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Codifying the minimum standards of the law of international watercourses: remarks on part one and a half

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This article discusses the attempts by the Working Group of the UN General Assembly's 6th Committee, which held its first session from 7 to 25 October 1996, to elaborate a framework convention on the Law of the Non-navigational Uses of International Watercourses. The Convention is based on the 1994 draft articles by the International Law Commission, and is intended to have a residual character. As such it will apply to States parties in the absence of specific watercourse agreements, and serve as a guideline. However, the persistence of a fragmented defence of short-term national self-interest on the part of many delegations prevented the finalization of a universal legal instrument in the first round of the negotiations. The major stumbling blocks relate to the natural adversarity between "upstream" and "downstream" riparians. Deep seated conflicts of interest were particularly prominent in discussions of concepts such as the "equitable utilization principle" vis-à-vis the "no-harm rule" (art. 7), the concept of "optimal utilization" (art. 5); the determination of when a particular use is "equitable and reasonable" (art. 6); constraints on the freedom of exploitation of natural resources (art. 7); and the obligation to notify co-riparians of planned measures which may have adverse effects upon other watercourse states (arts. 11–19). Despite many obstacles, the Working Group made considerable progress in identifying language that would balance respective interests in the Convention. It is hoped that agreement may be reached on the final text during the next session, scheduled for 24 March–4 April 1997 While the present article traces the deliberations at the UN in October 1996, and some of the main conflicts, a separate article by Maurizio Arcari in the forthcoming August 1997 issue of Natural Resources Forum will discuss the draft articles submitted by the International Law Commission. © 1997 Published by Elsevier Science Ltd

Water is best

Pindar, Olympian Odes, I

With a view to establishing a framework convention, the Working Group of the 6th Committee of the United Nations General Assembly (WG)[1] debated the draft articles on the Law of the Non-navigational Uses of International Watercourses, adopted by the International Law Commission (ILC) (see the following paper of "Draft Articles") in October 1996. However, the Working Group could not complete its discussion within the three weeks allotted. Therefore, as this goes to press a final text had not yet been submitted to the General Assembly for adoption in the form of a framework convention (Nussbaum, 1997). This fact may corroborate the pessimistic view that prospects for environmental multilateral treaty-making are indeed gloomy, given the present international law-making framework, the serious conflicts of principle in the way of global cooperation, the split between developed and developing countries, the persistence of short-term interpretations by governments as to what constitutes the national interest of sovereign states, and the apparent absence of any immediate incentives to engage in serious negotiations for a universal treaty regarding international watercourses (Susskind, 1994).

In the discussions of the Working Group, the disagreements between upstream and downstream riparian countries added to the above obstacles. Indeed, to a great extent, differences during the debate

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[1]The Sixth Committee Working Group of the Whole for the Elaboration of a Convention on the Law of the Non-Navigational Uses of International Watercourses, 7–25 October 1996, established by General Assembly resolution 49/52 (1994).

were prompted by defensive tactical considerations against the backdrop of pending bilateral, or regional, conflict scenarios. Most probably, certain extreme proposals were put forward for tactical reasons, so as to offset proposed amendments in the opposite direction. However, the general trend of the discussion demonstrated the growing awareness of delegations of the crucial importance of the subject, despite their caution in moulding the general legal principles that should apply in the absence of more specific agreements and provide a frame of reference for future negotiations. It also emerged that, on a great many points where the positions of delegations were most divergent, the ILC text, which had been indicated in the mandate of the General Assembly as the basis for discussion, was close to the centre. This fact prompted some optimism with regard to the outcome of the second session of the WG, scheduled to be held from 24 March to 4 April 1997.

In the light of the above considerations, it may be asked whether the objectives of codification and progressive development of the law on international watercourses would not have been better served by the elaboration of model rules or guidelines. This would seem particularly appropriate in a field where international law appears to serve more usefully as a frame of reference for negotiations rather than for adjudication or arbitration (Jiménez de Aréchaga, 1978; Benvenisti, 1996).

It is hoped that the impact of the future Convention on the general principles of international law in this domain will not be less than if they were set out in the form of model rules or guidelines. In fact, developing "upstream" countries that now have advantageous bilateral watercourse agreements with neighbouring countries are reluctant to tie their hands with a global convention—and even more reluctant if they have no such agreement, particularly if they are in the process of undertaking major water development programmes. Even though some countries may have no intention of becoming party to a global convention, they are nevertheless taking active part in its negotiation, with a view to reducing its legal force and the scope of its obligations. This attitude may be based on the fact that a conventional rule, corresponding to general customary law, also binds States not parties to the Convention. As indicated above, the draft convention currently under review undoubtedly purports to evidence the general law of international watercourses to an important extent. When a codification convention receives only few ratifications, this may impair the customary rules evidenced by it—although not necessarily so (Villiger, 1985). This preoccupation could be less acute with respect to model rules adopted in an instrument *per se* not legally binding, comparable to a General Assembly resolution. The normative impact of model rules declaratory of customary law would not be very dissimilar to that of a general convention. The same applies to the creation of new customary law by conventional or model rules pertaining to the progressive development of international law (Villiger, 1985, p. 192).

