

(iii) Secretariat Study

Law of International Rivers

The Working Group of the whole

By its resolution 49/52 the General Assembly, noting that the ILC had, *inter alia*, recommended the elaboration of a Convention, by the Assembly or by an international conference of plenipotentiaries, on the basis of the draft articles on the law of non-navigational uses of international watercourses, decided that at the beginning of the fifty-first session of the General Assembly, the Sixth Committee should convene as Working Group of the Whole for three weeks to elaborate a Framework Convention on the Law of non-navigational Uses of International Watercourses. It also decided that the item be included in the provisional agenda of its fifty-first session.¹

At the same session the General Assembly had also decided that the Working Group of the Whole shall follow the methods of work and procedures outlined in the Annex to that resolution. The Annex to resolution 49/52 had stipulated that the draft articles prepared by the ILC shall be the basic proposal before the Working Group of the Whole and that it (the Group) shall start with a discussion of the draft articles, on an article-by-article basis, without prejudice to the possibility of considering simultaneously closely connected articles, the decisions on article 2 "Use of terms", being reserved for the concluding stages of the work. The Group was to establish a Drafting Committee to which each article or group of articles was to be referred for examination in the light of the discussion. The Drafting Committee was to make its recommendations to the Working Group of the Whole in relation to each article or group of articles. It was also to prepare, for approval by the Working Group, a draft preamble and a set of final clauses. The Working Group was to endeavour to adopt all texts by consensus failing which it was to take its decisions in accordance with the rules of procedure of the General Assembly.

¹ See General Assembly Resolution 49/52 of 9 December 1994.

In accordance with paragraph 3 of resolution 49\52 the Sixth Committee at its fifty first session convened as a Working Group of the Whole, open to States Members of the United Nations or Members of specialized agencies to elaborate a framework convention on the law of Non-Navigational uses of international watercourses on the basis of draft articles adopted by the ILC and in the light of written comments and observations of States as well as views expressed in the debate at the forty ninth session.

The Working Group functioned for three weeks from 7th to 25th October 1996. At its first meeting the Working Group *inter alia* elected Ambassador Chusei Yamada (Japan) as Chairman and Ambassador Lamers (Netherlands) as the Chairman of the Drafting Committee. Mr. Robert Rosenstock who had been the Special Rapporteur when the ILC had adopted the draft articles on the topic had, in accordance, with General Assembly Resolution 49\52, been invited by the Secretary General to take a place at the Committee table as an expert consultant.

It may be recalled that the informal consultations with the representatives of the Permanent Missions to the United Nations convened, by the Legal Counsel, to facilitate the work of the Working Group had recommended that there should be no simultaneous meetings of the Working Groups and the Drafting Committee.

It may be stated that the division of labour between the Working Group and the Drafting Committee was quite clear. While the former was to establish general principles the latter was to concentrate on drafting the provisions.

It may be recalled that the set of 33 draft articles on "The Law of the Non-Navigational Uses of International Watercourses" together with commentaries thereto, adopted by the International Law Commission on second reading had been arranged in six parts. Part I of the draft articles entitled "Introduction" comprised draft articles 1 to 4. Part II of the draft articles addressed the "general Principles" of the Law of the non-navigational uses of International Watercourses and comprised draft articles 5 to 10. Part III of the draft articles embodied the text of draft articles 11 to 19 and addressed the question of Planned Measures. The provisions relating to

"Protection Preservation and Management" of non-navigational Uses of International Watercourses were set out in draft articles 20 to 26 and constituted Part IV of the draft articles. The text of two draft articles 27 and 28 addressed to "Harmful Conditions and Emergency Situations" comprised Part V of the draft articles. Finally Part VI of the draft articles comprising of draft articles 29 to 33 and set forth the Miscellaneous Provisions.

It may be stated in this regard that the AALCC Secretariat has provided a commentary on these draft articles. Since Arusha Session in 1986, apart from commenting on the draft ILC articles the Secretariat has been preparing studies on various legal aspects of the non-navigational uses of the international watercourses. It has also provided as and when necessary, detailed commentaries.²

The Working Group deemed it prudent to divide the draft articles into clusters for the purpose of discussions in the Working Group. Accordingly, the Working Group appears to have divided the 33 draft articles adopted by the ILC into five clusters viz.: cluster I comprised of draft articles 1, 3 and 4; cluster II comprising draft articles 5 to 10; cluster III consisting of draft articles 11 to 19 and 33, cluster IV consisting of draft articles 20 to 28 and cluster V comprising draft articles 29 to 32 and 2.

