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Chairman: Mr. YAMADA (Japan)

(Chairman of the Working Group of the Whole on the Elaboration of a Framework Convention on the Law of the Non-Navigational Uses of International Watercourses)

CONTENTS

AGENDA ITEM 144: CONVENTION ON THE LAW OF THE NON-NAVIGATIONAL USES OF INTERNATIONAL WATERCOURSES (continued)

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Mr. Yamada (Chairman of the Working Group of the Whole on the Elaboration of a Framework Convention on the Law of the Non-Navigational Uses of International Watercourses) took the Chair.

The meeting was called to order at 3.10 p.m.

AGENDA ITEM 144: CONVENTION ON THE LAW OF THE NON-NAVIGATIONAL USES OF INTERNATIONAL WATERCOURSES (continued)

Elaboration of a framework convention on the law of the non-navigational uses of international watercourses on the basis of the draft articles adopted by the International Law Commission in the light of the written comments and observations of States and views expressed in the debate at the forty-ninth session (continued) (A/49/10 and A/49/335; A/51/275 and Corr.1 and Add.1)

Cluster II (articles 5-10) (continued)

1. The CHAIRMAN requested the representative of Canada to report on the informal consultations which he had been conducting on article 7.

2. Mr. NUSSBAUM (Canada) said that the aim had been to produce a text to be used as the basis for further discussion. It had not been possible to meet all the concerns expressed: some delegations, for example, wanted to delete the article in its entirety. However, the approach taken in his proposal had secured broad support from a large number of the delegations which he had been able to sound out. The proposal took the form of three alternatives for article 7. He read out the text, which would be circulated as a conference room paper.

3. Mr. YIMER (Ethiopia) said that the assertion by the representative of Canada that the proposals resulting from the informal negotiations on article 7 enjoyed broad support was unwarranted. Her delegation, for one, had not been consulted.

4. Mr. KASSEM (Syrian Arab Republic) said that his delegation was still not happy with the wording of articles 7 and 8 and would submit amendments in writing for circulation as a conference room paper.

5. The CHAIRMAN said he took it that the Working Group wished all the proposals on cluster II to be referred to the drafting committee.

6. It was so decided.

Cluster III (articles 11-19 and 33)

7. Mr. PAZARCI (Turkey) introduced his delegation's proposal concerning cluster III (A/C.6/51/NUW/WG/CRP.37). The proposal differed from the draft articles of the International Law Commission on information and notification concerning planned measures essentially in its more general treatment of the obligation to notify and the procedure to be followed, which still allowed the watercourse States the option of using other agreed methods.

8. The first reason which had prompted Turkey to make the proposal was that the Working Group was preparing a framework convention, which should contain only fundamental principles and general arrangements for their implementation. It was inconsistent with the notion of a framework convention to enter into excessive detail. The second reason was that existing positive international law contained no general obligation on notification, and such an obligation could come into play only if there was a prior agreement between the watercourse States. That point had been recognized clearly in the Lake Lanoux arbitration.

9. As the commentary to the Commission's draft articles pointed out, there were a number of examples of the adoption of the principle of notification in international practice and some fewer cases of the provision of a notification procedure. It was unrealistic to try to adopt a principle of notification and even less a notification procedure applicable to specific agreements between States. It would therefore be wrong to impose such a method, bearing in mind the need to balance the legitimate interests of the different categories of watercourse States. His delegation believed that its proposal met the essential needs of all such States.

10. Mr. ŠMEJKAL (Czech Republic) said that the substance of the draft articles contained in cluster III required little comment, but it might have been preferable for the Commission to have offered, in what was a framework convention, a briefer treatment of the issues of information and notification, defining a few obligations in general terms and leaving other matters for States to regulate in implementation agreements. The Working Group could either try to redraft those provisions which went into excessive detail or work on the basis of the Turkish proposal, which reflected a more general approach to the subject.

