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Summary record of the 2066th meeting

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

Extract from the Yearbook of the International Law Commission:-
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might depend on the level of development of the State in question—a differentiation that lightened the burden of developing countries in which pollution originated, but offered scant consolation to their neighbours, possibly developing countries, too, which were the victims of a polluting activity. Nevertheless, such pragmatism was laudable, especially since State practice took account of differences in technical and economic capabilities. By establishing the category of due diligence, the Special Rapporteur sought to lighten the responsibility established for a wrongful activity; he sought to rid it of its automatic character and to render it dependent on certain conditions.

46. However, if accepted international standards were established, their breach, irrespective of the consequences, must automatically be considered as a violation of the law. Mr. Barboza (2064th meeting) had expressed doubts as to the feasibility of introducing such a formulation in a general convention, even though it was certainly desirable to establish clear and precise international standards. He himself agreed with the members of the Commission who thought that the prohibition as it now stood in article 16 was too peremptory; it was not in line with the actual state of international relations and could have an adverse impact on economic activity.

47. Mr. Barboza had suggested a more realistic, and consequently more productive solution, namely, a transitional regulation based on the idea that States would agree among themselves on the means of reducing the pollution to acceptable levels within a given time-frame through co-operation. It would seem difficult to reject such a solution, which was in keeping with actual practice in the interdependent world of today, where all States sought, on the basis of mutual interest, to strike a balance between the requirements of economic development and the need to protect the environment and to keep pollution down to a tolerable level. In support of that argument, he referred to a number of provisions in the agreements he had cited earlier. In the context of anti-pollution measures, those agreements enumerated steps to be taken in case of unforeseeable and unforeseen pollution: obligatory and immediate notification of the watercourse States concerned, elimination of the causes and consequences of the pollution, and prevention and reduction of the damage caused by the pollution of the waters; they also indicated ways of acting jointly against pollution in so far as that was feasible and necessary and taking advantage of opportunities for mutual assistance on the basis of reciprocal agreements. The fact that none of the agreements to which he had referred contained special provisions on responsibility did not mean that the question of compensation had been overlooked. The authors of the texts simply appeared to consider that the problem could be resolved by agreement among the parties directly concerned and in accordance with the procedures laid down in the agreements themselves.

48. It would be preferable not to refer draft articles 17 and 18 to the Drafting Committee until the Commission had before it all the draft articles on the subject under consideration. It would be virtually impossible to determine whether the draft articles fulfilled the desired objective if they were considered separately. Under the circumstances, the Commission could neither decide whether it was appropriate to combine the draft articles on pollution with the other draft articles, nor determine the form they must take in order to be incorporated in the law of the non-navigational uses of international watercourses. He had no intention whatsoever of questioning the calibre of the work done by the Special Rapporteur; he believed, however, that the Commission must have the entire text before it in order to see the problem clearly.

49. Mr. BENNOUNA said that the discussion on the three draft articles had brought out a problem of method in that the Commission did not know what the Special Rapporteur proposed to do with part V. Before the discussion proceeded further, he would like to hear about the Special Rapporteur's intentions regarding both the scope and the very purpose that were to be assigned to that part of the draft articles.

The meeting rose at 1.05 p.m.

2066th MEETING

Wednesday, 22 June 1988, at 10 a.m.

Chairman: Mr. Leonardo DÍAZ GONZÁLEZ

Present: Mr. Al-Khasawneh, Mr. Al-Qaysi, Mr. Arangio-Ruiz, Mr. Barboza, Mr. Barsegov, Mr. Beesley, Mr. Bennouna, Mr. Calero Rodrigues, Mr. Eiriksson, Mr. Francis, Mr. Graefrath, Mr. Hayes, Mr. Koroma, Mr. Mahiou, Mr. McCaffrey, Mr. Njenga, Mr. Ogiso, Mr. Pawlak, Mr. Sreenivasa Rao, Mr. Razafindralambo, Mr. Reuter, Mr. Roucounas, Mr. Shi, Mr. Thiam, Mr. Tomuschat, Mr. Yankov.

The law of the non-navigational uses of international watercourses (*continued*) (A/CN.4/406 and Add.1 and 2,[1] A/CN.4/412 and Add.1 and 2,[2] A/CN.4/L.420, sect. C, ILC(XL)/Conf.Room Doc.1 and Add.1)

[Agenda item 6]

FOURTH REPORT OF THE SPECIAL RAPPORTEUR (*continued*)

PART V OF THE DRAFT ARTICLES:

ARTICLE 16 [17] (Pollution of international watercourse[s] [systems])

ARTICLE 17 [18] (Protection of the environment of international watercourse[s] [systems]) *and*

ARTICLE 18 [19] (Pollution or environmental emergencies)[3] (*continued*)

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

[2] Reproduced in *Yearbook . . . 1988*, vol. II (Part One).

[3] For the texts, see 2062nd meeting, para. 2.

1. Mr. TOMUSCHAT said that, in formulating draft article 16, the Special Rapporteur had relied on a wealth of supporting material, so that in adopting that text the Commission would be in broad agreement with current thinking on environmental pollution.

2. It had been argued that article 16 said either too much or too little, and that it should either be amplified or deleted. He considered that the text was too succinct and should be expanded. If it was deleted, the Commission would be failing in its duty to deal with the most crucial problem affecting watercourses in industrialized countries. Pollution was due not so much to the use of water for irrigation, the building of dams or other works, as to the discharge of waste water into rivers and lakes. Thus article 16 responded to a bitter necessity, and to delete it from the draft would be tantamount to closing one's eyes to danger in ostrich-like fashion.

3. He supported the idea of splitting up article 16 in two separate articles. The definition of pollution should be moved elsewhere, possibly to an introductory article on the use of terms. The crucial provision, in paragraph 2, should be given its proper place as an essential element of the whole draft.

