

which were under consideration by the ILC. A view was expressed, on the other hand, that the AALCC could initiate studies relating to regional system agreements concerning the international rivers. However, some Member Governments were of the view that the AALCC should await the finalization of the ILC's work, in order to avoid duplication of work and they were also keen to follow the progress of work in the ILC. In order to accommodate all these views, the AALCC decided to continue the study in the following areas: (a) to identify the areas which were not likely to be covered by the work of the ILC and where it was deemed desirable for the AALCC to undertake a study; (b) to examine the Articles provisionally adopted by the ILC; and (c) to submit a tentative programme of work for the consideration of the Committee.

During the Twenty fourth session, in Kathmandu (Nepal, 1985) the AALCC considered the Secretariat's preliminary report which *inter alia*, indicated five areas for consideration, namely (i) an examination of the draft articles after they were adopted by the ILC and to furnish comments thereon for consideration of the Sixth Committee and possibly before a diplomatic conference; (ii) development of norms and guidelines for the legal appraisal of the validity or otherwise of any objection that may be raised by one Watercourse State in relation/regard to projects sought to be undertaken by another Watercourse State; (iii) study the matter relating to navigational uses and timber floating in international watercourses; (iv) study of other uses of international rivers such as agricultural and navigational purposes; and (v) study of state practice in the region of user agreements and examining the modalities employed in the sharing of waters such watercourses as the Gambia, Indus, Mekong, Niger and Senegal.

The AALCC Secretariat continued to monitor the ILC deliberations and presented a report on the ILC's progress of work for the consideration of the Committee at its Twenty-fifth Session (Arusha, 1986). At that Session it was decided that the consideration of this item be confined to the monitoring of the work done by the ILC. At the subsequent Sessions held in Bangkok (1987), Singapore (1988), Nairobi (1989) Beijing (1990) and Cairo (1991) the AALCC Secretariat presented studies which were accordingly confined to the examination of draft articles adopted by the ILC. During the Thirty-first Session (Islamabad, 1992) the Committee considered the Secretariat study

analyzing the ILC draft articles adopted by the Commission on first reading. The Thirty-second Session (Kampala, 1993) considered a study entitled, "The Law of International Rivers: A Preliminary Study Relating to River System Agreements". The Committee then directed the secretariat to examine crucial areas relating to the utilization of freshwater resources.

It may be recalled that the Commission adopted at its Forty eighth session whilst adopting a set of draft articles on second reading also adopted a resolution concerning confined ground waters, that is groundwater not related to an international watercourse, whereby it recognized the need for continuing efforts to elaborate rules pertaining to confined transboundary groundwater and expressed the view that the principles contained in its draft articles on the law of non-navigational uses of watercourses may be applied to transboundary confined groundwater. The resolution recognized that confined groundwater, was also a natural resource of vital importance for sustaining life, health and the integrity of ecosystems. Accordingly, the AALCC Secretariat presented to the Thirty-third Session held in Tokyo in 1994 a study, entitled, "The Law of International Rivers: Normative Approaches to the Sustainability of Freshwater Resources". That brief of documents had dealt with the legislative measures both at the national and international level, to preserve freshwater resources.

The Committee at that session (1994) after consideration of the Secretariat brief of documents expressed its concern at the growing misuse of freshwater resources which constituted only 2 per cent of the global water resources. It also noted with satisfaction the progress of work on the item "Non-navigational Uses of International Watercourses" during its second reading in the ILC.

The Secretariat brief for the 34th Session (held in Doha, Qatar) 1995 furnished a summary and comments on the draft articles adopted by the ILC after completing the second reading: The major part of the ILC discussion and disagreement stem from the extent and definition of "unrelated confined groundwater".

The Secretariat brief had also drawn attention to the resolution on "Draft Articles on the Law of the Non-navigational Uses of International

Watercourses" adopted by the General Assembly at its 49th Session whereby it had, among other things, taken note of the existence of a number of bilateral treaties and regional agreements and also invited States to submit, not later than 1 July 1996, written comments and observations on the draft articles adopted by the ILC. Further, Resolution 49\52 of 8 December 1994 of the General Assembly had also decided that at the beginning of the 51st session, the Sixth Committee should convene as a Working Group of the Whole, for three weeks 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 ILC. The Working Group of the Whole was to be open to States Members of the United Nations or members of Specialized Agencies, and fulfilment of its mandate was, apart from the draft articles adopted by the ILC, take into consideration the written comments and observations of States and views expressed in the course of the debate at the forty-ninth session of the General Assembly.