11. Mr. PRANDLER (Hungary) said there was a discrepancy between the title of article 12, which referred to "possible adverse effects", and its content, which referred to a "significant adverse effect", supposedly a lower threshold than the "significant harm" mentioned in article 7. In the interest of consistency, the word "significant" in article 12 should be replaced by "possible". The second part of the article was too vague, and he therefore suggested including documentation, as well as technical data and information, on any environmental impact assessment carried out, so that the last sentence would read: "Such notification shall be accompanied by available technical data, information and documentation, including, if appropriate, the results of an environmental impact assessment, in order to enable the notified States to evaluate the possible effects of the planned measures."

12. Mr. de VILLENEUVE (Netherlands) said he disagreed with the representative of Turkey, and wished to retain the essence of part III of the draft articles. A framework convention should offer minimum protection in cases where there was no pre-existing agreement and an adverse impact was possible. The Rio Declaration on Environment and Development stated clearly in principle 19 that States should provide timely information on activities that might have significant adverse transboundary environmental effects, and should consult with potentially affected States at an early stage. The wording proposed by the representative of Turkey was too vague to offer effective guarantees to potentially affected States.

13. Nevertheless, his delegation proposed some small changes to articles 12 and 14 (A/C.6/51/NUW/WG/CRP.8), which would oblige the notifying State to look into any possible adverse effects of its planned measures, to make that information available to the States concerned, and to bear the cost of collecting such information. Furthermore, in line with the Espoo Convention on Environmental Impact Assessment in a Transboundary Context, provision should be made for an environmental impact assessment to be carried out.

14. Mr. VORSTER (South Africa) said the process outlined in part III was too rigid and, notwithstanding the proviso in article 13 that States could agree otherwise, would benefit from being more flexible, interactive and participatory, as agreement between watercourse States could not be expected to coincide precisely with the procedural steps proposed in the draft articles. The fact that the planning process normally consisted of a series of consecutive steps was not adequately taken into consideration. Information had to be supplied by the notifying State on an ongoing basis, rendering the six-month evaluation periods unnecessary. The notified State should, in turn, be obliged to react to each successive planning stage in reasonable time, and the use of joint commissions or similar devices should be provided for in the draft articles.

15. The articles as they stood also allowed a country to stall for time, making it possible for a year to pass before the notified country realized that no true evaluation of the planned measures would be forthcoming. He suggested that the fixed six-month periods should be replaced by a general standard requiring a response from either the notifying or the notified State within a reasonable period of time. Also, more stringent sanctions were needed against both the notifying and the notified States for failure to comply with the requirements; the current text had no effective sanctions for a watercourse State that failed to respond to the notification of a planned measure.

16. Mr. MANNER (Finland) said that there were already provisions in international law which obliged States to notify other States of activities that might have adverse effects on their environment, as the representative of the Netherlands had pointed out. For example, in article 3 of the Espoo Convention, which was not even mentioned in the commentary by the International Law Commission, European States had agreed to notify each other of such activities as early as possible, and no later than when informing their own public. As long ago as 1974, Denmark, Finland, Norway and Sweden had concluded a treaty on the protection of the environment which contained similar clauses. The principle of an obligation of notification was becoming more and more widely used in international law. Lastly, he agreed with those representatives who had expressed a desire to see a reference to an environmental impact assessment included in the convention.

17. Mr. VARSO (Slovakia) said that a balance needed to be struck in part III between the rights and duties of upstream and downstream watercourse States. The convention was intended to provide a framework to determine how States could use watercourses; that principle was not subordinate to the principle of providing regulations to protect the watercourse, although such regulations were, of course, essential. It was important to take into account the concerns of the downstream watercourse States, a matter of good-neighbourliness. To that end, it was essential to exchange information and to consult on planned measures

which might have an adverse effect on a neighbouring State. The term "significant adverse effect" was a useful one in that context, and should be retained. The suggestion by the representative of Turkey to make part III a more general statement of principles was worthy of further consideration, as it would provide a clear guide as to what was to be regulated and what the convention was intended to achieve.

