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Summary record of the 2004th meeting

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

Extract from the Yearbook of the International Law Commission:-
1987, vol. I

23. Mr. ARANGIO-RUIZ said that Mr. Ogiso's second question raised a much broader issue than that of the mere distinction between new uses and natural changes as the origin of the duty to co-operate.

24. Actually, the provisions of draft article 10 were much more general in scope. They did not refer solely to the obligation to co-operate in the event of a new use by a State, or indeed of a natural change. The obligations set forth in the article were tied not so much to good faith and to good-neighbourliness, but rather to the physical fact that the watercourse was international in character.

25. It was doubtful whether the obligation of States enunciated in article 10 could be said to rest on the principle of good faith. In reality, the basis of that obligation lay in the Charter of the United Nations and in the unwritten rules developed since the adoption of the Charter, such as those set forth in the 1970 Declaration on Friendly Relations and Co-operation among States.[10]

26. Mr. KOROMA said that a reference to the principle of good-neighbourliness should indeed be included in article 10. It was a principle that could be said to emanate from the *Trail Smelter* arbitration. He also supported the suggestion that article 10 should be placed in the general part of the draft.

27. Mr. McCAFFREY (Special Rapporteur) said he agreed that article 10 was intended to express a general obligation that was not limited to the problem of new uses. At the same time, he recognized that it was not logical to place it in a set of procedural provisions.

28. He wished to assure Mr. Koroma that he did not intend to rule out any element of the bases of the duty to co-operate. However, it was necessary to avoid expanding the text unduly by including references to a number of bases for the obligation, for such a course might dilute the expression of the essential rule embodied in the article.

29. Mr. ARANGIO-RUIZ said it was wise to suggest that article 10 should be placed among the general principles. Nevertheless, the new place assigned to the article should not have the effect of detracting from its significance.

The meeting rose at 11.30 a.m.

[10] See footnote 5 above.

2004th MEETING

Tuesday, 26 May 1987, at 10 a.m.

Chairman: Mr. Leonardo DÍAZ GONZÁLEZ

Present: Mr. Al-Baharna, Mr. Arangio-Ruiz, Mr. Barsegov, Mr. Beesley, Mr. Calero Rodrigues, Mr. Eiriksson, Mr. Francis, Mr. Graefrath, Mr. Koroma, Mr. McCaffrey, Mr. Njenga, Mr. Ogiso, Mr. Pawlak, Mr. Razafindralambo, Mr. Reuter, Mr. Roucounas, Mr. Sepúlveda Gutiérrez, Mr. Shi, Mr. Solari Tudela, Mr. Thiam, Mr. Tomuschat, Mr. Yankov.

The law of the non-navigational uses of international watercourses (*continued*) (A/CN.4/399 and Add.1 and 2,[1] A/CN.4/406 and Add.1 and 2,[2] A/CN.4/L.410, sect. G)

[Agenda item 6]

THIRD REPORT OF THE SPECIAL RAPPORTEUR (*continued*)

CHAPTER III OF THE DRAFT:[3]

ARTICLE 10 (General obligation to co-operate)[4] (*continued*)

1. Mr. SHI said that the present topic was very difficult, complex and sensitive. Apart from general principles of international law, the Commission had little guidance from State practice. Every international watercourse had it own peculiarities, features and uses. Hence it was not surprising that, except for the Convention relating to the development of hydraulic power affecting more than one State (Geneva, 1923), there were practically no general conventions on the non-navigational uses of international watercourses. All the treaties or agreements on the subject had been concluded in connection with particular international watercourses and on a regional or bilateral basis. Even in the case of the 1923 Geneva Convention, the parties were few in number and actually included some that were not riparian States. It would be a difficult and possibly pointless task to try to draw generalized rules from the numerous regional and bilateral treaties. Perhaps the topic was one that involved progressive development more than codification. In formulating the draft articles, the Commission had to be fully aware of the nature of international law at its present stage of development, which, in the words of Georg Schwarzenberger, was a law of society, not a law of community.

2. In that task, two basic factors had to be taken into account. The first was that the waters of an international watercourse were a natural phenomenon which knew no political boundaries and constituted a natural hydrologic unity. That unity obeyed only the iron laws of nature, beyond human will. Therefore any use made of one part of an international watercourse affected other parts of it. The second factor was the sovereignty of a State over the part of an international watercourse situated within its territory: the waters thereof constituted natural resources over which that State had permanent territorial sovereignty, and hence exclusive use. The use and the development of international water-

[1] Reproduced in *Yearbook . . . 1986*, vol. II (Part One).

[2] Reproduced in *Yearbook . . . 1987*, vol. II (Part One).

[3] The revised text of the outline for a draft convention, comprising 41 draft articles contained in six chapters, which the previous Special Rapporteur, Mr. Evensen, submitted in his second report, appears in *Yearbook . . . 1984*, vol. II (Part One), p. 101, document A/CN.4/381.