4. It did not seem appropriate, however, for the article to start with a proposition enjoining States to co-operate in preventing or abating pollution. Every State was the master in its own territory, and the means of preventing pollution were at its disposal. Since no Government could take action in the territory of another State, the burden of combating pollution rested with the individual States concerned. Co-operation between States was certainly necessary, but it came one step behind. It would be of interest in that connection to consider the system of the 1982 United Nations Convention on the Law of the Sea, which focused on co-operation. The sea beyond the limits of national jurisdiction was *res communis omnium* and no State had preferential rights in it; consequently, any meaningful efforts to prevent pollution must rely on co-operation. Rivers and lakes were different in that they were placed under national sovereignty, although ultimately all rivers, with the pollution they carried, flowed into the sea.

5. He could agree, in general, with the definition contained in paragraph 1 of article 16. It was sufficiently broad to cover all the important phenomena involved. It covered even the Minamata situation; the discharge of mercury or copper into a watercourse caused a significant physical or chemical alteration of the water, which adversely affected the possibility of using it for any beneficial purpose. The discussion had not revealed any gaps in the definition that needed to be filled. As pointed out by the Special Rapporteur in paragraph (2) of his comments, thermal pollution was covered by the definition, since heating the waters constituted a physical alteration.

6. The distinction between simple pollution and prohibited pollution appeared convincing and well justified. Pollution could never be totally excluded so long as there was human activity on the banks of a watercourse, since waste water could only be discharged into watercourses. The ideal solution would be for all waste water to be purified and reused, but what had been achieved in some advanced branches of industry could not be generalized. Pollution was therefore unavoidable, but there had to be some limit to it.

7. The Special Rapporteur had set that limit by specifying an obligation not to cause appreciable harm. He had preferred the term "appreciable" to "substantial", thereby producing an unduly rigid provision. Pollution was inevitable. The rivers of Central Europe, for example, all carried pollutants which made their waters unsuitable for drinking; elaborate and expensive treatment was needed to make them fit for human consumption. That inconvenience was far from insignificant. The test of significant inconvenience, however, would hardly serve to draw the line between lawful and unlawful conduct. The qualification "appreciable", did not express what was needed for dealing effectively with pollution. The intended purpose was to avoid serious or substantial damage, and the test of prevention of appreciable harm set rather too idealistic a standard. The Special Rapporteur had defined it as a standard of due diligence. Accordingly, the obligation not to cause appreciable harm became a distant goal, and one to be attained by all reasonable means. It could be compared to the right to work under the International Covenant on Economic, Social and Cultural Rights.[4] States parties to that Covenant recognized the right to work, but they were not under an obligation directly to ensure it; they were only required to use their best efforts to achieve its full realization. That kind of flexibility constituted too low a standard, however. It might even be used to argue that populous States should enjoy greater rights to pollute than others. Similar problems arose in regard to economically or geographically disadvantaged States.

8. As he saw it, more should be done by way of concretization and specification. The "due diligence" approach was fraught with too many uncertainties. It was true that a framework agreement could not go into great detail; nevertheless, some inspiration could be drawn from the 1982 United Nations Convention on the Law of the Sea. In particular, an attempt should be made to set objective standards: for instance, the discharge of toxic substances that were not biodegradable should be banned altogether. Reference should be made to internationally recognized standards. It was true that no international organization had competence extending to international watercourses, unlike the situation obtaining in regard to the sea. Nevertheless, what was prohibited for the sea must necessarily also be prohibited for international watercourses. The subjective discretion of States in the matter should be limited. It was in that light that he viewed paragraph 3 of article 16, which specified one of the categories of measures which States had a duty to take jointly by way of co-operation.

9. On the whole, he agreed with the Special Rapporteur that any distinction between old and new pollution should be rejected in principle. Nevertheless, States considering the adoption of the future convention might be deterred from ratification by the thought that they could not do away overnight with a negative record of pollution inherited from the past. Thus to establish specific rules might be warranted in order to avoid

[4] United Nations, *Treaty Series*, vol. 993, p. 3.

retroactivity. The sins of the past could not be wiped out by the effects of a treaty; some time might be needed to phase out existing pollution. It should be made clear, however, that such a régime for old pollution was an exception to be applied only during a transitional period.

10. Because of the generality and flexibility of the standards set out in article 16, some provision should be made for procedural mechanisms. Very detailed procedures had been devised for planned measures. In Central Europe, those proposed rules would rarely be applicable; pollution was not caused by an identifiable individual project, but by thousands of different sources producing creeping pollution. He believed there was a need for procedural safeguards. At the request of a State claiming to be adversely affected, the State of origin should be required to enter into consultations and negotiations with a view to settling the matter peacefully and equitably. The onus would thus be on the polluting State to give the necessary explanations and to specify what effective measures it had taken to combat existing pollution. The result would be to improve the process of implementation of the substantive rules and to promote co-operation between the watercourse States concerned.

11. Mr. AL-KHASAWNEH said that he feared he would be striking a discordant note in the debate, because he had doubts about some of the assumptions on which the draft articles were based. His comments were not, however, intended to detract from the progressive development and codification of the law of international watercourses; on the contrary, he had always believed that a general convention on the subject was not only possible, but long overdue.

12. The experience of the Third United Nations Conference on the Law of the Sea and the 1982 United Nations Convention were relevant to the present work, and not only in regard to the problem of pollution. The 1982 Convention and the present draft articles dealt with the same subject-matter and some of the problems to be resolved were the same: in particular, the need to reconcile the division of the world into political sovereignties with the unbending laws of nature. It was therefore surprising that the Special Rapporteur should not have made greater use in his earlier reports of the United Nations Convention on the Law of the Sea. The modalities it provided for co-operation and for reconciling questions of national sovereignty with the reality of interdependence would have served to narrow the gap between the law as it was and the law as it should be. Firmer grounds would thus have been provided for some of the obligations proposed. The discussion had shown that they had their source in instruments that were not universal in character and that they could not therefore be incorporated in a draft intended for worldwide acceptance.

13. The Convention on the Law of the Sea, however, was not a framework agreement that provided for system agreements and operated as a set of residual rules in their absence. Of course, where there was a special need to deal with a particular situation, the Convention expressly stipulated for the possibility of supplementary agreements, as for example in articles 69 and 70.