The common interest relevance of the codification exercise underway

As mentioned above, the divergences in the debate to a great extent paralleled conflicting positions taken by States that share common watercourse systems. With few exceptions, the basic environmental policy differences among delegations, particularly between those representing developing States and those of highly industrialized countries, also reflected an upstream vs downstream frame of mind. The persistence of short-term self-interests prevented the successful outcome of the first round of the negotiations of the Working Group. For the chances to have a multilateral treaty on the use, preservation and management of an essential natural resource, as well as the compliance with it, depend on the degree to which such a treaty is perceived to embody the common interest (Fawcett and Parry, 1981). The serious impact of problems related to the utilization of watercourses on the common interests of an increasingly interdependent world community, such as global food security, is now widely recognized (Postel, 1995). From this perspective, non-watercourse States are also deemed to have a national interest in an environmentally satisfactory outcome of the negotiations for a universal instrument that lays down minimum international standards on the subject. Indeed, the success and effectiveness of the law-making process under review will greatly depend on the recognition that common interest factors (Arsanjani, 1981) are no less important to the national interest of a country than leverage exerted on a neighbouring country.

On the assumption that common interest considerations will stand out more strongly in the remaining phases of the negotiations, we will briefly examine a few of the most controversial issues debated during the first session of the Working Group.

The normative role of the future framework Convention

With a fair amount of flexibility and in conformity with the general rules on the application of successive treaties relating to the same subject, the ILC had followed a two-pronged approach with regard to the normative functions of the future framework Convention. On the one hand, the Convention was intended to have a residual character, in the sense that it would apply to States parties in the absence of specific watercourse agreements. On the other hand, it was designed to serve as a guideline for the negotiations of future agreements (ILC, 1994, p. 207).[2] This is reflected in the language of ILC art. 3 (see 'Draft Articles'), whereby States parties are expressly left free to conclude specific agreements "which apply and adjust the provisions of the [Convention] to the characteristics and uses of a particular watercourse or part thereof".

Some delegations requested, from different motivations, that the text should include explicit

[2]Hereinafter "the ILC Report".

provisions as to the exact normative impact of the Convention on existing, as well as future, agreements. This question was clearly of crucial importance, and the ensuing discussion was among the most heated, taking up a considerable portion of the time allotted to the Working Group.

As to the relationship between the Convention and existing agreements, there was indeed reason to consider explicitly the co-ordination between the *lex posterior* and the *lex specialis* rules in this case. While the 1969 Vienna Convention on the Law of Treaties (art. 30, 2) seems to give priority to the former, international case-law favours the latter (Czaplinsky and Danilenko, 1990).

The delegations of Argentina, Egypt, France, India, Pakistan, Switzerland and the U.S.A., proposed that a specific provision should be inserted that the rights and obligations arising from existing agreements should not be affected by the Convention. Others, including Ethiopia, Finland, Portugal, Sudan and Uganda, insisted that, where existing agreements were in conflict with the basic principles of the framework Convention, a provision should be included that States parties to both treaties were under obligation to eliminate such contradictions, along the lines of art. 9, para. 1, of the UN ECE Convention on the Protection and Use of Transboundary Watercourses and International Lakes (United Nations, 1992).[3] As a compromise, a new para. 1 was added to art. 3 which stated that, in the absence of an agreement to the contrary, the Convention will have no bearing on existing agreements, whereas a new para. 2, still in brackets, would provide that states "... [should] [may], where necessary, consider harmonizing such agreements to the basic principles of the present Convention" (United Nations, 1996c, CRP 10, Proposal by Italy).[4]

Article 3 as it appears in the Report of the Drafting Committee (United Nations, 1996a), contains, in brackets, the first paragraph of the proposal submitted by Egypt (CRP 29) specifying that the Convention will not affect the "acquired rights" deriving from existing agreements or customs. Even though this proposal was received with some perplexity as to its conceptual and terminological soundness, its theoretical origin may be founded in the common law theories on prior appropriation or vested rights (Caponera, 1993). Such theories were in practice upheld in the 1929 Agreement on the river Nile between Egypt and Sudan (U.K.), and to a great extent also in that of 1959. Nevertheless, as in the 1958 Geneva Conference on the Law of the Sea, when the U.S. delegation had proposed the inclusion of a provision applying the same principles with regard to fishing rights on the high seas, the Egyptian proposal did not command support.