18. Mr. YIMER (Ethiopia) said that, while he was not against the principle of notification, he did find some of the obligations contained in part III too onerous. For example, the wording in article 12, where the threshold established by "significant adverse effect" was lower than that of "significant harm", was too strong. In article 13, the six-month period allowed for the reply to notification, and its possible extension, was unduly unfair on the notifying State, which could have its plans delayed by up to a year. He agreed that cooperation was desirable, as required in the first part of article 14, but proposed that the article should end after "... for an accurate evaluation", since the last part, requiring the consent of the notified State, amounted to a veto on the part of the latter State. The proposal made by the representative of Turkey was more realistic than, and an improvement on, the current draft articles.

19. Mr. ROSENSTOCK (Expert Consultant) explained that the International Law Commission had sought a middle way between casual requests for information and the very high standards practised by the Nordic countries; it had simply tried to establish a process for the exchange of information in a timely fashion. The notified State had no veto; to talk of "reasonable time" would be unnecessarily vague, while six months was not actually a long time in the lifespan of a major watercourse project. Besides, provision was made in article 19 for cases where urgent, not to mention emergency, action was required.

20. If a middle course was not struck between the conflicting views aired so far, nothing would be achieved. That would be particularly unfortunate since part III was essentially about practical matters; the principles involved were not of the same order as those in articles 3 to 10.

21. The fine-tuning suggestions made by the representative of South Africa on interim phases of agreement could be usefully discussed further. Part III was intended to ensure there was a reasonable flow of information and reasonable opportunities for consultation and negotiation, not to put an excessive burden on developing countries. On the basis of the comments he had heard so far, the draft articles did seem to strike a reasonable middle course between the conflicting views that had been presented.

22. Mr. KASSEM (Syrian Arab Republic) said the fact that the convention was to be a framework convention did not mean it could not contain precise obligations and rights. After all, the International Law Commission was duty-bound under Article 13 of the Charter of the United Nations to seek the progressive development of international law, and if that law was to be useful, it needed to be precise. He agreed with the representative of the Netherlands that the articles forming part III should be retained and reinforced, for example, by adding a proviso that if the procedure laid down was not followed, a State could invoke article 33, to which his delegation would be suggesting some amendments in due course. He agreed with the Expert Consultant that the notified State had

no veto, since either party could always invoke article 33 in cases of disagreement.

23. Ms. BARRETT (United Kingdom) said that article 12 needed to be more specific if it was to be effective. The word "timely" was too imprecise to reflect the objective of the article, which was to ensure that notification took place sufficiently early to permit meaningful consultations and negotiations. She agreed with the suggestion made by the representative of Finland that article 3, paragraph 1, of the Espoo Convention provided a useful model, with its reference to notifying other States no later than when informing the ratifying State’s own public. The text was defective in that it contained in specific requirement that the notifying State should carry out an initial environmental impact assessment and make the results available to States that might be affected by its actions. The absence of such a requirement was not consistent with current developments in international environmental law. For example, articles 205 and 206 of the United Nations Convention on the Law of the Sea required States to carry out an assessment and suggested that the written amendments proposed by the Netherlands should be used as a basis for discussion by the Drafting Committee.

24. Article 12 had to be read in conjunction with article 31, and no exemption to the obligation to provide available information was made for confidential industrial or commercial data. The Drafting Committee should also consider that question at the appropriate time.

25. Mrs. ESCARAMEIA (Portugal) said she supported the statements made by the representatives of the Netherlands, Hungary, Finland, the Syrian Arab Republic and the United Kingdom. She drew attention to the amendments proposed by Portugal, contained in document A/51/275, which had been made in a constructive spirit. The draft articles under consideration were necessarily detailed and provided a sound basis for additional work.

26. Mr. NGUYEN DUY CHIEN (Viet Nam) said he endorsed the statements made by the representatives of Hungary, the Syrian Arab Republic, Portugal, the Netherlands and others in support of the draft articles under consideration, which reflected a reasonable approach to the subject-matter. The steps envisaged therein would serve to strengthen good relations and promote cooperation between neighbouring countries. The articles should therefore be used as a basis for further development.

