of utilization, having been initially adopted and approved as meeting the factors covering equitable and reasonable use, subsequently produced significant harm even though due diligence had been exercised. In other words, the difference concerned the point in time at which the judgement as to equitable and reasonable use was made. A judgement was made when the scheme was approved; subsequently, in the light of experience of operating the scheme, the extent of its being equitable and reasonable had to be reassessed. That temporal difference, reflected in the tense of the verb "has proved", was not reflected in the tense of the words "may be considered".

62. The CHAIRMAN asked whether the English word "proved" was being used in the sense of "turned out to be", or did it mean that somebody had to prove in a court the extent to which such use was equitable and reasonable?

63. Mr. BOWETT (Chairman of the Drafting Committee) confirmed that the sense was "has turned out to be". The concept of proof was not involved.

64. Mr. VILLAGRÁN KRAMER said that the clarification was constructive. The obligation to exercise due diligence was imposed only with regard to possible harm to watercourses. In his view, it must reflect the concern of all lawyers and States to preserve the wider ecosystem in which the watercourse was situated. The felling of trees in some countries inflicted incredible damage, not just in the hydrographic basin in question, but worldwide. The obligation to exercise due diligence must be extended to include the need to safeguard ecosystems.

65. Mr. TOMUSCHAT said the words "has proved" implied that, at least to some extent, the use had in fact been equitable and reasonable. But that assumption might itself be controversial: in a given situation, the only certain fact might be that harm had indeed been caused. The best wording for paragraph 2 (a) would thus be the formulation "...has been equitable and reasonable".

66. Mr. BOWETT (Chairman of the Drafting Committee) said that he could accept the wording proposed by Mr. Tomuschat.

67. Mr. BARBOZA said that he too could accept the amendment proposed by Mr. Tomuschat but would insist that the statement made by the Chairman of the Drafting Committee (2353rd meeting), namely that the burden of proof lay with the State that had caused the harm, should be reflected in the commentary.

68. Mr. Sreenivasa RAO said that the thrust of the paragraph would remain the same, regardless of a change in the tense of the verb. The Chairman of the Drafting Committee had rightly pointed out that, on balance, once harm was caused, the use to which the watercourse had been put would be reviewed. The thinking on that question had always been that, if the use was a priori reasonable and equitable, even when significant harm resulted, it could continue without further change other

than compensation for the harm. But the new wording of the article, developed as a compromise, included an additional obligation imposed on States: if such use had proved harmful, then they must consult on the question of ad hoc adjustments.

69. Mr. SZEKELY said that he too could accept Mr. Tomuschat's proposal, subject to the proviso already stated by Mr. Barboza.

70. Mr. GÜNEY said that he had a marked preference for retention of the words *s'est avérée* in the French version of paragraph 2 (a).

71. Mr. ROSENSTOCK (Special Rapporteur) said that the words "has been" were a more complex way of conveying what could be conveyed by the word "is". Paragraph 2 envisaged a situation in which use had occurred and harm had occurred: the question was whether such use was now equitable and reasonable. The easiest solution would be to use the simple verb "is".

72. The CHAIRMAN said that, if he heard no objections, he would take it that members agreed to a wording of paragraph 2 (a) reading: "the extent to which such use is equitable and reasonable taking into account the factors listed in article 6".

It was so agreed.

73. Mr. de SARAM said he wished to stress at the outset that his remarks were not intended to upset an emerging consensus regarding the general principles set out in article 7. However, he could not help but note that, in its fundamental concept, the article differed from the one adopted on first reading, which it would have been better to retain. It was a matter of importance as the field was a fast developing one. Conventions were being prepared in other spheres, dealing with situations where legitimate use within a State's jurisdiction caused damage outside of that jurisdiction. The article adopted by the Commission on first reading—to which there had been 20 pages of careful commentary—had represented one point of view. The concerns rightly raised by the Special Rapporteur at the present session had led to the adoption of a different point of view.

74. His own concern was that nothing the Commission did in the context of watercourses should in any way affect, either positively or negatively, the important discussion that would take place on the topic of liability next year. Indeed, his personal preference would have been for the article to be omitted, leaving it to the rules of State responsibility to determine, should harm be caused and the riparian States fail to agree, how damage should be compensated. He did not see how article 7, paragraph 1, laying down the due diligence standard, which he understood to be the standard generally applicable in the field of State responsibility, coupled with the obligation contained in paragraph 2 to consult on damage took matters much further than would have been the case if the question had been resolved as a matter of State responsibility. Moreover, he was concerned that, in the event of catastrophic damage, one should not let the loss lie where it fell. The Commission was aware that discussions were currently in progress on mechanisms outside rules of liability, regarding the manner in which such compensation should be provided for. His own

point of view was that it should be left very much to the riparian States to consult and to cooperate. The Chairman of the Drafting Committee, in his introduction (2353rd meeting), had said that the philosophy underpinning the draft was actually the obligation to consult and cooperate. For those reasons, he would have much preferred the article to be omitted.

