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Summary record of the 1790th meeting

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

Extract from the Yearbook of the International Law Commission:-
1983, vol. I

Account would have to be taken not only of sources of pollution on the internationalized parts of a watercourse, but also of sources of pollution within a State which affected a watercourse. In that connection, he noted that acid rain could pollute snow, which became glacier ice; and when the polluted ice melted, serious problems could be expected. A State on whose territory there was a drainage basin receiving such polluted water might not be in any way responsible for the triple phenomenon of air, water and river pollution.

33. The problem of drainage basins and river systems was merely a quarrel over words. It was a problem that arose in regard to pollution, because in that case it was impossible not to take account of the entire land territory of the State where the river basin was situated. Hence it was necessary to begin by clearly defining the obligations of a State which disturbed the balance of nature. It was thus a problem of responsibility that lay at the root of the Commission's concern.

34. The real difference of opinion in the Commission stemmed from the fact that, according to some States, responsibility arose at the crossing of the frontier; that was the moment when the natural order was or was not respected. A State was free to do as it pleased in its own territory until its responsibility was engaged, in other words when the frontier was crossed. The Special Rapporteur had proposed an *ex ante* mechanism which came into play before the State had acted. Some members of the Commission considered that mechanism unacceptable because it entailed an obligation that infringed State sovereignty. They believed that States already co-operated to a great extent, and that there was no need to make rules for them. In view of that difference of opinion, each member of the Commission must take a position.

35. His own belief was that there could be no progressive and coherent system which did not lay obligations on States, particularly in regard to machinery for consultations and notifications. It would probably not be necessary to draft mandatory rules if only European watercourses were involved, since the States concerned had finally managed to come to terms about them. But in the case of the developing countries, mere determination of the quantity and quality of the waters which crossed a border could be important and require the consent of both sides. No State should be able to reject the need to reach agreement on such a determination. A State might also be planning a use of water in its territory which would not, for the time being, have any harmful consequences for the downstream State, but which might have such consequences in the future. The problem then might simply be the amount of water reaching the downstream State. It was therefore advisable, during negotiations, to examine the situation as a whole and with an eye to the future. Hence he considered that responsibility *ex post facto* was not enough. In that connection, he drew attention to the good faith shown by the United States of America in abandoning the Harmon doctrine.

36. He also took the view that it would not be possible to provide for the stoppage of projects, as the Special Rapporteur had proposed, since a State could not delay the execution of a project indefinitely. In order to end a stoppage, he saw no other solution than the intervention of a third party. He could understand that for reasons of sovereignty States refused to accept mandatory decisions, but he thought some system must be established which would oblige States to explain the reasons for their positions and, if necessary, to seek assistance from a third party.

37. Lastly, he hoped that, instead of dwelling on general principles and definitions that might cause concern, the Commission would first try to settle the issues on which there was a consensus and those on which there was the least disagreement. It would then probably be able to draft articles that a larger number of States could accept.

The meeting rose at 1.15 p.m.

1790th MEETING

Monday, 27 June 1983, at 3 p.m.

Chairman: Mr. Laurel B. FRANCIS
later: Mr. Alexander YANKOV

Present: Mr. Balanda, Mr. Barboza, Mr. Calero Rodrigues, Mr. Díaz González, Mr. El Rasheed Mohamed Ahmed, Mr. Evensen, Mr. Flitan, Mr. Jagota, Mr. Koroma, Mr. Lacleta Muñoz, Mr. Mahiou, Mr. Malek, Mr. McCaffrey, Mr. Ni, Mr. Njenga, Mr. Quentin-Baxter, Mr. Razafindralambo, Mr. Reuter, Mr. Riphagen, Sir Ian Sinclair, Mr. Stavropoulos, Mr. Sucharitkul, Mr. Thiam, Mr. Ushakov.