14. A general convention need not be a monolithic structure permitting no derogations from its provisions. That had been recognized in article 41 of the 1969 Vienna Convention on the Law of Treaties, and it was not uncommon for multilateral treaties to be modified as between some of the parties. The 1961 Vienna Convention on Diplomatic Relations was notable for the number of agreements whereby some of the parties to it had undertaken more stringent obligations than those specified in the Convention itself. Yet that Convention did not start from the assumption that, since diplomatic missions varied, no codification of diplomatic relations was possible. To suggest that differences in the characteristics of the subject were a barrier to codification would be to cast doubt on the whole undertaking.

15. The decision to leave almost everything to watercourse States, offering them as guidance only the elastic concepts of equitable utilization and prevention of appreciable harm, did not provide the necessary certainty of the law applicable, which was an essential means of avoiding disputes between States.

16. The Commission should not ignore the disparities in power between watercourse States, which resulted not only from differences in their political power, but also from the caprices of geography.

17. Part I of the draft articles did not contribute much to the concept of codification. Part V, now under consideration, dealt more with the real problems inherent in the law of international watercourses in that it raised a number of questions: whether State responsibility or liability was involved; whether a list of prohibited pollutants should be included; and, in regard to pollution, whether the rule of "no harm" should be given priority over the principle of equitable utilization. It might also be asked to what extent the effect of watercourse pollution on non-riparian States should be taken into account, and whether it was realistic to speak of a watercourse and its ecology as an independent ecosystem when 80 per cent of sea pollution reached the sea through rivers. All those problems should have been identified from the start of the consideration of the present topic, but they had been left to a later stage. Some speakers had suggested that it would be too ambitious to try to resolve those problems in the draft; but if that view was accepted, the draft articles would be of very little use as guidance or programmes of action.

18. There appeared to be a contradiction between part I of the draft articles and some of the more specific provisions of the draft. The Special Rapporteur's reaction to that contradiction was exemplified by his endeavour to make no exceptions to the prohibition of appreciable harm in the case of pollution. That problem could have been easily resolved by giving primacy to the prohibition of appreciable harm from the start. In his view, it was untenable to give primacy to equitable utilization at the expense of the prevention of appreciable harm in the case of new uses, but to reverse that formulation in the case of pollution. New uses could, and usually did, cause pollution.

19. It was stated in the Special Rapporteur's comments (paras. (10) and (11)) to article 16 that to provide a list of pollutants was in keeping with the modern trend

of treaty-making, but that it would be inappropriate to provide such a list in a framework agreement. But that was an argument for dropping the framework approach, rather than for lagging behind the times.

20. Instead of providing watercourse States with normative rules clarifying their rights and duties, part I of the draft suggested to those States that their disputes could best be settled, and the optimum utilization of their watercourses best achieved, through system agreements. Article 4 defined those agreements and article 5 specified the parties entitled to negotiate them. The pre-eminence thus given to system agreements and the formal entitlement conferred on watercourse States in that matter could lead to the interpretation that the law of international watercourses consisted essentially of system agreements.

21. Articles 4 and 5 of part I of the draft were based on two articles originally proposed by the former Special Rapporteur, Mr. Schwebel. Their acceptance by the Commission at its thirty-second session, in 1980, had not been without opposition by some members, for the reasons explained in paragraph (36) of the commentary to article 3, adopted at the time by the Commission.[5]

22. At the thirty-sixth session, in 1984, the previous Special Rapporteur, Mr. Evensen, had attempted to introduce some measure of flexibility in that article by using the word "arrangements".[6] At the previous session, however, the Commission had adopted articles 4 and 5[7] without that element; in fact, it had gone even further since, under paragraph 2 of article 5, States whose use of water might be affected appreciably by the implementation of an agreement applying to only a part of the watercourse had the right not only to participate in consultations and negotiations, but also to become parties to such an agreement.

23. He did not doubt the appropriateness of the term "arrangements" in a multilateral treaty. To cite but one of many examples, article 69, paragraph 5, of the United Nations Convention on the Law of the Sea stated: "The above provisions are without prejudice to arrangements agreed upon in subregions or regions . . .".

24. In the discussions in the Sixth Committee of the General Assembly, one representative had even suggested that recognition of the right of participation of a third State in the circumstances set out in article 5 would be incomplete if the draft articles did not also include a provision establishing the obligation of other States to refrain from negotiating such agreements without the participation of a third State whose territory was also affected by the uses of the watercourse (see A/CN.4/L.420, para. 139). That totally inadmissible conclusion showed that a dictum of the arbitral tribunal in the *Lake Lanoux* case, which called on the two parties to engage in consultations and negotiations with the aim of concluding a treaty, had been inadvertently—and inadmissibly—transformed into a general entitlement of watercourse States to become parties to agreements. No State was likely to accept such a proposition, which would completely overturn the principle *pacta sunt servanda*.

25. As to the acceptability of the draft by States, it was not realistic to give watercourse States a right to become parties to partial watercourse agreements, since that right was not supported by State practice or by legal opinion. Political relations between watercourse States might be such that State A found it desirable to conclude a system agreement with State B, but impossible to enter into treaty relations with State C, for political reasons unrelated to watercourse uses.

26. In paragraph (12) of the commentary to article 4 ([Watercourse] [System] agreements), provisionally adopted in 1987,[8] it was stated that: "A major purpose of the present articles is to facilitate the negotiation of agreements concerning international watercourses". A rigid formulation such as that contained in article 5, paragraph 2, might well defeat that major purpose.

27. The legitimate concern to prevent third States from suffering appreciable adverse effects as a result of partial system agreements could be met more realistically by providing for an obligation of States intending to conclude such agreements to negotiate with third States if the latter so wished. That solution would take account of the need for consultations without encroaching unduly on the freedom of States to choose their treaty partners.