75. The CHAIRMAN asked whether Mr. de Saram's preference would have been to omit the article *in toto*.

76. Mr. de SARAM said that his concern related to due diligence as against strict liability or the obligation not to cause harm.

77. Mr. SZEKELY, referring to Mr. Villagrán Kramer's observations about the spatial scope of the harm, said he did not think that there need be any cause for concern in that regard. The harm referred to in article 7 was not just harm to the international watercourse. It could be seen from paragraph 1 that the obligation not to cause significant harm related, not just to watercourses, but to other watercourse States.

78. Further to a query by Mr. AL-KHASAWNEH, the CHAIRMAN said that consideration of article 7 would be continued at the next meeting.

The meeting rose at 1 p.m.

2355th MEETING

Thursday, 23 June 1994, at 10.10 a.m.

Chairman: Mr. Vladlen VERESHCHETIN

Present: Mr. Al-Khasawneh, Mr. Arangio-Ruiz, Mr. Barboza, Mr. Bowett, Mr. Calero Rodrigues, Mr. de Saram, Mr. Fomba, Mr. Güney, Mr. He, Mr. Idris, Mr. Kabatsi, Mr. Kusuma-Atmadja, Mr. Mikulka, Mr. Pambou-Tchivounda, Mr. Pellet, Mr. Sreenivasa Rao, Mr. Razafindralambo, Mr. Robinson, Mr. Rosentock, Mr. Szekely, Mr. Thiam, Mr. Tomuschat, Mr. Villagrán Kramer, Mr. Yamada, Mr. Yankov.

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

[Agenda item 5]

CONSIDERATION OF THE DRAFT ARTICLES
ON SECOND READING (continued)

1. The CHAIRMAN invited the members of the Commission to continue their consideration of the draft articles proposed by the Drafting Committee.

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

ARTICLE 7 (Obligation not to cause significant harm)
(concluded)

2. Mr. BOWETT (Chairman of the Drafting Committee) said that Mr. de Saram's remarks (2354th meeting) gave him the impression that his explanations with regard to article 7 had not been very clear. He would thus like to provide further clarification. Everyone agreed that, where a watercourse State envisaged a project for new uses of a watercourse, such a project must first of all be equitable and reasonable, as provided under article 5. However, and that was the point of article 7, paragraph 1, the State that was responsible for the project had to exercise due diligence in its planning, construction and utilization. Article 7, paragraph 2, provided for the situation in which, despite the exercise of due diligence by that State, significant harm had been caused to another watercourse State. In that case, the State in charge of the project must first, as provided in subparagraph (a), ascertain whether the project was in fact compatible with equitable and reasonable use of the watercourse and, as provided in subparagraph (b), see whether it might be possible to make adjustments to the project which would prevent harm from being caused. That idea of monitoring or supervision reflected current practice. Nevertheless, if significant harm was still being caused after adjustments had been made, the question of the compensation of the injured State must be considered.

3. Mr. AL-KHASAWNEH said that the new wording of article 7 gave rise to some problems, which he would summarize.

4. First, the harm referred to in the article was not just any type of harm, but significant harm, in other words, harm which would be almost impossible to repair. The best solution in such situations was surely prevention and that was why he had preferred and continued to prefer the text adopted on first reading.²

5. Secondly, among the reasons given for making major changes in the initial text was the need to take account of the discussions on that matter in the Sixth Committee and in the Commission itself. As he recalled, when Mr. Schwebel had been the Special Rapporteur on the topic, he had sought to subordinate the duty not to cause "appreciable harm", as it had been called then, to the duty of equitable utilization.³ It was on the basis of the debate that had taken place in the Sixth Committee in the early 1980s that his successor, Mr. Evensen, had changed the wording in such a way that the duty not to cause appreciable harm had become the cornerstone of the draft. When Mr. MacCaffrey had become Special Rapporteur, he had initially sought to return to the wording chosen by Judge Schwebel, but had had to give up that attempt in view of the reactions of the Commission and the Sixth Committee. The draft article submitted on first reading had thus been the result of much reflection and to those who objected to it as a compromise solution, he would reply that the same could be said for all the texts and that completely different conclusions could

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

³ *Yearbook* . . . 1982, vol. II (Part One), p. 65, document A/CN.4/348.