The law of the non-navigational uses of international watercourses (*continued*) (A/CN.4/348,[1] A/CN.4/367,[2] A/CN.4/L.352, sect. F.1, A/CN.4/L.353, ILC(XXXV)/Conf.Room Doc.8)

[Agenda item 5]

DRAFT ARTICLES SUBMITTED BY THE SPECIAL RAPPORTEUR[3] (*continued*)

1. Mr. JAGOTA, referring to the great contribution made by the Special Rapporteur to the Third United Nations Conference on the Law of the Sea, said that his remarkable ability to find solutions acceptable to all concerned would be of great assistance to the

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[1] Reproduced in *Yearbook . . . 1982*, vol. II (Part One).

[2] Reproduced in *Yearbook . . . 1983*, vol. II (Part One).

[3] For the texts, see 1785th meeting, para. 5. The texts of articles 1 to 5 and X and the commentaries thereto, adopted provisionally by the Commission at its thirty-second session, appear in *Yearbook . . . 1980*, vol. II (Part Two), pp. 110 *et seq.*

Commission in dealing with the delicate and politically sensitive topic of the non-navigational uses of international watercourses. The Special Rapporteur had drawn inspiration from the remarkable work of his predecessor, Judge Schwebel, whose third report (A/CN.4/348) was full of useful material.

2. The report under consideration (A/CN.4/367) contained a full draft of 39 articles. Article 1 was a new provision, but articles 2–5 had already been adopted by the Commission in 1980. Chapter IV of the draft contained articles 20–26, dealing with environmental protection and pollution problems, as well as articles 27–30, which in his view did not belong in that chapter. Article 27, on the regulation of international watercourse systems, and article 29, on use preferences, should be placed at the end of chapter II, on general principles, or in a special chapter immediately following it. Articles 28 and 30, the contents of which were bound to attract universal acclaim, should also be placed outside chapter IV.

3. In his oral presentation at the 1785th meeting, the Special Rapporteur had invited members of the Commission to comment on a number of questions. The first was that of determining the issues to be covered. The second was whether members agreed with the Special Rapporteur's general approach to the topic. The third was whether articles 6–9 correctly set out the general principles or whether those provisions should be modified or supplemented. The fourth question was whether the draft contained all the essentials for a framework agreement and what elements should be left to be governed by systems agreements. The fifth concerned the details of co-operation in, and management of, water resources and of procedure for the settlement of disputes, with special reference to the desirability of compulsory conciliation. Lastly, members had been invited by the Special Rapporteur to comment on the 39 individual articles submitted.

4. For his part, he had taken a continuing interest in international watercourses since the independence of India in 1947. The topic was, of course, a highly sensitive one from the political point of view, since it affected the very life of countries and had an impact on their rate of economic development. It was a topic which aroused strong emotions and had even led to wars between States. In federal States, the issue of the non-navigational uses of rivers gave rise to difficult problems between their component units. It was hardly necessary to stress that the topic was of particular interest to developing countries, but it should be emphasized that it was not a North–South issue; it was a matter for co-operation between southern States themselves. All those considerations pointed to the need to treat the topic with deftness and delicacy.

5. Traditionally, rivers had been used for navigation, fishing, timber floating and recreation, apart from domestic uses. With technological progress, newer uses had emerged and there had been a consequent realization of the role of water in development. The new uses included irrigation, the generation of hydroelectric power and industrial uses, which had grown enormously in recent years. With increasing urbanization, domestic uses of water had also increased very greatly. Of course, all the more recent uses—or increased uses—were combined with the traditional uses of water. With the development of more uses, the problem of how to regulate the flow had arisen. A distinction had to be made between consumption and non-consumption uses. Consumption uses reduced the quantity of water flowing downstream; non-consumption uses could have a polluting effect and thus affect the quality of the water supply.

6. In the traditional legal approach an "international river" had been defined as a river which flowed through more than one State. International lawyers had traditionally concentrated on the study of the rights and duties of riparian States, with particular reference to the relationship between the upstream State and the downstream State. Later, the river system approach had developed, along with the concept of "co-riparian" States. More recently, in the 1950s and 1960s, the new concept of the drainage basin had developed. The drainage basin had been defined in terms of the total quantity of water in a system of tributaries, and covered an entire watershed having a common terminus in the sea or a lake. The fundamental idea had been that co-operation between all co-riparians was necessary for the optimum utilization of a drainage basin, and the concept of co-basin States had emerged.