[4] For the text, see 2001st meeting, para. 33.

courses thus touched upon the vital, and often conflicting, interests of many riparian States.

3. Consequently, if the draft articles were to be meaningful, the Commission must strive to reconcile the sovereign right of riparian States to free use of the waters within their territories with the principle that a State must not exercise sovereignty in such a way as to cause harm to other States. Such reconciliation could be found in the doctrine of reasonable and equitable utilization, which could serve as a general guiding principle of law for determining the rights of watercourse States in regard to non-navigational uses. Equitable utilization was an objective principle and was predicated on an accommodation of interests between States. Since circumstances differed from one international watercourse to another and even along one and the same watercourse, the Commission would be wise to follow the general approach on which it had already embarked, in other words to prepare a framework agreement containing general principles and rules governing the non-navigational uses of international watercourses in the absence of agreement among the States concerned, and providing guidelines for the management of international watercourses and the negotiation of future agreements.

4. In his second report (A/CN.4/399 and Add.1 and 2), the Special Rapporteur had drawn attention to four salient aspects of draft articles 1 to 9, which were at present before the Drafting Committee. The first aspect concerned the definition of the term "international watercourse". It was apparent that both the Commission and the Sixth Committee of the General Assembly were generally in favour of postponing an attempt at defining the term; a laudable approach, for any such attempt at the present stage would inevitably lead to fruitless polemics and would not help to resolve conflicts of interest between riparian States. However, further progress in the present work would certainly help the Commission to arrive at a better understanding of the topic, and later at a universally, or at least generally, acceptable definition of the term.

5. On the other hand, opinion was divided, both in the Commission and in the Sixth Committee, on the "system" concept, which was the foundation for the provisional working hypothesis accepted by the Commission in 1980. In his opinion, it was best for the Commission to proceed to work on that basis, as suggested by the Special Rapporteur in his second report (*ibid.*, para. 63). Although the hypothesis utilized the system concept, it drew a distinction between the hydrologic concept and the legal concept, thereby recognizing the relativity of the international character of a watercourse.

6. The second salient aspect was the question whether the "shared natural resource" concept should be used in the draft itself. That concept was comparatively new and was not fully developed; it was also ambiguous. Moreover, it could be interpreted as a negation of the concept of permanent sovereignty over natural resources. If it was taken as a starting-point for the work on the present topic, it could well lead to the adoption of rules of law with imprecise legal consequences. He therefore agreed with the Special Rapporteur that the term "shared natural resource" should not be employed in the draft.

7. The third salient aspect concerned the principle of reasonable and equitable utilization, which could hardly be defined. In order for it to have a meaning, a number of factors had to be listed as criteria for assessing such utilization; yet a list of that kind could not be exhaustive, otherwise it could introduce an element of rigidity and thus render the principle inoperative. The Special Rapporteur was right to say that a limited list of general criteria had to be included in the draft. If, however, members were not able to agree to the inclusion of the list in the actual text of an article, they should seriously consider placing one in an annex. There were precedents for such a course in international treaty practice. For example, the General Agreement on Tariffs and Trade contained an article on the subject of subsidies. The term "subsidy" was not defined either in the Agreement itself or in the code of subsidies, but a long list of measures constituting subsidies was included in an annex to the code.

8. The fourth salient aspect concerned the relationship between the concept of equitable utilization and the obligation to refrain from causing appreciable harm. A straightforward reference to the obligation not to cause "appreciable harm" to the rights or interests of other watercourse States would, in his view, make the relationship between the two principles clear enough. An equitable allocation of uses would mean that the full needs of all the watercourse States concerned were not met. Accordingly, some States using the same watercourse could suffer factual harm, but not harm that constituted a legal wrong. However, if the harm to the other watercourse States was appreciable, the allocation of uses could hardly be considered as reasonable and equitable.

9. The draft articles submitted by the Special Rapporteur in his third report (A/CN.4/406 and Add.1 and 2) contained procedural rules relating to the utilization of an international watercourse, under the title "General principles of co-operation, notification and provision of data and information". It was true that the very generality and elasticity of the principle of equitable utilization required that it be supplemented by procedural rules for the purposes of implementation. The Commission's work should none the less aim at the formulation of draft articles on the law of the non-navigational uses of international watercourses by individual States, and not on the law of integrated uses of an international watercourse or the law of an international watercourse community. An attempt to devise a set of rules of the latter kind would be too ambitious and would have little chance of success. Admittedly, States were always free to conclude regional or bilateral agreements on integration of the uses of a watercourse, but it would be unrealistic for a general law of the non-navigational uses of international watercourses to be based on the concept of international watercourse integration. He was therefore somewhat at a loss to follow the basic ideas underlying the procedural rules proposed by the Special Rapporteur (*ibid.*, paras. 6-38).