28. Another question arising out of articles 4 and 5 was the requirement in article 4, paragraph 2, that a watercourse agreement should define the waters to which it applied. The purpose was to give "other potentially concerned States notice of the precise subject-matter of the agreement".[9] It was difficult to see the usefulness of that requirement except perhaps in the case of an agreement between two upper riparian States. For if the agreement was between two lower riparians, an upper riparian would not be a "potentially concerned State". The fact that the waters of a river flowed in one direction was something from which certain conclusions had to be drawn; successive watercourses and contiguous watercourses were not always amenable to the same treatment.

29. The obligation to give notice to other "potentially concerned States" also raised another problem. The Drafting Committee had adopted article 12 [11],[10] which required a watercourse State to give notice before it permitted the implementation of planned measures that might have an appreciable adverse effect on another State. Why should the burden thus be lighter for a single State, which was required to give notice to other States only if the measure might have that effect? In article 4, on the other hand, watercourse States were prohibited from concluding agreements that adversely affected, to an appreciable extent, uses by other watercourse States. It was difficult to see why States contemplating a measure jointly, through an agreement,

[5] *Yearbook . . . 1980*, vol. II (Part Two), p. 112.

[6] See para. 3 of the revised draft article 4 submitted by Mr. Evensen in his second report (*Yearbook . . . 1984*, vol. II (Part One), p. 108, document A/CN.4/381, para. 37).

[7] See 2050th meeting, footnote 3.

[8] *Ibid.*

[9] Para. (6) of the commentary to article 4.

[10] See 2071st meeting, para. 65.

should be required to give notice regardless of the degree of possible harm, and be under an obligation to define the waters to which the agreement applied.

30. The exact relationship between the concepts of equitable utilization and appreciable harm was far from clear, mainly because of the different approaches adopted by the various special rapporteurs. Mr. Schwebel, for instance, had taken the view that appreciable harm should be prohibited, save where it was permissible in the context of equitable sharing, whereas Mr. Evensen had given primacy to the rule that no appreciable harm should be inflicted. While the present Special Rapporteur had reverted to Mr. Schwebel's approach, he too considered that the prevention of appreciable harm should have primacy. The confusion was further compounded by the fact that in some cases the word "harm" was used to refer to a factual state of affairs, and in others to a legal wrong. He therefore suggested that, for the sake of clarity and consistency, the words "appreciable harm" should be understood throughout the draft to refer to a factual state of affairs. The threshold of appreciable harm could be determined objectively, provided that provision was made in the draft for fact-finding machinery and procedures for the settlement of disputes by a third party. Any harm that was more than appreciable would very probably be irreparable, in that once it had occurred it would be impossible to restore the *status quo ante*. Moreover, under a régime of liability, compensation would hardly be adequate—a point that militated in favour of strengthening the preventive provisions of the draft and of conferring on the State likely to be affected a right conditional on the occurrence of appreciable harm, objectively determined.

31. While he doubted whether watercourse States had a general duty to co-operate, as provided for in article 9 [10], he considered that the inclusion of such a duty *de lege ferenda* was highly desirable, given the need to secure optimum utilization and adequate protection of an international watercourse. Article 9 [10], however, was formulated in unduly rigid terms. The duty to co-operate was expressed in a more flexible and comprehensive manner in article 197 of the United Nations Convention on the Law of the Sea. He regretted, in particular, that article 9 [10] and the subsequent articles dealing with procedural obligations did not envisage a role for international organizations which, traditionally, were important instruments for co-operation and for the collection and processing of data and information with a view to the prevention or mitigation of floods, droughts and other natural or man-made disasters. The need for technical and financial support from the international agencies had been stressed both at the United Nations Water Conference (Mar del Plata, March 1977) and at the Interregional Meeting of International River Organizations (Dakar, May 1981), and he did not understand why their obvious role had been overlooked.

32. The fact that 80 per cent of marine pollution reached the sea through rivers was ample proof of the need to cover the problem of pollution in the draft articles. Since the scope of the draft would then extend beyond watercourses, due regard should be had to the provisions of part XII of the United Nations Convention on the Law of the Sea, relating to the protection and preservation of the marine environment. The topic would thus encroach on that of international liability for injurious consequences and on that of State responsibility. While it was difficult at that stage to say whether a standard of due diligence or one of strict liability should be the governing principle, he would have no difficulty if the latter were introduced in the draft. He agreed with Mr. Shi (2065th meeting) that the definition of pollution should be moved to the first part of the draft and that an attempt should be made to provide a "black list" of pollutants. The problem of river pollution was so serious that it called for a comprehensive régime providing for both preventive and curative measures. Hence any distinction between old and new pollution would not be useful.

33. Mr. AL-QAYSI said that with the Chairman's permission he would speak on draft article 15 [16] (Regular exchange of data and information),[11] as he had not yet had an opportunity of doing so.

34. He endorsed the Special Rapporteur's approach to the subject dealt with in the article. That subject was straightforward, and there was an urgent need to include it in the draft articles. The need for exchange of data and information reflected the duty to co-operate, which would itself make for the equitable and reasonable utilization of an international watercourse; the exchange of information would allow water uses to be planned with a minimum of conflict and possibly also promote the development of integrated systems of planning and management of watercourses. As the Special Rapporteur pointed out in his fourth report (A/CN.4/412 and Add.1 and 2, paras. 12 and 14), the exchange of information was implicit in the terms of articles 6 and 7, dealing with the obligation of equitable utilization and with the factors relevant to its fulfilment.

35. While the thrust of article 15 [16] merited support, certain points of drafting required further consideration. Paragraph 1 set out the basic obligation to co-operate in the regular exchange of "reasonably available" data and information, a term which, as explained in paragraph (3) of the comments to the article, was intended to apply to information collected by a watercourse State for its own use and information that was easily accessible on the basis of an "objective" evaluation of certain factors in each particular case. It seemed clear, from the saving clause at the end of paragraph 1 that the obligation would not arise where a watercourse State was not actually using or planning to use the watercourse. The presentation of the obligation in those terms could be defended on grounds of cost effectiveness, but it was important not to lose sight of the educational value of the draft articles as a whole, or of their role in encouraging States to set in motion mechanisms for the equitable and reasonable utilization of international watercourses in the collective interest of all watercourse States and with a minimum of conflict. On that basis, the obligation should be cast in terms of a duty to collect and regularly exchange data and information as and when they were reasonably available. That seemed to conform to the approach adopted by the two preceding special rapporteurs.