With due respect for the vital interests involved, crystallizing the legal position of third countries on the basis of bilateral treaties concluded at a time when technological and economic circumstances were essentially different, could run counter to the principle of the equitable apportionment of water resources. Even art. 8, para. 1, of the 1966 Helsinki Rules does not give unqualified priority to an existing beneficial use. On the contrary, the legitimate continuance of such a use is subordinated, not only to its reasonable nature, but also to "other factors leading to the conclusion that it be modified or terminated so as to accommodate a competing incompatible use".

The question may remain whether compensation is due, and if so to what extent, for the loss resulting from the displacement of previous uses. Since the new use would not necessarily be wrongful as such, one would not primarily think in terms of reparation or full compensation. In the Indus River case, settled with the mediation of the World Bank, the State developing new uses (India) paid compensation that was not calculated according to the loss suffered by the prior user (Pakistan), but on the basis of the benefits accruing to the former (Jiménez de Aréchaga, 1978, 196 f.).

Compulsory consultation when similar situations arise is appropriately provided for in art. 7, para. 2, subpara. (b), of the ILC text (see 'Draft Articles'), leaving of course unprejudiced the questions of international responsibility and of the other means for peaceful settlement of disputes, including those provided for in art. 33 of the draft, and of the liability of private entities. This compulsory consultation mechanism would also be consistent with the approach followed by the ILC in its current work on International Liability for Injurious Consequences Arising from Acts not Prohibited by International Law (ILC, 1996, p. 238).

As to the bearing of the Convention on the negotiation of future watercourse agreements, the present ILC formula in art. 3 leaves States parties free to conclude special agreements "which apply and adjust" the Convention to the characteristics of a particular watercourse. This was deemed less than fully satisfactory by some delegations both in terms of qualifying the principle of contractual freedom and the guideline function of the Convention. Some of those delegations, including Ethiopia, Finland, Germany, Iraq, the Netherlands, Portugal, Syria, Tanzania, Uganda and Vietnam, requested the insertion of language that would forbid States parties to conclude future watercourse agreements at variance with the basic principles of the Convention. In certain cases, this position—intended to give maximum binding effect to the Convention—was taken by countries that felt that the they would improve their position with respect to unsatisfactory special agreements or (in the absence of such agreements) the pressure from more developed co-riparian states. In other cases, the same stand was taken with a view to enhancing the normative effect of the provisions of Part IV concerning preservation and joint management of watercourses and related ecosystems.

The above position was opposed by other delegations, e.g. Argentina, the Czech Republic, Egypt, France, Israel, South Africa, Switzerland, Turkey and the U.S.A., who insisted on maintaining an explicit reference to the possibility for future watercourse agreements to depart from the Convention. A

[3]Drawn up at Helsinki on 17 March 1992. See International Legal Materials (1992, Vol. 31, 1312).

[4]Conference Room Papers produced during the Working Group session bear the UN document symbol, e.g. A/C.6/51/NUW/WG/CRP 10, and are hereinafter referred as CRP # (with respective number).

compromise solution, which could not be formulated due to time constraints, proposed to keep art. 3, para. 1, of the ILC draft as it now stands, whereas the summary records would state that the general understanding is that the framework Convention will serve as a guideline for the negotiation of future agreements, while, once such agreements are concluded and unless they provide otherwise, the rights and obligations provided therein will not be affected by the Convention. Such a compromise was the result of informal negotiations conducted over virtually the entire three weeks of the Working Group session and was agreeable to nearly all delegations.

An argument objecting to the Convention having any normative autonomy at all, may be worth considering briefly. According to the delegate from France, the fact that the future instrument is defined as a Framework Convention—even though not so defined in the title—implies that its substantive provisions would apply only insofar as expressly incorporated, or referred to, by special agreements. This would be tantamount to denying the Convention's residual character.

The term "framework", when applied to a Convention, seems to have a purely descriptive meaning, but no normative implications. Indeed, it should be noted that this expression appears nowhere in the 1969 Vienna Convention on the Law of Treaties. It is true that there are a great many conventions, particularly in the field of environmental protection, that are defined as framework conventions (by scholars or in their own language) and that contain provisions that need to be supplemented by further agreements, or protocols, translating the general principles enunciated into concrete rules (Kiss, 1993). However, it is only on account of their contents that the rules of a particular convention may not be suited to concrete application; whereas, the very nature of the future Convention is such that it can materially apply to international watercourses, even if co-riparians remain free to conclude specific agreements applicable to specific watercourses.