10. In any case, draft article 10, on the general obligation to co-operate, was puzzling. The need for co-operation between watercourse States in the uses of an international watercourse was undeniable, but the purposes and bases of co-operation should be well defined. Unfortunately, article 10 lacked clarity in that respect. It spoke of the general duty of States to co-operate in good faith in their relations concerning international watercourses. In the first place, the principle of good faith was not all-encompassing and it could not replace other general principles of international law which governed State relations concerning international watercourses. Secondly, in the light of Principle 21 of the Stockholm Declaration,[5] article 10 might prove to be too ambitious. In any event, it was not clear and specific about its purpose. In that connection, he would point out that, according to Principle 21, "States have . . . the sovereign right to exploit their own resources pursuant to their own environmental policies, and the responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other States or of areas beyond the limits of national jurisdiction". Clearly, Principle 21 had two aspects: one being the permanent sovereignty of States over their natural resources and the other the exercise by a State of its sovereign rights in such a manner as not to cause harm to other States. As he saw it, the purposes of co-operation between watercourse States should be similar to those set out in Principle 21. Such co-operation should therefore be practised not only in good faith, but also on the basis of the sovereignty, territorial integrity, equality and mutual benefit of all the watercourse States concerned. By co-operation of that kind, States would be able to achieve optimum utilization of the watercourse.

11. Lastly, he supported the suggestion that article 10 should be placed in chapter II of the draft, and not in chapter III.

12. Mr. REUTER said that, more than any of the other topics before the Commission, the one assigned to Mr. McCaffrey posed problems of presentation and drafting, whereas, in all likelihood, the substance did not lend itself to controversy. In his second report (A/CN.4/399 and Add.1 and 2), the Special Rapporteur had amply cited the *Lake Lanoux* arbitration, yet the Commission should guard against the temptation of placing too constructive an interpretation on that case. The arbitral tribunal had been able to base itself on general principles, but it had also been in a position to take account of treaties concluded between France and Spain. Moreover, the case had involved few difficulties and would never have been brought before an arbitral tribunal if Spain had not felt a legitimate concern, exacerbated by the political situation at that time. It had had bitter memories of the sanctions imposed on it in 1946, sanctions which it had regarded as unjustified, and had refused to conclude an agreement that would have enabled France to develop the Lake Lanoux drainage basin and so deprive it of waters which flowed naturally into Spanish territory.

13. He endorsed the underlying philosophy of the draft, for it tended to emphasize procedures, without which the draft would indeed be of little value, and drew a distinction between two kinds of obligations, namely obligations of result and obligations of conduct. The title of chapter III of the draft set forth two quite specific obligations of result: the obligation to provide notification and the obligation to provide data and information. As could be inferred from developments in his previous reports, the Special Rapporteur would doubtless go still further and press for the obligation to consult. The consultation phase could be followed by a procedure that went beyond notification and the provision of data and information and would become an obligation to negotiate in cases in which States did not reach agreement in the course of consultations. In its award in the *Lake Lanoux* case, the arbitral tribunal had decided not to use the term "negotiations", which had been deemed too weighty, and had used the French term *tractations*. In the present instance, the obligation to negotiate was not an obligation of result and merely imposed certain conduct on States without requiring them to reach agreement.

14. Similarly, the obligation to co-operate was an obligation of conduct, and he doubted whether it had a place in the general principles. It should be properly distinguished from the other obligations, which were obligations of result, or have a separate place of its own. He wondered about the exact meaning to be attached to the term "co-operation", which appeared to have become popular after the Second World War and was used particularly in English. It was something of a portmanteau term, comparable to the "collaboration" on which States set such store. Nor was he sure that the obligation to co-operate should be imposed on States. In the case, for instance, of a system which called for work that would obviously be beneficial to all the riparian States, was it possible to consider imposing the obligation to co-operate, in other words the obligation to take part in the work, however useful it was for all the riparian States? From that standpoint, the obligation to co-operate might well prove unacceptable to States.

15. He recalled that some legal texts employed a cautious formulation whereby States were invited to engage in their mutual relations in a "spirit of co-operation", in other words to display openness, to take into consideration not only what was useful in the general interest, but also what was reasonably useful to another State. That was not an unduly heavy obligation inasmuch as States kept control over obligations of conduct, except in extreme cases. The obligation to negotiate, for example, could be violated only if a State refused to engage in negotiations, if it broke them off arbitrarily, or if it systematically refused to bear in mind the interests of another State.

16. Consequently, the obligation to co-operate was a kind of label for an entire range of obligations, and the commentary should make that point clear. If it was taken to mean an obligation performed in a "spirit of co-operation", it would be better to use the appropriate terms. Moreover, by indicating what the objective of the draft articles was, it would be possible to add that

[5] See 2002nd meeting, footnote 10.

displaying a spirit of co-operation meant endeavouring to achieve that objective.