[11] For the text, see 2050th meeting, para. 1.

36. As to the alternative mentioned in paragraph (2) of the comments, he thought the existing wording should be retained, since a mere "spirit of co-operation" did not convey the idea that there was a duty to co-operate.

37. In paragraph 2 of article 15 [16], the words "or other entity" should be deleted, since the draft articles should be addressed solely to States. That should not cause any difficulty, since the draft formed the basis for a framework agreement which could, if necessary, be supplemented by States for the purposes of any given situation. A reference to the possibility of including other entities as required should be made in the commentary.

38. He commended the Special Rapporteur for a series of well-documented reports and for placing a number of options before the Commission, which would help it to make progress on a topic that had remained on the agenda far too long. He was grateful for the Special Rapporteur's schedule for completion of the first reading of the draft articles during the current quinquennium; he trusted that the final product would be meaningful in terms of substantive obligations and thus serve the needs of States.

39. Mr. Sreenivasa RAO expressed his appreciation to the Special Rapporteur for the wealth of source material he had compiled on the prevention, control and abatement of the pollution of watercourses. His comprehensive treatment of a complex topic would enable members to arrive at appropriate conclusions.

40. The pollution of watercourses and the environment was no longer a matter of merely esoteric concern but a daily occurrence, the seriousness of which was highlighted by the fact that India had launched an extensive programme to clean up the Ganges, whose once pure and sacred waters were now heavily polluted. Environmental pollution had been the focus of international attention since the 1970s, i.e. since the spate of oil spills along the Santa Barbara coast and since the *Torrey Canyon* incident. More recently, there had been the accidents at Chernobyl and Bhopal. Everyday life was marked by scores of other incidents which people apparently accepted as an inevitable part of the pursuit of modern values. Consumerism, reckless industrialization, the need to fight poverty and disease, competitiveness in the social and economic fields, employment of mass communication techniques, high energy generation by atomic power plants, extensive drilling for oil and, above all, the mindless pursuit of militarization and arms production all contributed to pollution.

41. Developed countries, multinational corporations and other institutions rarely passed on to less developed States the experience gained from industrialization and the technological revolution; hence there was a timelag before that experience was available all over the world. Some institutions and corporations even attempted to transfer their unsafe and discredited practices to other parts of the world that were ignorant of the dangers involved, luring them with the symbols of so-called civilization. The shifting of polluting industries, the dumping of unsafe chemicals and pharmaceutical products, and the transfer of old technology and systems management were all too common to need elaboration.

42. In the face of that situation, a variety of long-term strategies was needed to achieve the objective of preventing, controlling and abating the pollution of watercourses and the environment. Detailed regulations to govern the uses of watercourses were particularly important, since rivers were commonly used for the dumping of waste and toxic substances. But any attempt to treat watercourse systems alone, without dealing with the root causes of pollution and the basic attitudes of States, would meet with little success. The fact of interdependence and the common interest in promoting universal strategies without sectarian motivation must be recognized and emphasized.

43. If the draft articles were to be universally acceptable, they must serve mainly to promote the objectives of prevention, control and abatement of pollution. Accordingly, the provisions on the duties of States should be drafted in the light of the current realities of social organization and of actual levels of knowledge regarding pollution and its management. Above all, those duties must be undertaken by States in full appreciation of the common interests involved and by consent expressed through joint arrangements or agreements. Many treaties and bilateral agreements prepared by learned associations emphasized the importance of willing acceptance by States of reciprocal and mutually beneficial obligations. That was a point the Commission might wish to consider, and he was gratified to note that in the presentation of his materials the Special Rapporteur had stressed the need for a consensual approach.

44. The role of international organizations and the development of international standards to be observed by States in their respective regions had also received attention in the Special Rapporteur's report (A/CN.4/412 and Add.1 and 2). In proposing article 16, the Special Rapporteur rightly emphasized that the test of State responsibility was not strict liability but due diligence, a concept that was firmly rooted in the law of torts and the principles of State responsibility and which had the merit of promoting such desirable objectives as co-operation, consultation and exchange of data and information.

45. Moreover, the Special Rapporteur had consistently maintained that appreciable harm should be a test for determining whether a State had incurred responsibility. The use of the term "appreciable harm" by the Special Rapporteur as opposed to "substantial harm"—a term used by some others to denote the same degree of harm—need not be contested. What was at issue was harm in the legal sense, meaning not harm that occurred in the day-to-day use of a watercourse, but harm that was significant, unreasonable and material in terms of its adverse effect on the equitable and reasonable use and enjoyment of the watercourse by other States in the system. Defined thus, appreciable harm was a reasonable concept, although it had been suggested that any adjective qualifying the word "harm" should be dropped. But to provide that any harm at all would give rise to responsibility would expose the draft to criticism, make it unacceptable universally and detract from the general orientation of the development of the obligations presented by the Special

Rapporteur and accepted by the Commission and indeed in international State practice.

46. A further question was whether the duty not to cause appreciable harm should be subordinate to the general principle of the reasonable and equitable use of the watercourse by States. The conclusions reached on that question by various international associations differed widely. His own view was that the duty not to cause appreciable harm and the right to equitable and reasonable enjoyment of the watercourse were not antithetical, and that the relationship between the two had to be analysed in the context of a given situation. He noted that the Special Rapporteur, who proposed that the duty not to cause appreciable harm should be related to the right of States to equitable and reasonable enjoyment of the watercourse, considered that, as a matter of preferred objective or policy, the duty not to cause appreciable harm by pollution should be dealt with in more absolute terms. Given the world-wide trend towards the absolute control of pollution, as reflected in judicial decisions and national laws, the Special Rapporteur's point was well taken. The Indian Supreme Court had recognized the need to adopt absolute standards and, in a recently decided case, had dismissed the relevance of certain exceptions to absolute liability.