The balance between the equitable utilization and participation principle and the no-harm rule

The discussion on the main general principles governing the uses of international watercourses prompted no less impassioned a debate. However, some readiness was detectable on the part of "environmentalist" delegations to codify minimum standards—somewhat less stringent than those of the most advanced bilateral or regional instruments in the field, e.g. as the Helsinki Convention of 1992 (United Nations, 1992).

If views among scholars diverge as to whether the equitable utilization principle in the final ILC text prevails over the no-harm rule, or vice versa,[5] delegations did not appear to be much clearer on this point. However, they certainly knew their immediate national interest. Consequently, some found the temptation overwhelming to introduce proposals that would give prominence to one principle or the other, in support of their country's position. The various amendments of opposite tenor put forward in the Working Group, tend to confirm that art. 5 to 7, as submitted by the ILC, are very close to a reasonable compromise between the conflicting rights of equal value that are involved. Therefore, from a realistic perspective, it is hoped that amendments further qualifying either of the two principles will not significantly alter this delicate balance.

Proposals for amendments have been put forward for each of the three articles under consideration, but it is especially the proposed modifications to art. 7 that would have most impact on the balance between the two principles at issue. Discussion of art. 7 was left open after the first session of the Working Group. However, from a contextual consideration of the provisions at hand, and considering the likelihood that the other parts of the text will not undergo major changes, the margins for alteration of the said balance seem rather restricted.

No doubt, arts. 5 to 7 represent a normative package, but one which is part and parcel of the whole text of the future Convention. A close link is clearly found between the articles in hand and Part IV (arts. 20–26) which sets out the obligations of protection, preservation and management of international watercourses. It would not be appropriate to consider the latter set of rules as pertaining exclusively to pollution, and arts. 5 to 7 as referring basically to apportionment of freshwater, as the interdependence between water quality and quantity is well-known. A decreased flow in the river leads to a reduced capacity of the water to absorb pollutants, and conversely, pollution may restrict the uses of the watercourse (Gaja, 1973). This is in line with the concept of pollution defined in art. 21 as "any detrimental alteration in the composition or quality of waters of an international watercourse which results directly or indirectly from human conduct". Furthermore, as it cannot be denied that a watercourse is its own ecosystem, the general obligation of protection and preservation of ecosystems of international watercourses, set out in art. 20, would apply to situations covered by arts. 5 to 7, and the latter could be interpreted in the light of the former.

The need to establish a linkage between the core rules in arts. 5 to 7 and other rules in the Convention, particularly those in Part IV, should be seen from the perspective of drafting history. In fact, when the ILC started working on the subject, more than 20 years ago, the main preoccupation was the question of equitable apportionment of freshwater. Consideration of problems of pollution entered the picture at a later stage, and this was reflected in the drafting of the text.

The debate on the principle of equitable and reasonable utilization and the participation principle in arts. 5 and 6

Apart from numerous general statements of principle on art. 5, what gave rise to most of the controversy over this provision was the concept of "optimal utilization" to the effect that "an international watercourse shall be

[5] While Benvenisti (1996), p. 404), contends that the text gives priority to the equitable and reasonable principle over the no-harm rule, M. Fitzmaurice (1995, p. 370) maintains the contrary, with some qualifications.

used and developed by watercourse States with a view to attaining optimal utilization thereof and benefits therefrom consistent with adequate protection of the watercourse". Delegations including those of Austria, Canada, Finland, Greece, the Netherlands, Portugal and Venezuela, proposed that the concept of optimal utilization should be qualified in accordance with the principle of sustainability. On this score, Syria proposed to add a new paragraph which would incorporate the language of the commentary of the ILC, indicating that the reference to optimal utilization is not meant to legitimize the idea that the State capable of the most technologically efficient, or monetarily valuable use of a watercourse should have a superior claim to its use.[6]

It was also proposed that the ecosystem approach adopted in art. 20, which opens up Part IV on protection, preservation and management, should be expressly reflected in the language of art. 5.[7] A drafting proposal, reflecting in rather minimalist terms the above requests, appears in brackets in the provisional text of art. 5 as contained in the Report of the Drafting Committee (United Nations, 1996a), with the words "and sustainable" inserted between "optimal" and "utilization", while the words "and its ecosystems" would be added at the end of the sentence, i.e. after "consistent with adequate protection".[8] The latter addition was meant to represent a compromise formula with respect to the most extensive proposal: "and related ecosystems".[9]

The above discussion was closely linked to that on para. 2 of art. 5 which spells out the principle of equitable participation in the use, development and protection of international watercourses. This provision constitutes a systematic application of the general principle of co-operation, codified in art. 8, and further specified through Parts II, IV and V. Article 5, para. 2 is intended to balance the implementation of the principle of equitable utilization in combination with that of optimal utilization for all parties concerned. That is to say that, when the unrestricted use of a particular watercourse by one State is in conflict with uses of co-riparians—which is virtually always the case—all states involved have an obligation, and the corresponding right, to work out an equitable, possibly preventive, solution in a co-ordinated manner. In the light of this interpretation, one perceives possible tactical motives behind both the above Syrian proposal to add a new paragraph to art. 5, and the proposal by Turkey that art. 5, para. 2 should be deleted altogether.[9]