7. For various reasons, when the General Assembly of the United Nations had considered the topic of international watercourses in 1970, it had avoided any mention of drainage basins and had preferred to refer only to "international watercourses". In 1979, the Commission had adopted the concepts of "user States" and "user agreements". In 1980 the Commission had adopted the concepts of an "international watercourse system", "system States" and "system agreements". With regard to international resources shared by two or more States, UNEP had evolved the concept of "shared natural resources" in 1978 (A/CN.4/L.353). In recommendation 85 of the 1977 Mar del Plata Action Plan,[4] the text of which was quoted in the report (A/CN.4/367, para. 34), similar terminology had been adopted in referring to "shared water resources".

8. That being the position, the question arose as to what direction the Commission should take in developing the international law of the non-navigational uses of international watercourses. As he saw it, the Commission should codify the existing law and develop it to a reasonable extent; and it should make a point of indicating the future direction of development. But it should be left to States to elaborate details in their system agreements. Like the law of the sea, the topic of the non-navigational uses of international watercourses was a very sensitive one, and if the Commission wished to retain its present role it must go beyond mere codification, but at the same time not go too far in the direction of progressive development. In his view, the 1980 concept of a framework law was acceptable, but the Commission should encourage States to develop the law further through their system agreements.

[4] See 1787th meeting, footnote 9.

9. The framework agreement would embody the codification of existing law on the topic. It should stress, *inter alia*, the right of each system State to an equitable share of the waters of the international watercourse system. It should recognize the right of each system State to use its share of water, as well as the international watercourse system within its territory, in accordance with its own policies, programmes and principles. It should also specify that a system State "shall so exercise its rights with regard to its share of the waters and to the use of the international watercourse system" as not to cause material harm to another system State. The rule should refer to "material" or "significant" harm, but if the majority of the Commission wished to use another adjective, such as "appreciable", he might be prepared to accept it.

10. As to the practical implications of the rules and, in particular, the question of the settlement of disputes, he believed that the provisions in the draft should be purely recommendatory. Those questions should be dealt with in the system agreements. The Commission should avoid introducing into its draft the elements of veto or moratorium; questions of that kind should likewise be left to the system agreements.

11. The development and management of water resources, and co-operation on such development, were matters that should be dealt with by individual States or by means of joint projects agreed on by system States. The Commission should confine its action to promoting the desired co-operation. It should therefore be content with a recommendation and avoid any attempt to frame mandatory rules. To put it more simply, the verb form "should" ought to be used, rather than "shall".

12. System agreements were bound to vary, and so would the amount of co-operation between the States concerned, depending on the political climate. For instance, the Indus Waters Treaty 1960 between India and Pakistan,[5] which had taken 10 years to negotiate, had been working well since its adoption, despite many vicissitudes in the relations between the two countries and notwithstanding periods of hostilities. In addition to the Indus River itself, the Treaty covered five other rivers in Punjab. Of the total of six rivers, three belonged to India and three mainly to Pakistan. For the three rivers used by Pakistan, limits had been set to the amount of water India was allowed to use upstream. The Treaty provided for exchanges of data and information and a joint commission had been set up to discuss matters of common interest, in particular new uses of water. That commission was responsible for distinguishing between technical differences, which had to be referred to a neutral technical expert, and legal disputes concerning the interpretation and application of the Treaty, which had to be referred to a court of arbitration. He was glad to report that since 1960 not a single matter had been referred either to a neutral technical expert or to a court of arbitration. Many difficulties and problems had, of course, arisen, but they had all been settled by the joint commission and the two countries concerned.

13. He supported the Special Rapporteur's proposals on environmental protection and pollution, which were based on humanitarian considerations; the subject was largely free from political implications. He also supported the provisions on the safety of international watercourse systems, installations and structures, and warmly welcomed the proposed provisions on timely notification of water-related hazards.

14. Commenting on the individual draft articles, he supported the idea of converting article 1 into a note, since its contents were purely descriptive, as pointed out by the Special Rapporteur himself (*ibid.*, para. 73). The Commission would thus be reverting to the approach it had adopted for the definition of an "international watercourse system" in 1980.[6] But if other members wished to retain article 1, he would propose that the text be confined to the first sentence of paragraph 1, and paragraph 2. The second and third sentences of paragraph 1 should be relegated to the commentary.