17. It was also worth noting in regard to the obligation to negotiate that, quite often, negotiations were easier under a bilateral agreement than under a multilateral agreement. For that reason, the draft articles could call, in the absence of multilateral negotiations, for respect for equity in conducting a number of bilateral negotiations, so as to avoid any discrimination and maintain some balance between each set of bilateral negotiations.

18. Lastly, while he approved of the ideas reflected in draft article 10, he none the less thought that obligations of result should be separated from obligations of conduct.

19. Mr. McCAFFREY (Special Rapporteur), responding to a point raised by Mr. Shi, said that the purpose of the materials presented in chapter II of his third report (A/CN.4/406 and Add.1 and 2) was merely to provide members with information about modern, sophisticated régimes for the management of watercourses. He had not intended to suggest that the draft articles should be directed at integration on the local, regional or any other level. It had been suggested that a model institutional régime for the planning, management and development of international watercourses could be included in an annex to the draft; but in his view it would be virtually pointless to try to incorporate such a régime in the draft articles themselves. A system for the integrated management of watercourses might admittedly facilitate relations among States, but at the present stage in the development of international watercourse law it could not be said to be a requirement of international law.

20. Mr. Reuter had noted that, fundamentally, the obligation to co-operate meant doing something together, and had asked whether that was the true meaning of co-operation under draft article 10. Again, it had not been his intention as Special Rapporteur to suggest that States should form collective institutions in order to act through an integrated mechanism of some kind. Co-operation, within the meaning of draft article 10, denoted a general obligation to act in good faith with regard to other States, and in that particular case to fulfil certain specific obligations in using an international watercourse. There was no abstract obligation to co-operate. A general obligation to co-operate should be incorporated in the draft because, if equitable allocation of uses was to be achieved and maintained, constant dealings between States would be required, dealings that should be conducted in good faith and in a co-operative manner. Mr. Reuter's idea of a spirit of co-operation was something less than an obligation to co-operate as he understood the expression, although he had no initial objection to the idea. Possibly article 10 should open with the words "States shall co-operate", which appeared in several articles of the 1982 United Nations Convention on the Law of the Sea.

21. Draft article 10 obviously needed further refinement, but he believed that, in the light of the constructive comments made, a formulation could be found to make it clear that the obligation of co-operation was a fundamental obligation designed to facilitate the fulfilment of more specific obligations under the draft articles.

22. Mr. KOROMA said that, like Mr. Arangio-Ruiz (2003rd meeting), he found the exchange of views taking place among members extremely useful.

23. It would have been helpful if the Special Rapporteur could have explained at the outset that draft article 10 was predicated on the need to comply with the principle of equitable utilization of a shared natural resource, namely water. The true intent of the article would then have been more readily apparent. That remark was to be construed not as a criticism of the Special Rapporteur, but rather as an encouragement to future special rapporteurs to attempt to explain the intent of the articles they proposed.

24. As far as the text of article 10 was concerned, he considered that, since the main purpose of a definition was to articulate a mode of conduct, the article required refinement and should be placed in another part of the draft.

25. Mr. FRANCIS, stressing the special relevance of sovereignty to draft article 10, said that, in his view, only the source State in a watercourse system, in other words the State in whose territory the watercourse originated, exercised sovereignty over the waters passing through its territory. That sovereignty was, however, qualified to the extent that, like all the downstream States, that State's use of the waters must not cause harm to other riparian States. All other States in the watercourse system exercised no more than sovereign rights over the waters passing through their respective territories; they had sovereignty only over the river-bed beneath such waters.

26. He did not think that co-operation, within the meaning of article 10, should constitute a legal obligation. For the purposes of the draft, a form of wording should be found which imposed a firm obligation, on the clear understanding that a breach of the obligation would not give rise to State responsibility. If co-operation was not forthcoming and harm occurred, there would be liability under the principle *sic utere tuo ut alienum non laedas.* The notions of equity and reasonableness could, however, be achieved only if the riparian States co-operated in the proper manner, and were both willing and able to do so.

The meeting rose at 11.20 a.m.

2005th MEETING

Wednesday, 27 May 1987, at 10 a.m.

Chairman: Mr. Leonardo DÍAZ GONZÁLEZ

Present: Mr. Al-Baharna, Mr. Arangio-Ruiz, Mr. Barsegov, Mr. Calero Rodrigues, Mr. Eiriksson, Mr. Francis, Mr. Graefrath, Mr. Hayes, Mr. Koroma, Mr. McCaffrey, Mr. Njenga, Mr. Ogiso, Mr. Pawlak, Mr. Sreenivasa Rao, Mr. Razafindralambo, Mr.