The AALCC at its Thirty-fourth Session *inter alia*, commended the ILC on the adoption of the draft articles on the Non-navigational uses of International Watercourses and urged Member States to consider utilizing the Secretariat Studies and commentaries in furnishing before July 1996 their comments and observations on the draft articles to the United Nations. The Committee requested the United Nations General Assembly to consider adopting a 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 and the comments made thereon by the Member States. It also directed the AALCC Secretariat to report to the 36th Session of the Committee of the outcome of the consultations at the Fifty-first Session of the General Assembly.

The Secretariat study prepared for the Thirty sixth Session held in Tehran, in May 1997, among other things recounted the history of consideration of the item by the Committee and furnished an overview of the work of the Working Group of the Whole on the Draft Framework Convention on the Non Navigational Uses Of International Watercourses established by the Sixth Committee.

The Committee at that session took note of the Secretariat report. At the request of the Delegate of Bangladesh the Committee directed the Secretariat to continue to monitor the progress in respect of the Framework Convention on the Non Navigational Uses Of International Watercourses as adopted by the Working Group of the Whole established by the Sixth Committee.

Thirty Seventh Session : Discussion

The Assistant Secretary General Mr. Asghar Dastmalchi introduced the above topic and stated that the item "Law of International Rivers" had been on the agenda of the Committee since 1966, following a reference made to the Committee at the Eighth Session by the Governments of Iraq and Pakistan. Subsequently, a reference was made to outline the areas which needed closer scrutiny namely (a) definition of the terms "International Rivers", and (b) rules relating to utilization of waters of International Rivers by the States concerned for agricultural industrial and other purposes not connected with navigation. A Sub-Committee had been constituted at the Tenth session to prepare draft articles on this item in the light of experience of the countries of Asia and Africa and reflecting the high moral and juristic concepts inherent in their own civilization and legal systems. However, these draft articles could not be finalised due to lack of consensus on some of the provisions. Meanwhile, the International Law Commission was actively engaged in considering this topic and it was therefore decided that Committee defer the examination of the topic.

Thereafter in 1983 at the Tokyo Session, this item was again placed on the agenda of the Committee at the request of the Government of Bangladesh. In its request the Government of Bangladesh had suggested that the Committee could resume the consideration of the item excluding the areas which were under consideration by the ILC. Following this request, the AALCC Secretariat undertook the preparation of a number of briefs of documents for consideration at the sessions of the Committee.

Upon a decision taken at the 25th Session of the Committee, (Arusha, 1986) the Secretariat confined itself to monitoring the progress of the

ILC. Accordingly, the Secretariat prepared studies analysing the ILC draft articles till the 31st Session. It may be mentioned that at the 32nd Session of the AALCC held in Kampala following the consideration of the brief on River System Agreements the AALCC directed the Secretariat to examine crucial areas relating to the utilization of freshwater resources.

The item was also considered at the 36th Session of the AALCC held in Tehran in 1997. The brief, among other things, recounted the history of consideration of the item by the Committee and furnished an overview of the work of the Working Group of the Whole on the Draft Framework Convention on the Non Navigational Uses of International Watercourses.

At the 36th Session Ambassador Chusei Yamada, the Chairman of the Working Group of the Whole had reported that the Working Group had concluded its work and agreed on the text of the draft convention on the subject. The Committee at that session took note of the report prepared by the Secretariat and at the request of the Delegate of Bangladesh, directed the Secretariat to continue to monitor the progress in respect of the Framework Convention on the Non Navigational Uses of International Watercourses as adopted by the Working Group of the Whole established by the Sixth Committee.