15. He had few comments on articles 2–5 which the Commission had already adopted in first reading. With regard to article 2, he was not in favour of including measures of administration and management of watercourse systems and their waters within the scope of the draft articles. In article 3, he approved of the use of the concept of "components/part" of the waters of an international watercourse system. Articles 4 and 5 should be retained as they stood.

16. Articles 6–9 were the heart of the draft. Article 6 introduced the concept of a "shared natural resource". As he saw it, that concept applied to a resource in which there was a community of interests, as in the case of joint ownership. It did not apply where the interest of the States concerned was in sharing certain uses of a resource. The law of the sea provided an analogy: in the 200-mile economic zone pertaining to the coastal State, that State shared the fishery resources to some extent with certain other States; but it would not be correct to describe those fishery resources as a "shared natural resource". That expression might be appropriate in the case of a boundary river or an oilfield straddling a frontier, but he felt strongly that it was not correct to apply it to a river system. If it was employed solely in order to stress the duty of the upstream State to allow the water to flow downstream, the concept of a "shared natural resource" might be acceptable for the purpose of bringing out the respective rights and duties of the States concerned; but it could never be the basis of new rights and obligations.

17. It was therefore necessary to clarify the concept of a shared natural resource, and paragraph 1 of article 6 did not do so. He was particularly struck by the ambiguity of the second sentence of that paragraph, which stated that each system State was entitled to a "reasonable and equitable participation" in what was described as "this shared resource". That language could only be a source of diffi-

[5] See 1786th meeting, footnote 6.

[6] *Yearbook . . . 1980*, vol. II (Part Two), p. 108, para. 90.

culty and conflict. It would be better to say that each State was "entitled, within its territory, to a reasonable and equitable share in the beneficial uses of the waters" of an international watercourse system. In fact, he was proposing that the Commission should use the language of article IV of the Helsinki Rules[7] adopted by the International Law Association in 1966 (*ibid.*, para. 83).

18. Draft article 7, on equitable sharing in the uses of an international watercourse system and its waters, was not acceptable. If the imperative verb form "shall" was to be retained, the scope of the article should be confined to the use of the watercourse system and its waters and the reference to development should be dropped. If the reference to development was to be retained, however, the verb "shall" should be replaced by "should". The provisions of article 7 would thus not constitute a mandatory rule, but merely a recommendation. It would be left to the system States concerned to formulate appropriate rules.

19. The provisions of draft article 8 were too complicated. Paragraph 1 contained an unduly long list of relevant factors, which should be compared with the list in article V of the Helsinki Rules (*ibid.*, para. 95). He found paragraph 2 (*e*) and (*f*) of article V of these Rules much clearer than the corresponding subparagraphs of draft article 8. Furthermore, subparagraphs (*f*) and (*j*) of draft article 8, paragraph 1, appeared to deal with the same subject. Lastly, the contents of paragraph 2 should be transferred to chapter V, on the settlement of disputes.

20. Draft article 27 (Regulation of international watercourse systems) and draft article 29 (Use preferences) should be placed in chapter II, on general principles, or in a separate chapter together with any other principles concerning specific uses of water the Commission might later decide to include.

21. He considered that the number of articles in Chapter II of the draft should be reduced. That chapter should indicate that each State had not only a right to a share in the watercourse, but also an obligation, and that there should be an exchange of data with a view to arriving at an accommodation of interests and resolving any differences: details should be settled in system agreements. There should be no question of a moratorium or any semblance of a vote, which article 12, paragraph 3, and article 13, paragraph 3, seemed to suggest. The draft articles should seek to promote the establishment of institutions, but the establishment of joint commissions or other such bodies should be left to the system States.

22. He supported the Special Rapporteur's approach to pollution, as reflected in draft articles 26 and 27.

23. So far as the settlement of disputes was concerned, he considered that for the time being draft article 31 would suffice. The Commission could revert to the matter after it had discussed general principles and the substantive aspects of the draft. Once it had agreed on the content of the framework rules, it could decide whether the other articles on dispute settlement were necessary.