Negotiations on art. 5 were also inextricably linked to those on art. 6, which spells out the criteria for determining when a particular use is equitable and reasonable. In this context, again, the element of sustainability was brought up (CRP 18).[11] Eventually, a compromise will most likely be found for the inclusion of this concept, already generally accepted in other fora, either in arts. 5, or 6, as a determining factor in the assessment of whether a particular utilization is equitable and reasonable.

The criticism that the human rights dimension connected with the utilization of freshwater has been somewhat neglected by the ILC (Benvenisti, 1996), may seem to be justified with regard to art. 6. This article makes no mention of human rights, except for a general reference to "the social and economic needs of the watercourse States concerned", in para. 1 (b). Nevertheless, the Expert Consultant, Mr Robert Rosenstock, reminded delegations that art. 6 should be interpreted in conjunction with art. 10, para. 2, according to which a conflict between different uses will be resolved "[···] with special regard being given to the requirement of vital human needs". In the ILC commentary to this provision, it is further explained that "special attention is to be paid to providing sufficient water to sustain human life, including both drinking water and water required for the production of food in order to prevent starvation" (ILC, 1996, p. 257). The introduction of this element in art. 10, on conflicting uses of an international watercourse, rather than in art. 6, concerning the factors for the assessment of the equitable and reasonable use, could be seen as a way of treating an important question in an ancillary context. This consideration is partly tempered by reference to the interpretive argument noted above, that arts. 5 to 7 should be read in conjunction with other parts of the Convention, especially with Part IV. Indeed, art. 21, in setting out the general obligations of prevention, reduction and control of pollution, makes express reference to "harm to human health or safety". Moreover, in its commentary on art. 7, the ILC plainly states that "[a] use which causes significant harm to human health and safety is understood to be inherently inequitable and unreasonable" (ILC, 1996, Commentary to Art. 7, para. 14, p. 242). In this instance, as in others, the relevance of the ILC commentary as a supplementary means of interpretation, in accordance with art. 32 of the Vienna Convention on the Law of Treaties, should not be underestimated. Nonetheless, the Finnish delegation proposed that the following language should be added in the chapeau of art. 6: "[s]pecial regard should be given to vital human needs" (CRP 18). The fact that the above wording was proposed for the chapeau, rather than under letters b, or c, indicates that this element was intended to be given priority with respect to other factors and types of uses, which should be considered on the same footing. Other proposals included the reference to human needs on a par with the other factors listed in art. 6 (CRP 28).[12]

Another proposal, which is still on the table after the

[6]This proposal was reiterated through a more succinct formula in Conference Room Paper 41 (United Nations, 1996c, CRP 41) (hereinafter CRP). Along similar lines, see also the proposal put forward by Iraq in CRP 13.

[7]See, in particular, the proposal submitted by the Netherlands in CRP 11 to the effect that the words "and related ecosystems based on the sustainable development principle and precautionary principle" should be added at the end of art. 5, para. 1.

[8]Proposal submitted by Canada, Germany, Italy, Romania and the U.S.A. (CRP 35).

[9]See the Dutch proposal cited above (CRP 11).

[10]Author's notes.

[11]See, especially, the proposal of amendment of the chapeau of art. 6 submitted by Finland (CRP 18).

[12]See the proposal by India that would basically circumscribe the factor in hand to the domestic dimension of water and food requirements, apart from drinking.

first session of the Working Group, purports to add the precautionary approach as one of the factors in the indicative list of art. 6, para. 1 (CRP 35). This would simply be an adaptation to the specific domain of international watercourses of the principle enunciated in the 1992 Rio Declaration, that "[w]here there are threats of serious or irreversible damage, lack of full scientific certainty shall not be used as a reason for postponing cost-effective measures to prevent environmental degradation" (Principle 15).

Article 6 seems the most appropriate place for the precautionary approach to display its normative function, as it would unquestionably apply to both quantitative and qualitative dimensions. However, art. 21 on prevention, reduction and control of pollution may be the second best place, assuming the interdependence between the flow and the quality of waters discussed above.

Article 6, para. 2, as proposed by the ILC, which provides for the obligation to consult "when the need arises" to determine in concrete terms whether a certain watercourse use is equitable and reasonable under art. 5 of the Convention, was left unchanged by the Working Group. This confirms the impression that delegations have accepted an integrated approach to solving problems concerning the management of international watercourses through co-operation among the States concerned. In determining what is a reasonable and equitable use of a particular international watercourse, this provision prevents the legitimizing of unilateral assessments. Nonetheless, its successful application will depend largely on the good will of the parties and on the prospects for equitable distribution of advantages during negotiations.