The Assistant Secretary General also stated that the Convention aimed at guiding States in negotiating agreements on specific watercourses was adopted by the General Assembly by its resolution 51/229 of 21 May 1997. By a vote of 103 for 3 against and the 28 abstentions the General Assembly *inter alia* invited States and regional economic integration organizations to become parties to it. The Convention shall be open for signature by all States and by regional economic integration organizations until 20th May 2000 at the United Nations Headquarters in New York.

He also said that the Convention governs the non-navigational uses of international watercourses, as well as measures to protect, preserve and manage them. "Throughout the elaboration of the draft Convention, reference had been made to the commentaries to the draft articles prepared by the International Law Commission to clarify the contents of the articles. It may be

stated in this regard that the work of the Commission on the International Watercourses has had a major influence on the development of law in other fields, in particular, the ongoing work of the International Law Commission on the subject of "International Liability for Injurious Consequences Arising Out of Acts Not Prohibited by International Law". The draft articles on the Non Navigational Uses of International Watercourses as adopted by the International Law Commission have influenced the drafting of such specific agreements as the 1995 Protocol on Shared Watercourse Systems in the South African Development Community Region and the 1995 Agreement on the Cooperation for the Sustainable Development of the Mekong River basin.

Outlining some of the salient features of the Convention he stated that the preamble to the Convention, *inter alia*, expresses the conviction that a "framework convention will ensure the utilization, development, conservation, management and protection of international watercourses and the promotion of the optimal and sustainable utilization thereof for present and future generations."

Viewed as a framework Convention, it provides general principles and rules to guide States in negotiating future agreements on specific watercourses. It is understood, however, that the Convention is to serve as a guideline for future watercourse agreements and unless such future watercourse agreements provide otherwise the Convention will not alter the rights and obligations provided therein. The concept of preservation as referred to in Article 1 of the Convention, relating to the "Scope of the Convention", is understood to include also the concept of conservation. The Convention addresses such issues as flood control, water quality, erosion, sedimentation, saltwater intrusion and living resources' "One of the many statements of understanding that the Chairman of the Working Group of the Whole took note of during the course of elaboration of the Convention on the Law of the Non-Navigational uses of International Watercourses is that the Convention is inapplicable to the use 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 sources.

The Convention defines the term "Watercourse" broadly as a system

of surface waters and ground waters constituting by virtue of their physical relationship a unitary whole and flowing into a common terminus" and then goes on to define an international watercourse to mean a "watercourse parts of which are situated in different States". While this definition is in accord with hydrological reality and calls the attention of States to the inter-relationship among all parts of the system of surface and underground waters that make up an international watercourse and suggesting thereby that an affect on one part of the watercourse system would be transmitted to the other, two States cited the inclusion of groundwater as a reason for abstaining from the vote on the draft Convention.

Article 2 of the Convention defines the term watercourse State" to mean a State Party to the Convention "in whose territory part of an international watercourse is situated, or a Party that is a regional economic integration organization, in the territory of one or more of whose Member States part of an international watercourse is situated". In the Working Group of the Whole it was understood that the term "watercourse States" is employed in the Convention as a term of art. "It was recognized that although it is stipulated that both States and regional economic integration organizations can fall within the definition nothing in that paragraph could be taken to imply that regional economic integration organizations have the status of States in international law.

Finally, he stated that, the adoption of the Convention, had made a significant contribution to the progressive development of international law and its codification. Such elements of the Convention as equitable and reasonable utilization, no harm, and prior notification reflect the codification of some existing norms.

The Delegate of India while commenting on the framework Convention on NonNavigational uses of Inteniational Watercourses as adopted by the Working Group on the Whole established by the Sixth Committee stated that the status of the convention can be compared at best with a Model Legislation which is available for utilization according to each States own particular requirements. In his view this Framework Convention is not a properly balanced piece of legislation. He specifically commented on Articles 3, 5, 32

and 33., Article 3 he felt had deviated from the principle of freedom of autonomy. Article 5 had not been drafted in clear terms, and would thus present difficulties in implemenation of the Convention. Article 32 according to him presupposes economic integration of States, and should not have been included in the Convention. His most substantive comment was on Article 33 which dealt with the dispute settlement mechanism, according to him the creation of a fact finding commission, curtailed to a large extent the option by which parties could mutually agree upon who could settle their disputes and in effect this third party dispute settlement would in effect be a settlement without (the consent of the States Parties to the dispute. On ground of Article 33 his country had abstained from voting for the Convention. The Delegate expressed the view that now when the United Nations had adopted the framework Convention, there was no need for tile AALCC to study the subject any further.