Mr. Yankov took the Chair.

24. Mr. RAZAFINDRALAMBO congratulated the Special Rapporteur on his report (A/CN.4/367), although he could not, unfortunately, support all its conclusions. He had hesitated to intervene in the debate, first, because of his ignorance of the subject and, secondly, because he thought that members of the Commission who came from countries with experience of it and with an obvious interest in finding solutions to their problems should have priority. He had been impressed by the force of the arguments advanced by speakers who had preceded him. They had convinced him that the importance of the issue went far beyond the framework of relations between the riparian States of an international watercourse, and that the solutions adopted were likely to affect the development of international law relating to the new international economic order.

25. Several fundamental principles were involved, including the right of permanent sovereignty over natural resources and the duty of States to co-operate with one another as prescribed by the Charter of the United Nations. It seemed that everyone recognized the need to respect and promote those two principles and that any divergences were due to the fact that different countries saw them in a different light. The Special Rapporteur had the delicate task of trying to reconcile positions that were apparently far removed from one another. In his draft, he had tried to balance the requirements of sovereignty of each riparian State with those of international co-operation, whose corollary was the obligation to maintain good-neighbourly relations and refrain from causing injury to other States.

26. The Special Rapporteur had followed the approach adopted by the previous Special Rapporteur, Judge Schwebel, and approved by the Commission at its thirty-second session. That approach consisted in advocating the conclusion of separate agreements suited to the particular characteristics and constraints of each international watercourse and preparing a draft framework convention to provide a basis for those agreements. In his oral introduction (1785th meeting), the Special Rapporteur had said that the draft convention was to contain general principles, mostly of a mandatory nature, followed by a system of river administration and management, and procedures for the peaceful settlement of disputes. That plan was quite acceptable.

27. In chapter I of his draft, the Special Rapporteur had reintroduced, in slightly modified form, the first four articles provisionally adopted by the Commission and an article based on the descriptive note adopted at the same time. Paragraph 1 of article 1 repeated, with a few minor additions, the descriptive and geographical definition of the term "international watercourse system" proposed in the note. Paragraph 2, which was clearly more important, gave a functional definition, in negative form, of waters which were to be regarded as forming part of the international watercourse system for the purposes of the article. The real interpretation of the term "system" was

[7] See 1785th meeting, footnote 13.

to be found in paragraph 2, whose meaning and scope would have been clearer if it had been drafted in a positive form, for example:

> "A part or parts of a watercourse system situated in one system State shall be treated as part of the system to the extent that they are affected by or affect uses of waters situated in another system State."

28. It could hardly be said, however, that the definition, in whatever form it was cast, dispelled all doubt. The Commission's mandate referred to the uses of international watercourses and it would be preferable for the meaning and scope of those terms to be more clearly specified. The Special Rapporteur seemed to have been aware of that fact, since in paragraph 1 of article 1 he had stated that an "international watercourse system" was a system "ordinarily consisting of fresh water components" and had felt obliged to add two subparagraphs to explain the term. The article on the scope of the draft would have been a more appropriate place for those two new subparagraphs. However that might be, the explanations given of the term "system" were liable to be judged incomplete. They seemed to contradict the Special Rapporteur's assertion that he had avoided any reference to specific components of an international watercourse system so that the general principles stated in the draft might be flexible enough to be applicable to the specific features of each international watercourse.

29. The Special Rapporteur's wish not to create a superstructure from which legal principles might be deduced would perhaps be more adequately met if the definition in paragraph 2 of article 1 was lightened by deletion of the word "system" in the phrase "system State". The term "international watercourse system" would keep its purely descriptive definition with a hydrographic connotation and could then be replaced by the term "hydrographic basin". As for the delimitation of the system, it would form the subject of the provision concerning the scope of application. In any event, he was inclined to agree with the proposal made by many speakers, including Mr. Jagota, that the Commission should for the time being leave aside the controversial question of a definition and should continue to treat the phrase "international watercourse system" as a simple working hypothesis.