27. Mr. REBAGLIATI (Argentina), said that the draft articles in cluster III struck a balance among the possible available options. They were extremely important because they were aimed at pre-empting disputes and promoting cooperation among riparian States with a view to avoiding serious consequences at a later stage for States embarking on or affected by planned measures. All efforts made in that connection were worthwhile. His delegation was therefore prepared to consider favourably the proposals put forward by the Netherlands, Hungary and Finland, which did not alter the balance struck in part III and possibly even improved it.

28. Mr. ROSENSTOCK (Expert Consultant), clarifying his previous statement, observed that in saying that the principles involved in cluster III were not of the same order as those in cluster II, he had not wished to suggest that the

draft articles currently under consideration were not important, but merely that they should be less conceptually challenging than those in cluster II. The current text of cluster III left room for improvement, but with a little effort it should be possible to find common ground without spending excessive time on the matter.

29. Mrs. DASKALOPOULOU-LIVADA (Greece) said that her delegation was, by and large, satisfied with the overall content of the draft articles in cluster III, which outlined procedures that met the need for information on planned measures and struck a good balance between the divergent positions. Her only serious misgiving concerned article 19, which opened the door to abuse that could undermine the significant progress achieved in the other draft articles. It was also difficult to understand the relationship between articles 19 and 28 and to reconcile the notion of urgency with that of planned measures; she would comment further on that point of the Drafting Committee. With regard to the proposal to eliminate the notification procedure and replace it with the procedure of information on request, she fully agreed with the significant arguments advanced by the representatives of the Netherlands and Finland.

30. Mr. MAZILU (Romania) said he agreed with other delegations that more account should be taken of the provisions of the Rio Declaration and that articles 12 to 19 were too detailed for a framework convention. For example, there was no need to retain provisions such as those contained in the latter part of article 14. It was crucial, however, to retain the guarantee, with a view to promoting a better balance between the interests of upstream and downstream States. His delegation would submit written proposals on the subject to the secretariat.

31. Mrs. MEKHEMAR (Egypt) said she shared the concerns expressed by the representatives of Hungary, Finland and other countries in regard to the importance of article 12 and the additions to be made to it. A watercourse was an independent unit over which no State could claim complete sovereignty. With a few amendments, the draft articles in cluster III would constitute a sound basis for addressing the concerns expressed.

32. Mr. HAMDAN (Lebanon) expressed support for the statements made by the representatives of the Netherlands, Finland, Hungary, the Syrian Arab Republic, Viet Nam, Argentina and the United Kingdom. He noted that the 1989 Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal contained provisions on notification which were similar to those in the draft articles. The views of the Expert Consultant should be taken into account, especially his comment on the last part of article 14 to the effect that consent was required within the period referred to in article 13, failing which the provisions of the latter article would be null and void. His delegation supported the proposals concerning environmental impact assessment made by the representative of the Netherlands and others and trusted that care would be taken to ensure consistency in the draft articles.

33. Mr. AKBAR (Pakistan) said he first wished to qualify his statement by affirming that his delegation was ready to consider suggestions with a view to compromise. It supported articles 12 to 15, but had difficulty with articles 16 to 19 because they posed more problems than they solved. Overriding provisions, such as those contained in article 19, were unnecessary, as they nullified

article 14 and article 17, paragraph 3. Moreover, situations defined as urgent could be addressed pursuant to article 28. He therefore felt that articles 16 to 19 could be deleted.

34. Mr. CAFLISCH (Observer for Switzerland) expressed agreement with the view that the draft articles imposed excessive obligations on upstream States that were planning measures. However, in the spirit of good-neighbourliness and with environmental protection in mind, his delegation was prepared to accept the procedures set out in the draft articles, except for those described in article 33, which was inadequate. Despite the judicious caution of the Expert Consultant, various proposals had been put forward that would considerably increase the obligations set forth in part III of the text. In the case of article 13, for example, the proposal to replace a fixed period with "a reasonable period of time" was likely to be detrimental to a State planning a measure. If such trends persisted, upstream States, which should be partners and not adversaries of downstream States, would have no further interest in becoming parties to the convention. Only a balanced and moderate approach could give the convention some semblance of universality.