The Working Group added a new para. 3 to art. 6 of the ILC which explicitly states what was already implicit in the existing language, i.e. that no factor has objective priority over the others and that, in determining whether a particular use is equitable and reasonable, all relevant factors should be considered jointly. This formula seems aimed at reassuring those delegations that may fear that prominence might be given to a particular factor, of which the application is felt to be unfavourable to their national interests. Again, this formulation could also be seen, by some delegations, as a way to discourage other proposals at a later stage of the debate that might insert particular factors in the chapeau of art. 6, as already proposed with regard to vital human needs.

The debate on the no-harm rule in art. 7

Article 7 of the ILC draft undoubtedly triggered the most impassioned debate during the three-week discussion of the Working Group. This article touches most substantively upon the freedom of exploitation of natural resources inherent in the territorial sovereignty of upper riparian countries and, conversely, on the right of neighbouring lower riparians to insist that such a freedom be exercised in a way that would not unjustly restrict their own. Despite painstaking informal consultations and an appeal from the Chair of the Drafting Committee to keep the text as it was proposed by the ILC, no solution could be found that commanded general agreement. When this appeal from the Chair was unsuccessfully made, it became clear that the whole exercise entrusted to the working group could not be brought to completion within the prescribed time.

In fact, there were two opposing groups of delegations. On the one hand, there was the group consisting of upstream countries, such as Czech Republic, Ethiopia, Switzerland and Turkey, which expressed the view that art. 7 introduced an unjustifiable restriction on state sovereignty, and advocated the deletion of this article.

On the other hand, downstream delegations held that causing harm is absolutely incompatible with equitable and reasonable utilization; therefore they also objected to the addition of the concept "due diligence" and the word "significant" to the 1991 version of the ILC text (CRP 20, CRP 26).[13] The 1991 version of draft art. 7 provided an obligation not to cause harm.[14] After some discussion over the concept of due diligence, some delegations that favoured its deletion turned the attention of the debate from the question of "to cause, or not to cause harm" to the more appropriate question of the duty of prevention of damage as an aspect of the duty to avoid causing substantial harm to co-riparians. The credit for this improvement in the conceptual consistency of the discussion goes primarily to the Canadian delegation, which proposed to replace para. 1 of art. 7 with language clarifying that "[w]atercourse States shall, in utilizing an international watercourse [···], take all appropriate measures to prevent causing [significant] harm to other watercourse States" (CRP 42, Option 1). This wording maintains the preventive approach of the final version of the ILC text, without reference to the controversial concept of due diligence, but rather specifying its content. In terms of drafting technique, this formula is supported by the existence of similar wording in other important instruments in the field.

On both sides, delegations gradually showed more readiness to bridge the gap in the general approach to the no-harm rule and its relation to the principle of equitable and reasonable utilization. At the drafting stage, some delegations, including Brazil, China, Germany, India, Italy, Mexico and the U.S.A., with varying degrees of enthusiasm and some of them considerably modifying their initial stand, expressed their readiness to compromise and accept the ILC text. It is submitted here that the considerations behind the positions taken reflect a fairly wide range of different interpretations allowed by the flexible language of art. 7 in conjunction with other relevant provisions of the draft Convention.

Delegations that called for the deletion of art. 7, indicated that its deletion would not, nevertheless, eliminate the no-harm rule altogether, but subordinate it to the principle of equitable utilization. To that end,

[13]For the most radical proposals to this effect, see that of Egypt (CRP 20) and the first one on the matter by Canada (CRP 26).

[14]It read as follows: "Watercourse States shall utilize an international watercourse in such a way as not to cause appreciable harm to other watercourse States".

the delegation of Turkey requested that it be made "explicit" in the text that the no-harm rule is "without prejudice to the principle of equitable and reasonable utilization" (CRP 24). Closer to a compromise was the stand taken by the Swiss delegation; its request for the deletion of art. 7 was accompanied by a proposal to insert in art. 6 a provision that a use that causes significant harm to the ecosystem of an international watercourse is not a reasonable use.[15]

Another bone of contention in the discussion over art. 7 was the adjective "significant". Downstream delegations requested its deletion, which was strongly resisted by upstream delegations. During the debate, it gradually emerged that there was unanimous acceptance of the *de minimis* rule. As a general principle, this derives from national legal systems, and from the principle concept of good neighbourliness. Its implication in the context of art. 7 is that co-riparians have a duty to overlook insignificant damage. As general agreement was reached on the substance of the issue, it should now be less difficult to find a drafting solution that reflects the *de minimis* rule in the text.