30. The title of chapter II, "General principles: rights and duties of system States" (arts. 6–9), could be taken to imply that the other chapters contained only residuary rules intended to be supplemented by special agreements; yet general principles were also stated in articles 10, 20 and 31. It could be argued, however, that the general principles appearing in other chapters derived from those set out in chapter II. That chapter proposed two fundamental rules which, in the Special Rapporteur's view, should govern relations between riparian States. One of those rules concerned the rights of States, and the other their duties. The rights of States were governed by a composite principle: the reasonable and equitable use of a shared natural resource. If the principle of a shared natural resource was accepted, the rules of participation and sharing could only be established on the basis of reasonableness, equity, good faith and good-neighbourly relations, with a view to attaining optimum utilization. As the previous Special Rapporteur had pointed out in his third report (A/CN.4/348, para. 42), there was perhaps no more widely accepted principle than that each system State was entitled, within its territory, to a reasonable and equitable share of the beneficial uses of the waters. Moreover, the concept of optimum utilization of shared natural resources appeared in the Charter of Economic Rights and Duties of States.[8]

31. The concept of shared natural resources was by no means universally accepted; it might be considered to derogate from the right of permanent sovereignty over natural resources, which was regarded as *jus cogens*. The qualifying adjective "shared" appeared incompatible with the words "natural resources" in so far as sharing was held to be imposed by the very nature of the resource in question. Adherents of the concept had argued that, in the case in point, the natural resources were exclusively owned but common to several States. That argument seemed attractive if, by the functional interpretation of the term "system", waters apparently situated in the territory of only one State could be seen as increasing the common stock of natural resources which that State had to share with other States, some of which might not be contiguous to it. Failure to share could then generate State responsibility for an internationally wrongful act, that concept being extended to water uses.

32. The concept of shared natural resources was not a recent one and had already formed the subject of several United Nations resolutions; but in order to support its legal status, some speakers had compared it with the concept of the "common heritage of mankind" adopted in the United Nations Convention on the Law of the Sea.[9] But that was to overlook the fact that the "common heritage" consisted of resources situated outside the territorial jurisdiction of any State, which were, in fact, a *res nullius*. That being said, as Judge Schwebel had put it in his third report, and as the present Special Rapporteur had agreed, the draft articles were envisaged as a set of principles and rules fulfilling the function of codification and, to a certain extent, progressive development of international law on the subject (*ibid.*, para. 500). Did the concept of shared natural resources pertain to progressive development of international law? If so, it would be advisable to consider the consequences of erecting it into a peremptory norm of international law when its precise contours had not yet been adequately defined. One such consequence might well be that other fields of international relations would soon be contaminated, especially that of the environment. No State, even if it was an Island, could remain indifferent to such a development of international law because of the impact it would inevitably have on the new international economic order. Consequently, he was in favour of leaving that concept aside for the present.

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[8] Art. 3 of the Charter (General Assembly resolution 3281 (XXIX) of 12 December 1974).

[9] Sixth paragraph of the preamble and article 136 of the Convention (see 1785th meeting, footnote 10).

33. He had no comments or objections to make concerning chapters III and IV. In reply to a question raised by the Special Rapporteur regarding article 28, however, he could say that he shared the view expressed by many members of the Commission that, for reasons advanced by the Special Rapporteur himself, the draft should leave aside the question of international humanitarian law applicable in the event of war. A saving clause referring to the 1977 Geneva Protocols could, however, be included.

34. Chapter V dealt with a question of crucial importance for the draft, the whole structure of which was based on the likelihood of a conflict of interests between riparian States whose positions appeared *a priori* to be in conflict. The Special Rapporteur had had to proceed with great caution, which explained his use of vague, subjective and conditional wording. That caution was a source of imprecision. But the approach adopted in regard to the settlement of disputes appeared judicious in so far as it gave preference to friendly settlements as against judicial decisions or arbitral awards. He personally would prefer compulsory conciliation; but the parties might wish to gain time or have direct recourse to judicial or arbitral settlement, especially if the *de facto* situation called for the adoption of provisional or conservatory measures. In that case, there would be no room for prior conciliation procedure.