35. Mr. LALLIOT (France) said that the draft articles should be balanced and preserve the interests of various categories of country. He generally supported the comments made by the representatives of the Czech Republic and Romania to the effect that the main objective of a framework convention was to set out general principles. The draft articles in part III should therefore be made more concise.

36. Mr. WELBERTS (Germany) said he agreed with the views of the Expert Consultant concerning part III. His delegation had no basic objections to articles 11 to 19, although they could be made more precise. He was not unsympathetic to the proposals put forward by the representatives of the Netherlands, Finland and the United Kingdom, among others, while the proposals of the representative of Turkey contained both positive elements and drawbacks. For example, the text of article 13 proposed by Turkey removed the requirement for notification, which in his view was crucial to confidence-building and good-neighbourly relations. He wished to propose an amendment to article 33, which currently emphasized fact-finding as a means of conflict resolution. In principle, his Government supported that approach, but if the procedures provided for under article 33, subparagraphs (a) and (b), failed to settle a dispute, there was a strong possibility that States might not agree to refer the dispute to arbitration or judicial settlement as provided in article 33, subparagraph (c). It therefore supported the view of Finland that, in such instances, recourse to arbitration or judicial settlement under subparagraph (c) should not be subject to further agreement between the States concerned.

37. Mr. HARRIS (United States of America) said he associated himself with the remarks of the previous speaker. The draft articles had been studiously developed to produce a fair balance between the many competing interests and he therefore strongly supported close adherence to the current text. While he was sympathetic to the desire to address additional concerns, particularly those concerning environmental impact assessment, he felt that the global nature of the convention necessitated careful consideration of the language used with a view to ensuring that all regions of the world and all interests were fairly represented.

38. Mr. PRANDLER (Hungary) said he appreciated the relevance of the views expressed by the representatives of Finland and Germany concerning the peaceful settlement of disputes. If the procedures set out in articles 17 and 18 produced no results, recourse should be had to article 33, in particular the fact-finding singled out by the representative of Germany. He generally approved of article 19, although its contents might be better placed in article 28, to which it should at least make a cross-reference. He would be grateful if the Expert Consultant could explain whether article 19, paragraphs 1 and 2, and article 28, paragraph 1, were regarded as dealing with two different sets of problems. He believed that the two issues were interlinked and therefore suggested that the matter should be referred to the Drafting Committee.

39. Mr. ROSENSTOCK (Expert Consultant) said that article 19 did not deal with emergency situations, but with planned measures whose implementation was of the utmost urgency in order to protect public health, public safety or other equally important interests. Accordingly, the State planning measures did not have the option of implementing them within a reasonable period of time. Those were the only circumstances in which the article applied.

40. Mr. TANZI (Italy) said that part III of the draft articles established some of the least burdensome obligations in the field of environmental law; for that reason, his delegation would oppose any attempts to narrow their scope.

41. Mr. RAO (India) said that his delegation deemed the obligations laid down in part III of the draft to be somewhat inflexible. The obligations concerning notification and information would be interpreted differently by different countries; the developed countries would probably set higher standards in that regard than could be met by the developing countries.

42. His delegation agreed with the Expert Consultant that the situations envisaged in article 19 were different from those provided for in article 28. The obligations established in article 19 appeared to be balanced and reasonable.

43. Mrs. MEKHEMAR (Egypt) said that her delegation had difficulties with the six-month period provided for in article 13 and believed that the period for reply to notification should not be fixed, but should be determined by agreement between the parties. Concerning article 17, paragraph 3, her delegation believed that States should be barred from implementing planned measures during the course of consultations and negotiations.

44. Mr. de VILLENEUVE (Netherlands), referring to article 18, paragraph 1, said that in the sentence beginning "If a watercourse State has serious reason to believe ...", the word "serious" was superfluous.