47. There remained, however, a gap between the identified objectives and the strategies adopted at various levels of State practice. There should be an awareness of that gap and a very careful accommodation of the multiple interests involved. The Commission should not try to set a higher or a lower degree of priority between the two objectives of reasonable and equitable use and enjoyment of watercourses and the duty to avoid appreciable pollution harm but, bearing in mind the specific nature of the framework type of agreement, should seek to identify the objectives clearly, while allowing States in different regions to come to grips with the problem in their own way and in the light of their own experience. That would help to make the articles more acceptable.

48. On the question whether the draft articles should include "black lists" and "grey lists" of substances to be prohibited or controlled, he would advocate a promotional approach: on the basis of available scientific data, a consensus should be reached on the substances and clear guidance be given in the draft articles. Instead of specifying the actual substances that were prohibited, the draft articles might refer to their compounds, such as arsenic compounds, mercury compounds, cadmium compounds, etc. That approach had been found useful in India. At all events, States should be left free to act on the basis of their own practical experience and to include in their bilateral and multilateral agreements those elements that were really relevant to the management of specific watercourse systems.

49. Lists alone were not sufficient, however; standards, e.g. for heat levels and equipment that should be prohibited or controlled, were also needed. The setting of such standards was a very complex procedure; a consensus must be achieved before they could be made applicable to interactions between States, and a tremendous amount of scientific data and expertise had to be brought to bear on the task. The question arose whether the Commission should attempt to establish such comprehensive standards for international watercourse systems. It should certainly reflect further on the balance it wished to strike and the elements it would emphasize in the draft articles, and it should not delve too deeply into subjects that had ramifications far beyond matters directly related to international watercourse systems. Pollution, for example, would have to be dealt with, but the emphasis to be placed on it should be determined by common consent. A concern for timing was also in order; as Mr. Reuter (2065th meeting) had said, if the Commission tried to develop the topic in a really comprehensive manner, it would further delay the completion of the draft articles on which it had already been working for so long.

50. As to article 16, he had no difficulty in accepting paragraph 1, but thought it would be improved if the words " 'pollution' means" were replaced by the words " 'pollution' includes", which was a more flexible and more comprehensive formulation. Similarly, in the reference to detrimental effects on human health, the word "safety" should be replaced by the word "well-being".

51. He would like to see paragraph 2 redrafted to switch the emphasis from mandatory or prohibitive language to the promotional approach he had mentioned. The words "or to the ecology of the international watercourse [system]" should be replaced by the words "and shall take all appropriate measures to prevent, control and abate such harm". As Mr. Reuter had pointed out, "ecology" was a very broad concept, and it might be difficult to establish that the ecology had been harmed.

52. He would also suggest that paragraph 3 be redrafted to stress the promotional approach, which would render it more acceptable to a large number of States. The words "At the request of any watercourse State, the watercourse States concerned shall consult with a view to preparing and approving . . ." should be amended to read "Watercourse States shall co-operate with each other through consultation and exchange of data and information, to prepare and approve wherever possible . . .".

53. He had no objection to articles 17 and 18.

54. The prevention, control and abatement of pollution could not be divorced from the basic objective of achieving development, which was rightly being pursued by a great many States. As their development effort required the enlargement of their resource base through the introduction of technology, certain kinds of pollution were sure to occur. The problem for the Commission was to strike a balance between promoting the right to development and controlling pollution. It was widely recognized that there was no conflict between development and ecology, and that the developing countries wished to pursue their efforts to achieve development in a safe and habitable environment.

55. Given those objectives, the topic under discussion was of great importance. The background materials submitted by the Special Rapporteur provided excellent guidance for making choices in the drafting of the

articles. The obligation not to cause appreciable harm should be stated in clear terms, but in concordance with the general objectives of promoting ecologically safe progress and preventing, controlling and abating pollution.

56. Mr. ROUCOUNAS suggested that the Commission might consider changing the order of articles 16 and 17 to conform to a progression from the general to the particular. Article 17, setting out the obligation to protect the physical environment, would come first, followed by article 16, which dealt with pollution itself, and then by article 18, describing the extreme situations of environmental crisis.

57. With regard to article 16, he agreed that the Commission must draft a set of provisions on pollution, for otherwise it might appear to have wilfully overlooked an element that was central to the development of environmental law. In its work on definitions and rules of conduct, the Commission must do its utmost to promote legislative consistency. The multifarious bodies, agencies and departments dealing with pollution control, sometimes even within a single State, often met with difficulties because a variety of standards were used for a single purpose. The Commission could render great service by helping to reduce the provisions on pollution control to manageable proportions, thereby assisting government and international agencies in their important tasks. If it were to encourage the development of a variety of legal régimes, the Commission would not be responding properly to the expectations of the international community.

58. In his opinion, an important feature of international watercourses, namely that they ran to the sea, had been neglected in the draft articles: the line of demarcation between régimes for the protection of sea water and fresh water had not been clearly drawn. Obviously, the standards set out in the 1982 United Nations Convention on the Law of the Sea would have to be taken into consideration; the Commission could hardly establish standards inferior to those of that Convention, especially as 80 per cent of marine pollution came from rivers.

59. The definition of pollution proposed by the Special Rapporteur was firmly based on scientific and academic work, and would help to promote consistency in international regulations. Other international bodies were also working on definitions of pollution. UNEP had done an in-depth study of the relationship between regional protection against pollution and the framework established under the 1982 United Nations Convention on the Law of the Sea, and had concluded that there were only minor divergences between the two which could easily be overcome.

60. The Commission was quite capable of drafting a definition of pollution, and he believed that a list of pollutants should be included in the draft articles. A reference to the need to furnish available physical, biological and chemical data on pollutants should also be included, as a parallel to the obligation stated in draft article 9 [10], drawing on the wording of paragraph 12 of draft article 10 submitted by Mr. Schwebel in his third report,[12] according to which States had the duty "to share with one another the available physical, chemical and biological data on pollutants". He had some doubts whether the draft articles as currently worded made that obligation clear enough; if not, they should be amended.