35. He would develop those preliminary reflections further during the subsequent discussion on the topic.

36. Mr. RIPHAGEN, congratulating the Special Rapporteur on his report (A/CN.4/367), said that the topic under consideration highlighted the conflict between the laws of nature and the law of nations. Nature knew no frontiers, whereas the territorial separation of States, with each State having sovereignty over events within its own territory, still formed the basis of the law of nations. The question that arose, therefore, was how to deal with water which flowed over and under the territories of States and into oceans beyond national jurisdictions.

37. The classical system of absolute separation of national territories could not be applied to a given watercourse without adjustments, as had been recognized in a number of treaties and, to a lesser extent, in State practice. To deal with that problem, the various Special Rapporteurs seemed to have favoured a framework treaty, which would leave it to the States of a given watercourse system to fill in the details. It remained to be decided where the dividing line between the framework treaty and matters of detail lay.

38. There were three interrelated elements of the problem which had to be considered: the object of the rules to be formulated, which came under the heading of the definition of an international watercourse system as laid down in draft article 1; the human conduct to be regulated by the draft articles, which was referred to as the uses of an international watercourse system and was dealt with in draft article 2; and the power to prescribe and prohibit that conduct, which involved such procedural arrangements as system agreements (art. 4), notification and consultation (arts. 11 *et seq.*), settlement of disputes (arts. 31 *et seq.*) and certain articles on the joint management of waters.

39. The object of the rules to be formulated obviously had to cover at least the location, quantity and quality of water in its natural flow. It was immaterial whether the course or "container" of the water was natural or artificial; since it determined the flow of water, it formed part of the object. The possibility of potential natural courses was recognized in the second clause of draft article 1, paragraph 1, which referred to watercourses that were "apt to appear and disappear". On that basis, there could presumably be a watercourse even if, for the time being, it held no water.

40. The next step was to include in the object hydraulic works, since according to draft article 27, paragraph 1, such works controlled, increased, moderated or otherwise modified the flow of the waters in an international watercourse system. He noted that the Special Rapporteur did not include such artefacts in the international watercourse system itself, although he had laid down rules of conduct concerning them in draft article 27 and elsewhere. It was also necessary to determine whether there were other sites, installations and works pertaining to an international watercourse that should be included in the object of the rules. Article 28 seemed to give an affirmative answer to that question, at least in so far as their safety and security was the relevant to the location, quantity and quality of the water.

41. Having mentioned artefacts, he would pass on to the "environment of a watercourse system" (art. 20) which included its "surrounding areas" (art. 22). In that connection, he noted the reference in the report (*ibid.*, para. 156) to "the maintenance of an adequate vegetation cover, preferably forest land" as being imperative for the conservation of water resources.[10] Other examples of ecosystems that formed part of, but went beyond the international watercourse system were given in other paragraphs of the report and also in subparagraphs (*d*) and (*f*) of draft article 21, in which context possible human interference with the natural hydrological cycle had to be considered. Indeed, such natural causes as precipitation and thawing, referred to in the second clause of draft article 1, paragraph 1, could to some extent be induced by human conduct. He had in mind, for example, the branch of technology known as "weather modification" and the acid rain to which Mr. Reuter had already referred (1789th meeting). Unless he was mistaken, neither the report nor the draft articles made any mention of such conduct.

42. With regard to the second element of the problem, namely conduct, the main concept was introduced in draft articles 6–8 and related to the object as a shared resource, in that each system State was entitled to a reasonable and equitable share. The notion of the distribution of benefits, and probably costs, was far-reaching and at first sight

[10] Heading of section VI of the European Water Charter (1968) (text reproduced in *Yearbook . . . 1974*, vol. II (Part Two), pp. 342–343, document A/CN.4/274, para. 373).

completely at variance with the principle of territorial sovereignty. But modern international law was increasingly disinclined to allow any unreasonable exercise of territorial sovereignty that was detrimental to other States and the exercise of their national sovereignty: one example was to be found in the law governing the right of transit of land-locked countries to and from the sea.