Repeated informal consultations and a coordination meeting were held on art. 7. At this meeting, the Chairman, Ambassador F. M. Hayes (Head of the Irish delegation) was able to submit a compromise text of three paragraphs as a basis for further discussion (CRP 68). The first paragraph is identical to para. 1 of the Canadian proposal cited above, thus substituting "due diligence with "all appropriate measures", but keeping the adjective "significant" as an expression of the *de minimis* harm. Para. 2 reads as follows:

> Where nevertheless significant harm is caused to another watercourse State, the State whose use causes the harm shall, in the absence of agreement to such use, and in consultation with the State suffering the harm, seek ad hoc adjustments to its utilization designed to mitigate or eliminate the harm. The States concerned may consider whether compensation to the State suffering the harm might contribute to balancing of the respective interests.

Compared to the ILC text, this provision is slightly more stringent for the State causing damage. The obligation of consultation with the affected State—over (a) the extent to which a particular use is equitable and reasonable, (b) the measures for elimination or mitigation of the damage, and (c) the question of compensation—becomes in the proposed text an obligation to seek, in consultation with the affected State, the appropriate measures for the mitigation or elimination of the harm. The question of compensation remains, though in more explicit terms, a factor for balancing the respective interests of co-riparians in a co-ordinated manner, and is not to be related in any way to an assessment of responsibility or liability. The possibility of such an assessment remains totally unprejudiced under either version of art. 7.

A third paragraph was added in this proposal to the effect that any use that causes significant harm to human health and safety should not be permitted. This point was discussed above in connection with the relevant factors under art. 6 for determining when a particular use is equitable and reasonable. Indeed, in the statement introducing the text for the proposed third paragraph of art. 7, it was recognized that this provision would be better placed in art. 6.

Single elements in this formula incurred much the same objections from a number of delegations that had previously been expressed with regard to the same elements included in a different drafting mix. The impression was inescapable, that the lack of readiness to compromise on the part of the most radical delegations was not so much a reaction to the text being proposed, as it revealed their desire to delay the adoption of the Convention altogether.

A last minute proposal for art. 7 was submitted that, due to time constraints, could not be discussed exhaustively before the end of the session, but deserves serious consideration as an alternative and as a basis for discussion at the next session.[16] An interesting aspect of this proposal is that its proponents, Austria, Canada, Portugal, Switzerland and Venezuela, represent a wide range of national perspectives. In terms of contents, the first of the two paragraphs reiterates para. 1 of the Canadian proposal already cited above. The second paragraph provides the obligation for the State whose use causes significant harm to "take all appropriate measures [···], in consultation with the affected State, to mitigate and eliminate such harm and, where appropriate, to discuss the question of compensation". Were it not for the expression "consistent with the provisions of articles 5 and 6" after "all appropriate measures", this wording would be the most stringent version of arts. 7 on the table at present. Thus, the exact content of this provision will remain undetermined until arts. 5 and 6 are defined, particularly since the reference to such articles may legitimize—although it should not—the argument that the no-harm rule is subordinate to the equitable and reasonable utilization principle. This may not be acceptable to certain delegations, unless they are in total agreement with the final text of arts. 5 and 6.

Duty of notification concerning planned measures with possible adverse effects

Part III of the draft, from arts. 11 to 19, is devoted to the enunciation and further procedural articulation of the obligation to notify co-riparians of planned measures "which may have a significant adverse effect upon other watercourse States". The expression "significant adverse effect" in draft art. 12, which sets out the general obligation in question, is not to be considered as a drafting oversight by the ILC, rendering the provision inconsistent with the expression "significant harm" in art. 7. On the contrary, it was deliberately used to establish a more stringent standard than "significant harm". This

[15]This written proposal was circulated in writing, but not as a Conference Room Paper.

[16]The text was circulated in all official languages but, due to time constraints, not as a Conference Room Paper.

drafting choice appropriately avoids legitimizing the presumption that the planned measures might fall under art. 7.

It is argued here that art. 12 is declaratory of a general customary obligation, abundantly in evidence in international practice. In order for the obligation to give notice of planned works to serve its purpose effectively, draft art. 12 appropriately provides that the "notification must be accompanied by available technical data and information in order to enable the notified States to evaluate the possible effects of the planned measures". This is in accordance with the statement of the arbitral tribunal in the Lake Lanoux case that "[a] State which is liable to suffer repercussions from work undertaken by a neighbouring State is the sole judge of its interests" (United Nations Reports of International Arbitral Awards, Vol. XII, 314). After some controversial debate, the words "including the results of any environmental impact assessment" were added after the words "technical data and information" (United Nations, 1996a, art. 2). This addition brought the ILC version of the general obligation up-to-date and into conformity with recent and authoritative international instruments, e.g. the Rio Declaration (in Principle 19) and the UN ECE Helsinki Convention of 1992 (in art. 3).