Part I of the draft articles referred to as cluster I by the Working Group addressed the question of the protection of international watercourses from the adverse effects of human activities. The text of 4 draft articles constituting the first cluster of articles, addressed the scope of the draft articles (Article 1), the "use of Terms" (Article 2); "Watercourse agreements (Article 3); and "Parties to watercourse agreements" (Article 4)

² Following are the studies prepared by the AALCC Secretariat since the resumption of this item at the Tokyo (1983) session: The Law of International Rivers: Normative Approaches to the Sustainability of fresh Water Resources. Doc. No. AALCC/XXXIII/Tokyo/94/5; The Law of International Rivers: A Preliminary study Relating to river System Agreements. Doc. No. AALCC/XXXII/Kampala/93/6; The Law of International Rivers Doc. No. AALCC/XXXI/Islamabad/92/5; The Law of International Rivers: A Preliminary Report and an outline on Tentative Programme of Work. AALCC/ XXIV/19; Doc. No. AALCC/XXV/10

In the course of deliberations in the Working Group it was pointed out that draft article 1 on the scope of the articles (i) excluded the navigational uses of such watercourses; (ii) did not establish rules on conservation and management of living resources of international watercourses; and (iii) was non-protective. However though Article 1 of the draft article rightly omitted the question of navigational uses paragraph 2 of draft article 1 touched on the issue by stipulating that the use of international watercourses for navigation uses is not within the scope of present articles except in so far as other uses affect navigation or are affected by navigation. Such an approach gave priority to the draft articles in the application of rules related to mixed use involving both navigation and other water uses simultaneously. To avoid complications it may be preferable to either exclude the navigational issue altogether or to ensure that the problems of mixed use stipulated in paragraph 2 did not fall solely within the scope of the draft articles. It was proposed that the term "protection" be inserted before the phrase "Conservation and management" in paragraph 1 of that draft article to reflect the nature of the measures covered by part IV (Protection Conservation and Management) of the draft articles.

As regards draft article 3 on Watercourse Agreements it was pointed out that while it took into account the possibility that "Watercourse states may enter into one or more watercourse agreements the relationship between such watercourse agreements and the draft articles remained unclear. It is also unclear whether the framework convention would apply only to watercourse agreements concluded prior to the entry into force of the proposed framework convention. The purpose of the framework convention was not to supplement existing agreements but to facilitate their implementation." To eliminate any ambiguity in this regard it was proposed that a separate article entitled "Relation to other International Agreements" be inserted included in the draft articles.

The proposed article, would read "This convention shall not alter the rights and obligations of States that arise from other bilateral, regional or subregional agreements already in force between them"

As to conservation and management of living resources such as fish it was pointed out that the draft articles intended to establish rules on the conservation and management it would have included numerous

regulatory provisions for such activities. The view was expressed that conservation and management of living resources did appear to fall within the broad definitional scope of article 1 paragraph 1. It was proposed that a paragraph be added to draft article 1 to clarify the issue. The proposed addition read "This convention does not apply to the conservation and management of living resources that occur in international watercourses except to the extent provided for in Part IV and except insofar as other uses affect such resources".

As regards the Second cluster of articles, Articles 5 - 10, comprising Chapter II on the General Principles of the draft articles as adopted by the ILC. It was stated that it was important to codify the most recent developments in international law in the area of sustainable development and that the principle of sustainable development should be set forth in that article. The delegates of Finland, Germany, Hungary, Netherlands and Portugal, South Africa, Venezuela shared the view that the principle of sustainable development should be incorporated into the draft articles.

With regard to the third cluster of articles, (Articles 11 to 32) intended to ensure that there was a reasonable flow of information and reasonable opportunities for consultation and negotiation, a view was expressed that the procedure outlined in Part III of the draft articles was too rigid. It was stated in this regard that it would benefit from being flexible, interactive and participatory as agreements between watercourse States could not be expected to coincide with the procedural steps outlined in the drafts articles. Thus one delegate deemed the obligations laid down in that part to be inflexible as in his opinion the obligations concerning notification and information could be interpreted differently by different countries. Others, however, were of the view that this part of the draft articles established some of the least burdensome obligations in the field of environmental law and opposed attempts to narrow the scope of these provisions.

The spirit of compromise among watercourse States might not always be present when a dispute arises, the draft articles should provide for a system of compulsory third-party settlement. Arbitration or other judicial

settlement procedures and should not be subject to further agreement between the States concerned.