61. He understood "due diligence", in connection with article 16, as establishing an obligation for States to behave in such a way that pollution was not caused by their actions. He did not see it as liberating States from international responsibility for pollution; but, as it was a fundamentally subjective notion, he was unsure whether it could be incorporated in the draft articles. In response to Mr. Tomuschat's point about due diligence in the context of collection and provision of data and information by developing countries, he said that it might be possible to adopt a flexible approach and, as Mr. Mahiou had suggested many years ago, to provide for the plurality of the content of a standard as it applied to developing countries.

62. In the course of the work done on the topic over the years, the concept of appreciable harm had become generally accepted. However, as Mr. Barboza (2064th meeting) and Mr. Arangio-Ruiz (2065th meeting) had pointed out, that notion was being refined in the context of two other topics on the Commission's agenda. He wished to take advantage of the fact that discussion on it had been reopened to ask the Special Rapporteur whether the concept of appreciable harm was already part of international law on watercourses, or whether the Commission was breaking new ground.

63. Article 17 comprised general guidelines for environmental protection and provided for international co-operation; the existing rules of international law on the matter were unfortunately not every comprehensive. The reference to the marine environment in paragraph 2 raised the question of concordance with the 1982 United Nations Convention on the Law of the Sea. A number of multilateral agreements had expressly recognized the higher authority of that Convention, even before it had been adopted. Examples were the 1973 International Convention for the Prevention of Pollution from Ships and the 1976 Barcelona Convention for the Protection of the Mediterranean Sea against Pollution,[13] both of which contained articles specifically referring to the United Nations Convention, which had not been adopted until 1982. A reference to the Convention on the Law of the Sea appeared in paragraph 3 of article 20 submitted by Mr. Evensen in his second report on the topic.[14] It was also worth noting that the revised statutes of the Inter-Governmental Oceanographic Commission (IOC) merely contained a sentence to the effect that everything pertaining to marine research must be in conformity with the rules of international law, and that at the forty-second session of the General Assembly some representatives had criticized the failure of IOC to refer specifically to the United Nations Convention on the Law of the Sea. For all those reasons, he believed that a

[12] *Yearbook ... 1982*, vol. II (Part One), p. 145, document A/CN.4/348, para. 312.

[13] See 2063rd meeting, footnote 7.

[14] *Yearbook ... 1984*, vol. II (Part One), p. 118, document A/CN.4/381, para. 82.

reference to the need for conformity with that Convention should be inserted in paragraph 2 of article 17.

64. Referring to article 18, he observed that the requirement to notify "any competent international organization" of a pollution or environmental emergency was useful even in the absence of an international organization having direct competence in that field, since it drew attention to the need for concerted international action in such a situation. Referring to paragraph (5) of the Special Rapporteur's comments on article 18, he supported the suggested addition of a provision along the lines of article 199 of the United Nations Convention on the Law of the Sea on the joint development and promotion by States of contingency plans for responding to pollution incidents in the marine environment.

65. Mr. PAWLAK associated himself with previous speakers in congratulating the Special Rapporteur on chapter III of his fourth report (A/CN.4/412 and Add.1 and 2). His extensive and scholarly comments on the new draft articles 16, 17 and 18 reflected both the contemporary practice of States and opinions from other sources. However, the Special Rapporteur had not only put forward suggestions; he had also raised questions to which there was no easy answer.

66. The fundamental questions relating to article 16 were the definition of "pollution" and the problem of the responsibility of watercourse States for harm caused by pollution to other watercourse States. On the first of those issues, the definition proposed in paragraph 1 of the article, comprehensive although it appeared to be, failed to reflect the full reality of the pollution of rivers and other watercourses as known at present. In particular, the definition did not specify what it was that produced alterations in the composition or quality of waters, and did not mention the distortion of the ecological balance of watercourses or the changes in river beds resulting, for example, from the disposal of toxic wastes. Such changes, as was known, were liable to make themselves felt for many years. The Special Rapporteur should consider including those elements in his definition. As to the precise point at which the definition of pollution should appear in the draft, he associated himself with previous speakers who had recommended that it should be moved to the introductory article on the use of terms.

67. On the problem of responsibility, he subscribed to the view that a clear formulation should be provided, setting out the international obligation of States not to cause pollution harm to other watercourse States. Paragraph 2 of article 16 represented, in a sense, the concretization of article 8 [9] already adopted by the Drafting Committee.[15] Since pollution was, at least in part, a by-product of the utilization of a watercourse, the question arose whether a concretization of the general obligation already provided for in article 8 was really necessary. In view of the importance of curbing the pollution of watercourses, he considered that a separate provision independent of the general obligation under article 8 was justified.

68. He agreed with Mr. Tomuschat and Mr. Roucounas that the expression "appreciable harm" was too weak and too subjective; the term "substantial", mentioned by the Special Rapporteur in paragraph (4) of his comments to article 16 would be preferable, as it would provide a more objective basis for technical standards. He would also prefer the term "injury", used in the Helsinki Rules, to the term "harm".

69. The relationship between the present articles and existing conventions, regulations and agreements between States was an important matter, which had already been raised by Mr. Barsegov (2065th meeting) and Mr. Sreenivasa Rao. The diversity in the régimes of international watercourses had to be taken into account and the standards specified in existing agreements should be applied in determining the fulfilment by States of their obligations under the framework convention being drafted. He agreed with Mr. Sreenivasa Rao that article 16 should include a provision setting out the obligation of States to prevent and control the pollution of international watercourses.

70. Mr. KOROMA congratulated the Special Rapporteur on his fourth report (A/CN.4/412 and Add.1 and 2) on a topic whose great importance was self-evident. The scarcity of water supplies, the harm caused to the human environment and to marine life by pollution and the need to check the discharge of hazardous and toxic wastes into watercourses were recognized by all. It was against that background that the Commission was called upon to draw up rules with a view to the prevention or abatement of pollution of international watercourses.