As a matter of fact, during the general debate of the Working Group of the Whole, a small number of delegations went so far as to object to the very existence of a customary obligation to give notice of works that may cause adverse effects to co-riparians. In this connection, Turkey originally proposed the deletion of Part III altogether, except for art. 18, which was to be amended. Article 18 confers the right on a watercourse State to request information on condition that it has reason to believe that the planned measures may have an adverse effect upon it. This provision also requires the requesting State to support its request with "a documented explanation". Obviously, art. 18 would impose an unbalanced procedural burden on the requesting State without the matching obligation of information and consultation on the State planning the measures generally stated in art. 11 and further specified in art. 12.

The amendment proposed by Egypt would make an indefinite one and, could be consequently, the implementation of the work indefinitely suspended.[17] No instance of international legal practice indicates that the duty of notification implies a duty to obtain prior consent from the co-riparian. On the contrary, again in the Lake Lanoux case, the arbitral tribunal expressly denied the existence of "a right of veto that paralyzes the exercise of territorial competence of one State at the discretion of another" (United Nations Report of International Arbitral Awards, Vol. XII, 314).

After a heated debate, the ILC text of Part III was finally confirmed as a middle ground agreeable to most. Consequently, the moratorium period under art. 13 would be limited to 6 months, to be extended for another 6 months at the request of the notified State. Still unsettled is the question whether a further 6 months of suspension should be contemplated in the event fact-finding under art. 33 is resorted to.

In case the notified State were to consider that the implementation of the planned work would be at variance with the principle of equitable and reasonable utilization, or with the no-harm rule, an obligation of negotiation and consultation is set forth in art. 17 which enhances the co-ordinated means of dispute settlement among those already contained in art. 33 of the UN Charter.

Concluding remarks

At the end of the first session of the working group, particularly from an environmentalist perspective, it appeared that the future Convention would be a setback compared to existing multilateral agreements regarding watercourses as, for example, the UN ECE Helsinki Convention of 1992. It is often the case that negotiations in universal fora of principles bearing on crucial national interests lead to the elaboration of the lowest common denominator among various existing instruments and different perceptions of the state of general customary law. The more progressive the text adopted, the higher the risk that its function of codification or creation of customary law will be undermined by paucity of ratifications, or non-observance. However, the magnitude of the obligation to co-operate expressed throughout the text should not be overlooked, apart from the codificatory impact of the substantive rules of the Convention. Regardless of the number of ratifications that the finalized Convention will receive, the wide support for the general principle of co-operation, evident during the Working Group session, enhances the expectation that watercourse problems will be tackled in an integrated and co-ordinated manner through consultation and negotiation.

In the analysis above of the discussion on art. 7, the most controversial in the whole debate, the case was made that a lack of willingness to compromise was rooted in an intention, on the part of certain delegations, to delay the adoption of the future Convention. It appeared that, in some cases, such an attitude was motivated by the desire to prevent the adoption of a text which would have a bearing on advanced bilateral negotiations of watercourse agreements.

It was doubtful that the situation of special watercourse agreements would change substantially before March 1997. On the other hand, Bangladesh and India concluded of a watercourse agreement on the Ganges River on 12 December 1996, thus bringing to an end a 20-year long dispute. This was an encouraging sign for the March session of the Working Group. The conclusion of this and other recent watercourse agreements, may have been a factor reducing the

[17]Author's note. Even if the Turkish delegation reserved its position on art. 12–19 as adopted by the Drafting Committee, see its report (United Nations, 1996a), it later proposed to replace these provisions with four articles (12–15) of a less stringent character (CRP 37).

residual normative function of the future Convention. It also corroborated the argument that the codification process underway had had an impact, even before its completion, conducive to special agreements enhancing coordination in specific watercourse situations. A similar example to this effect can be found in the Protocol on Common Water Resources concluded on 2 August 1991 between Argentina and Chile, a few months after the adoption on first reading of the draft articles by the ILC. In art. 3 of this Protocol the parties agreed to consult each other on a common position in multilateral negotiations germane to the subject. Along the same lines, one can refer, amongst others, to the Agreement, also outside Europe, on the Cooperation for the Sustainable Development of the Mekong river basin, concluded on April 1995 between Cambodia, Lao People's Democratic Republic, Thailand and Vietnam.

Considering that water disputes are, more often than not, an important part of wider disputes, the systematic enunciation of the principle of co-operation in the present text, together with a number of other substantive rules, amount to a courageous attempt to offer standards of technical cooperation that might spill over into political conflicts.

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