45. Mr. MANNER (Finland) said that, as the spirit of compromise among watercourse States might not always be present when a dispute arose, the draft articles should provide for a system of compulsory third-party settlement. His delegation therefore believed that arbitration or other judicial settlement procedures should not be subject to further agreement between the States concerned. His delegation proposed the following amendment to article 33, subparagraph (c):

"If, after 12 months from the initial request for fact-finding, mediation or conciliation or, if a fact-finding, mediation or conciliation commission has been established, six months after receipt of a report from the Commission, whichever is the later, the States concerned have been unable to settle the dispute, they shall at the request of any of them have recourse to compulsory arbitration or other binding judicial settlement before a forum having jurisdiction in the dispute."

46. If the States concerned had not accepted the jurisdiction of the forum (i.e., the International Court of Justice), they would in any case be deemed to have accepted arbitration under the convention. In the interests of simplicity, his delegation had refrained from proposing detailed provisions on the establishment of an arbitration commission; such details could be agreed on by the States concerned.

47. Mr. CAFLISCH (Observer for Switzerland) said that the question of the peaceful settlement of disputes was of vital importance for the codification and progressive development of international law, especially in cases where States, because of geographical or other reasons, shared a natural resource. Article 3, paragraph 2, and articles 11 to 19 of the draft dealt with situations in which a new activity planned by one or more watercourse States threatened to cause significant harm to other watercourse States. Several delegations had suggested that the fixed period for notification in such cases should be replaced by a reasonable period of time; an independent third party would clearly be in the best position to assess whether a given period was reasonable. That issue must be resolved rapidly and satisfactorily; otherwise, a watercourse State could block the legitimate uses of a watercourse by other States for an indefinite period.

48. Currently, the only binding settlement procedure provided for in the draft was contained in article 33, subparagraph (b), which provided that if negotiations and consultations failed, a State party to a dispute could unilaterally initiate a fact-finding procedure. That provision was insufficient, first, because it dealt only with the determination of the facts in the case, whereas disputes could also relate to the interpretation and application of the treaty, and secondly, because the decisions of the Fact-Finding Commission referred to in article 33, subparagraph (b) (i), were in no way binding on the parties to the dispute.

49. His delegation therefore proposed a three-step procedure, consisting of: first, consultations and negotiations; second, if such consultations and negotiations did not take place within a fixed period of time, each State party could unilaterally initiate a conciliation procedure; and third, if the conciliation procedure failed to resolve the dispute within a given period, and if all States parties to the dispute had accepted the jurisdiction of the International Court of Justice, the earliest petitioner could submit the dispute to the Court. Otherwise, that same party could unilaterally initiate an arbitration proceeding, the details of which would be worked out at a later stage.

50. The proposal which he had just outlined was in keeping with contemporary trends in environmental law, as exemplified by the 1992 Convention on the Protection and Use of Transboundary Courses and International Lakes, and by

part XV of the United Nations Convention on the Law of the Sea, which was also based on a choice of dispute settlement procedures.

51. Mr. AKBAR (Pakistan) said that his delegation supported the Finnish proposal and agreed that the draft articles should provide for compulsory dispute settlement mechanisms.

52. Mr. KASSEM (Syrian Arab Republic) noted with satisfaction the inclusion of article 33, which had been lacking in the 1991 version of the draft articles. However, the article should provide for compulsory recourse to the International Court of Justice or to binding arbitration in the event that consultations and negotiations did not lead to settlement of a dispute. In addition, article 33, subparagraph (b) (i), did not specify how the Fact-Finding Commission was to be established.

53. Mr. HARRIS (United States of America) said that his delegation found it difficult to form an assessment of article 33 until the reading of all the draft articles had been completed.

54. Mr. PRANDLER (Hungary) said that, while his delegation understood the concerns expressed by the United States representative, it welcomed the Finnish proposal and shared the views expressed by the Swiss representative concerning the need for compulsory dispute settlement procedures.

55. Mr. YIMER (Ethiopia) said that, while his delegation could accept subparagraph (c) of article 33, it believed that the other dispute settlement mechanisms provided for were overly rigid and thus unsuited to a framework convention.

The meeting rose at 6.10 p.m.