71. Article 16 responded to the international community's needs by acknowledging that States were under an obligation to exercise care in conducting or permitting, within their jurisdiction, actions with potentially harmful consequences to other watercourse States, and to refrain from discharging harmful or hazardous wastes into watercourses to such an extent as to cause appreciable harm to other watercourse States. As to the use of the term "appreciable harm", he thought it might be advisable to revert to the term "substantial harm" or "significant harm" as being more readily quantifiable; the difference in meaning was slight.

72. On the question of the criterion of due diligence, he observed that all the elements contained in the definition supplied by Pierre Dupuy, quoted in paragraph (6) of the Special Rapporteur's comments to article 16, were also included in the concept of strict liability. The text as it stood could be interpreted to mean that no liability arose if the harm caused to other watercourse States was not "appreciable". That was surely not the Special Rapporteur's intention. The important point to bring out was that harm should not be caused by any watercourse State to other watercourse States.

73. On reflection, he was inclined to agree that paragraph 1 of article 16 should be included in article 1 (Use of terms). The wording of the paragraph should be amended in the light of the definition of pollution used in the 1982 United Nations Convention on the Law of the Sea (art. 194); in particular, the reference to the use of the waters "for any beneficial purpose" was confusing and should be deleted.

[15] See 2070th meeting, para. 34.

74. The best approach would have been to predicate article 16 on article 9 [10], which set out the general obligation to co-operate. The majority of States, whether industrialized or not, were not prepared to accept the standard of strict liability for damage in case of pollution. He therefore agreed with Mr. Roucounas that article 17 should be brought forward to the position now occupied by article 16; the next article might then specify the obligation of individual watercourse States not to cause or permit pollution, and recommend various ways of ensuring its prevention.

75. The law on pollution control of watercourses should hinge on international co-operation; it was failure to observe the obligation to co-operate that should entail liability. That, in his view, was as far as the international community was prepared to go at present, and he saw little point in drafting articles, however commendable their spirit, which would not receive the international community's approval.

76. The CHAIRMAN announced that, in the previous week, the Commission had once again used 100 per cent of the time and conference service facilities allotted to it.

The meeting rose at 1 p.m.

2067th MEETING

Thursday, 23 June 1988, at 10 a.m.

Chairman: Mr. Leonardo DÍAZ GONZÁLEZ

Present: Mr. Al-Khasawneh, Mr. Al-Qaysi, Mr. Arangio-Ruiz, Mr. Barboza, Mr. Barsegov, Mr. Beesley, Mr. Bennouna, Mr. Calero Rodrigues, Mr. Eiriksson, Mr. Francis, Mr. Graefrath, Mr. Hayes, Mr. Koroma, Mr. Mahiou, Mr. McCaffrey, Mr. Ogiso, Mr. Pawlak, Mr. Sreenivasa Rao, Mr. Razafindralambo, Mr. Reuter, Mr. Roucounas, Mr. Shi, Mr. Thiam, Mr. Tomuschat, Mr. Yankov.

The law of the non-navigational uses of international watercourses (*continued*) (A/CN.4/406 and Add.1 and 2,[1] A/CN.4/412 and Add.1 and 2,[2] A/CN.4/L.420, sect. C, ILC(XL)/Conf.Room Doc.1 and Add.1)

[Agenda item 6]

FOURTH REPORT OF THE SPECIAL RAPPORTEUR (*continued*)

PART V OF THE DRAFT ARTICLES:

ARTICLE 16 [17] (Pollution of international watercourse[s] [systems])

ARTICLE 17 [18] (Protection of the environment of international watercourse[s] [systems]) *and*

ARTICLE 18 [19] (Pollution or environmental emergencies)[3] (*continued*)

1. Mr. YANKOV said that his comments on articles 17 and 18 would be of a preliminary nature. In his previous statement (2063rd meeting) on some general points relating to part V of the draft, and more particularly to article 16, he had already expressed his views on the notion of protection and preservation of the environment of international watercourses. He would not, therefore, revert to the matter, although the consideration of article 17 offered an opportunity to do so, since the article dealt directly with that issue and treated it as an obligation of States. In fact, article 17 dealt with it much more comprehensively than did article 16. By its very title (Protection of the environment of international watercourse[s] [systems]), which should have been worded "Protection and preservation of the environment of international watercourse[s] [systems]", article 17 sanctioned a concept of protection and preservation of the environment that was much broader in scope than the obligation not to cause or permit pollution.

2. On that subject, two different trends had emerged. The first, which could be described as "traditional", was to avoid pollution of the environment: a concept that belonged to the past and perhaps to the present, but certainly not to the future. The other, much broader, was to give a legal content to the concern to protect, preserve and if possible improve the environment, because it was no longer enough for mankind to combat the increase in pollution.

3. Pollution had already reached such proportions that some rivers were dead and others were turning into channels to spread pollution. It was therefore imperative to take preventive and corrective measures at the same time as conservation measures and, where possible, measures to improve the environment. Article 16, and especially paragraph 2, although it focused on the obligation not to cause or permit pollution, did not, for all that, reflect the classical notion of *non facere*. It did not state simply the obligation to refrain from doing something but, rather, the obligation to refrain from doing something specific: causing harm to the environment. Article 17, for its part, focused more on the obligation to take all reasonable measures to protect the environment of an international watercourse. Accordingly, the idea of placing article 17 before article 16, which had been put forward by Mr. Roucounas (2066th meeting) and supported by Mr. Koroma (*ibid.*), was quite justified, considering that paragraph 1 of article 17 enunciated the general obligation to protect and preserve the environment.

4. That was in fact the approach underlying part XII of the 1982 United Nations Convention on the Law of the Sea, in which the first article, namely article 192, proclaimed the general obligation of States to protect and preserve the marine environment. In that connection, incidentally, the provisions of the Convention relating to deep sea mining always used the expression

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

[2] Reproduced in *Yearbook . . . 1988*, vol. II (Part One).

[3] For the texts, see 2062nd meeting, para. 2.