The Delegate of Nepal congratulated the President and Vice President on their election and thanked the Government of India for hosting the 37th Session of the Committee. He also paid tribute to Dr. M. Javad Zarif for his excellent contribution as President for the 36th Session. While supporting the views of the Delegate of India he said that the Convention had not gained wide support from the U.N. Member States and this was clear due to the fact that only 103 States had voted for the convention. The number of ratifications required for the convention to come into force was 35 which meant only 18% of the total membership of the UN. Thus he felt there was need for the Asian African States to be very cautions while becoming parties to the Convention.

The Delegate of Egypt supported the views expressed by Indian Delegate and said that any framework convention \ agreement provided only guidelines to Member Countries to be able to conclude bilateral or multilateral agreements. He agreed witli the views expressed by the Delegate of Nepal and cited his country's reason for abstention from the convention, they were also based on Articles 3, 5 and 33. He expressed the view that as the Framework Convention had been adopted, for the present, he did not see any further role for the AALCC. But if need arose in future, he felt, the subject could always be studied again.

The Vice President while summing the debate on the item stated that because a Framework Convention had been adopted, it was for each Member State to take its position individually. Therefore it was decided to remove the item from the agenda.

(ii) **Decision on the "The Law of International Rivers"**
(Adopted on 18.4.98)

The Asian-African Legal Consultative Committee at its Thirty-Seventh Session

Taking note of the Report of the Secretary General on the item "Law of International Rivers" set out in Doc.No. AALCC/XXXVII/New Delhi \98\ S.8;

Having heard the comprehensive Statement of the Assistant Secretary General

Taking cognizance of the resolution of the General Assembly adopted at its 51st Session on the Convention on the Non-navigational Uses of International Watercourses;

1. **Commends** the General Assembly for having adopted the Convention on the NonNavigational uses of International Watercourses;
2. **Expresses appreciation** for the work of the Secretariat on the item;
3. **Decides** to conclude the work on the subject.

(iii) Secretariat Study : Law of International Rivers

The Working Group Of The Whole

It may be recalled that the General Assembly at its 49th Session 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 nonnavigational uses of international watercourses, had decided that at 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 that session the General Assembly also decided that the Working Group of the Whole follow the methods of work and procedures outlined in the Annex to its 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 (hereinafter simply referred to as the Group). The Assembly had recommended that the Group 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, and to reserve its decisions on draft article 2 "Use of terms", 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.

In accordance with paragraph 3 of resolution 49\52 the Sixth Committee at its 51st 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 Lammers (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 place at the Committee table as an expert consultant.

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. Following informal consultations with the representatives of the Permanent Missions to the United Nations, convened by the Legal Counsel, it had been agreed that to facilitate the work of the Working Group no simultaneous meetings of the Working Group and the Drafting Committee should be held.

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 ILC 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 the "**Protection, Preservation and Management**" of Non-Navigational Uses of International Watercourses were set out in draft articles 20 to 26 and

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

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 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 of the AALCC in 1986, apart from commenting on the draft ILC articles the Secretariat has been preparing studies on the 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. This cluster of draft 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 the Tokyo (1983) session: The Law of International Rivers: Normative Approaches to Sustainability of Fresh Water Resources (Tokyo, 1994) The Law of International Rivers: A Preliminary Study Relating to River System Agreements (Kampala, 1993) The Law of International Rivers (Islamabad, 1992) The Law of International Rivers: A Preliminary Report and an outline on Tentative Programme of Work (Arusha, 1986)

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 be included in the scope if “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 uses 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 of the draft articles relating to the protection, conservation and management of international watercourses

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 i.e. the draft framework convention remained unclear. It was 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 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 had the draft articles intended to establish rules on the conservation and management it would have included numerous regulatory