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

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

As to Cluster IV (Articles 20 - 28) the articles had been drafted with a view to both dealing with existing pollution and preventing pollution in the future. Article 22 did not deal with the introduction of all alien or new species into a watercourse, but only with those that might have a detrimental effect on the watercourse ecosystem. In article 24, where the concept of sustainable development was introduced, "management" was not obligatory. Articles 25 and 26 stressed the importance of cooperation in regulating water flow and protecting installations.

Despite its best efforts, the Working Group could not in the line allocated complete its consideration of the entire set of draft articles and submitted its report to the Sixth Committee. Following consideration of the Report of the Working Group the General Assembly *inter alia* decided to convene a Second Session of the Working Group of the Whole of the Sixth Committee for a period of 2 weeks from 24 March to 4 April 1977 to elaborate a framework convention on the law of non-navigational uses of international watercourses. It also decided that on the completion of its mandate the Working Group of the whole shall report directly to the General Assembly.³

Pursuant to the aforementioned resolution of the General Assembly adopted at its 51st Session the second session of the Working Group of the Whole of the Sixth Committee was convened in New York from 24 March to 4 April 1997. The AALCC Secretariat was not represented at either of the sessions of the Working Group.

³ The text of the Resolution adopted by the General Assembly at its 51st Session is annexed to this study, along with the methods of work and procedures of the Working Group of the whole.

Resolution adopted by the General Assembly on the Recommendation of Sixth Committee on the Convention on the Law of the Non-Navigational Uses of International Watercourses

The General Assembly

Bearing in mind Article 13, paragraph 1 (a), of the Charter of the United Nations,

Reaffirming its resolution 49\52 of 9 December 1994, by which it decided that the Sixth Committee should convene, at the beginning of the Fifty-first Session, as a Working Group of the Whole to elaborate a framework convention on the law of the non-navigational uses of international watercourses on the basis of the draft articles adopted by the International Law Commission,

Noting that some progress was achieved in the elaboration of the convention, but that the Working Group will need more time to complete its mandate.

1. *Takes Note* of the Report of Working Group of the Whole;
2. *Decides* to convene a second session of the Working Group of the Whole of the Sixth Committee, for a period of two weeks, from 24 March to 4 April 1997 to elaborate a framework convention on the law of the non-navigational uses of international watercourses,
3. *Also decides* that on the completion of its mandate the Working Group of the Whole shall, report directly to the General Assembly,
4. *Further decides* that the provisions of paragraph 5 of resolution 49\52 shall continue to apply, and that the methods of work and procedures outlined in the annex to the present resolution shall be followed.

Methods of work and procedures

1. The Working Group of the Whole shall continue its work building on the work already carried out by the Drafting Committee and the Working Group as reflected in their reports, including the oral report of the President of the Drafting Committee,
2. The Working Group of the Whole shall maintain its Drafting Committee, which shall consider the provisions of the draft articles prepared by the International Law Commission that it was unable to consider in its previous meetings, as well as the draft preamble and the set of final clauses.
3. Other issues arising from the reports referred to in paragraph 1 of the present annex, including, those between brackets and with footnotes shall be discussed in the Working Group of the Whole. The Working Group of the Whole may decide to refer to the Drafting Committee aspects of drafting related to these issues.
4. The Working Group of the Whole shall endeavour to adopt all texts by general agreement. Failing such an agreement within a reasonable period of time, it will take its decisions in accordance with the rules of procedure of the General Assembly.

VII. United Nations Conference on Environment and Development: Follow up

(i) Introduction

The item entitled "United Nations Conference on Environment and Development : Follow-Up," has been considered by the Committee at its 32nd (Kampala, 1993), 33rd (Tokyo, 1994) and 34th (Doha, 1995) Sessions. The Secretariat studies prepared for these sessions focussed on the developments with regard to the implementation of Agenda 21 in general and Conventions on Climate Change, Biological Diversity and Desertification in particular.

At the 35th Session (Manila 1996), the Committee by a resolution directed the Secretariat "to continue to monitor the progress in environmental matters, particularly towards the implementation of Agenda 21 and the Follow-up of the recent environmental conventions" and submit the report to the 36th session. Accordingly, the Secretariat furnishes an overview of the: (a) United Nations Framework Convention on Climate Change; (b) United Nations Convention on Biological Diversity and (c) United Nations Convention to Combat Desertification.

Thirty-Sixth Session: Discussions

The Deputy Secretary General Mr. Tohru Kumada introduced the paper which provided an overview of the recent developments in the field of environmental law, particularly the Framework Convention on Climate Change, Convention on Biological Diversity and the Convention to Combat Desertification. He called that this item had been on the agenda of AALCC since its Kampala Session whereby the Secretariat was asked to monitor the developments related to the implementation of Agenda 21, particularly the three Conventions.