43. The principle that a State must not cause harm to another State was in no way contrary to the classical tenets of international law, even though it was generally confined to specific conduct that caused specific harm and was treated as an internationally wrongful act. The same principle had been extended to acts not prohibited by international law and to the injurious consequences of such acts. Draft article 9 was based on that principle as it applied to the chain of causation forged, as it were, by the natural flow of water across frontiers. That article seemed to be—or could be made—independent of the definition of the international watercourse system and of that system as a shared resource. But, as he saw it, the notion that underlay draft article 9 was half-way between the classical concepts of territorial sovereignty and State responsibility, on the one hand, and the international watercourse system as a shared resource, on the other. That was because conduct within the territory of a State which related to water must affect actual or potential conduct within another State relating to that water, if the location, quantity or quality of the water was affected by the said conduct on the part of either State. It was necessary to consider only the adverse effects or harm, since beneficial effects would give rise to no complaint and hence to no legal problem. Inevitably, however, the relative advantages and disadvantages would be compared and evaluated with a view to assessing the extent to which the conduct of the one State and the actual or potential conduct of the other State were reasonable and equitable. It was only a matter of a different approach to the basic question of the distribution of benefits and costs.

44. The duty to refrain from, or to prevent, conduct causing "appreciable harm" to another State could be applied to various kinds of human interference with water and, most easily, to interferences with its natural flow. It could, however, also be applied in cases relating to the quantity of water, where a choice had to be made between competing users. For example, uses such as irrigation and navigation could conflict, and it might be noted that the Mannheim Convention[11] provided for navigation on the River Rhine to take precedence over irrigation.

45. The duty not to cause "appreciable harm" could be adopted even in the case of conservation, when it was primarily a matter of the quality of the water and when the potential or future user was concerned. It had to be recognized, however, that to do so was to stretch the principle to its limit, since no direct harm was involved, although there was a very close connection with the "shared resource" approach.

46. The "shared resource" approach also underlay draft article 8, which despite its length did not, in his view, provide much guidance for solving problems relating to the distribution of the shared resource. The factors listed in subparagraphs (*f*), (*g*), (*h*) and (*j*) of paragraph 1, for instance, seemed to refer to the relevance of the general behaviour of the State and could be regarded as subjective. Other factors were more objective, such as those in paragraph 1 (*c*)—although it was difficult to see what a State could contribute in terms of water—and in paragraph 1 (*i*), in connection with which the Commission would note the somewhat broader concept of alternatives laid down in paragraph 2 (*g*) and (*h*) of article V of the Helsinki Rules.[12] The relative weight of such subjective and objective factors was far from clear.

47. Both the principle of not causing "appreciable harm" and the "shared resource" approach were closely linked to the power elements of the problem. System States would almost inevitably disagree on questions of appreciable harm or equitable distribution, but the articles could lay down an obligation to negotiate a system agreement that would supply the necessary details. With the Commission's permission, he would enlarge on that point at the following meeting.

The meeting rose at 6 p.m.

[11] Revised Convention for the Navigation of the Rhine, signed at Mannheim in 1868 (Council of Europe, *European Yearbook, 1956* (The Hague), vol. II, p. 258).

[12] See 1785th meeting, footnote 13.

1791st MEETING

Tuesday, 28 June 1983, at 10 a.m.

Chairman: Mr. Alexander YANKOV
later: Mr. Laurel B. FRANCIS

Present: Mr. Balanda, Mr. Barboza, Mr. Calero Rodrigues, Mr. Díaz González, Mr. El Rasheed Mohamed Ahmed, Mr. Evensen, Mr. Flitan, Mr. Jagota, Mr. Koroma, Mr. Lacleta Muñoz, Mr. Mahiou, Mr. Malek, Mr. McCaffrey, Mr. Ni, Mr. Njenga, Mr. Quentin-Baxter, Mr. Razafindralambo, Mr. Reuter, Mr. Riphagen, Sir Ian Sinclair, Mr. Stavropoulos, Mr. Sucharitkul, Mr. Thiam, Mr. Ushakov.

The law of the non-navigational uses of international watercourses (*continued*) (A/CN.4/348,[1] A/CN.4/367,[2]

[1] Reproduced in *Yearbook . . . 1982*, vol. II (Part One).

[2] Reproduced in *Yearbook . . . 1983*, vol. II (Part One).