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**Replies of Governments to the Commission's questionnaire**

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

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Replies of Governments to the Commission's questionnaire

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Introduction

1. By paragraph 4(e) of section I of resolution 3315 (XXIX) of 14 December 1974, the General Assembly recommended that the International Law Commission should continue its study of the law of the non-navigational uses of international watercourses, taking into account General Assembly resolutions 2669 (XXV) of 8 December 1970 and 3071 (XXVIII) of 30 November 1973 and other resolutions concerning the work of the Commission on the topic, and comments received from Member States on the questions referred to in the annex to chapter V of the report of the Commission on the work of its twenty-sixth session.<sup>1</sup>

Comments received from Member States pursuant to resolution 3315 (XXIX) were issued in document A/CN.4/294 and Add.1.<sup>2</sup>

2. By paragraph 5 of resolution 31/97 of 15 December 1976, the General Assembly urged Member States that had not yet done so to submit to the Secretary-General their written comments on the subject of the law of the non-navigational uses of international watercourses.

3. By a circular note dated 18 January 1977, the Secretary-General invited Member States that had not yet done so to submit as soon as possible their written comments referred to in resolution 31/97. At the

<sup>1</sup> Yearbook . . . 1974, vol. II (Part One), pp. 301-304.

<sup>2</sup> Yearbook . . . 1976, vol. II (Part One), p. 147.

thirtieth session of the Commission, the replies received were circulated in document A/CN.4/314.<sup>3</sup> An additional reply to the Secretary-General's note was circulated at the thirty-first session of the Commission in document A/CN.4/324.<sup>4</sup>

4. At its thirty-first session, in 1979, the Commission, in view of the importance of the topic and the need to have at its disposal the views of as many Governments of Member States as possible, decided again to request, through the Secretary-General, the Governments of Member States which had not already done so to submit their written comments on the questionnaire formulated by the Commission in 1974.<sup>5</sup>

5. The Secretary-General, by a circular note dated 18 October 1979, invited the Governments of Member States which had not yet done so to submit as soon as possible their written comments on the Commission's questionnaire.

6. The General Assembly, by paragraph 4(d) of resolution 34/141 of 17 December 1979, recommended that the Commission continue its work on the topic, taking into account the replies from Governments to the questionnaire prepared by the Commission and the views expressed on the topic in debates in the General Assembly.

7. New replies to the questionnaire prepared by the Commission were received and circulated in 1980, at the Commission's thirty-second session, in document A/CN.4/329 and Add.1.<sup>6</sup>

<sup>3</sup> *Yearbook* . . . 1978, vol. II (Part One), p. 253.

<sup>4</sup> *Yearbook* . . . 1979, vol. II (Part One), p. 178.

<sup>5</sup> *Yearbook* . . . 1979, vol. II (Part Two), p. 169, para. 148.

<sup>6</sup> *Yearbook* . . . 1980, vol. II (Part One), p. 153.

8. The General Assembly, in its resolution 35/163 of 15 December 1980, recommended that, *inter alia*, the Commission should proceed with the preparation of draft articles on the topic, taking into account the replies to the questionnaire addressed to Governments as well as information furnished by them. By resolution 36/114 of 10 December 1981, the General Assembly recommended that, *inter alia*, the Commission should continue its work aimed at the preparation of draft articles on the topic. The General Assembly, by both resolutions 35/163 and 37/114, urged Governments to respond as fully and expeditiously as possible to the requests of the Commission for comments and observations on its draft articles and questionnaires and for materials on topics on its programme of work.

9. Between February and June 1982, replies were received from the Governments of Bangladesh and Portugal. These are reproduced below in the same form as those published previously, with general comments and observations in section I, and replies to the questionnaire in section II.

10. Thus, as of 15 June 1982, the following 32 Member States have submitted replies to the questionnaire formulated by the Commission in 1974: Argentina, Austria, Bangladesh, Barbados, Brazil, Canada, Colombia, Ecuador, Finland, France, Federal Republic of Germany, Greece, Hungary, Indonesia, Libyan Arab Jamahiriya, Luxembourg, Netherlands, Nicaragua, Niger, Pakistan, Philippines, Poland, Portugal, Spain, Sudan, Swaziland, Sweden, Syrian Arab Republic, United States of America, Venezuela, Yemen and Yugoslavia.

## I. General comments and observations

### Bangladesh

[Original: English]  
[27 August 1981]

1. In connection with the replies to the Commission's questionnaire, furnished herewith, the comments already submitted by the Government of Bangladesh on the draft articles provisionally adopted by the Commission on the law of the non-navigational uses of international watercourses<sup>7</sup> may be carefully noted. This subject is of vital importance to Bangladesh and all other riparian and basin States. The formulation of the principles of law, applicable or to be applied, has hardly been touched upon in those draft articles, and the Commission has introduced the new concepts of "system States" and of defining an international watercourse system on the basis of affected uses instead of geographical configuration, which are not substantiated by established international custom or State practice. In its report on its thirty-second session, the Commission supported its use of the word "system" in connection with "river" by citing precedents from the Treaty of Versailles and other treaties and the use of the term "river system" in some scholarly texts.<sup>8</sup> But a close

scrutiny of those provisions shows that the term "river system" was used in the narrower sense of rivers and their tributaries or supplementary streams only. Such concepts, based on the international rivers concept, have become obsolete and have been replaced by the broader and more sound concept of an international drainage basin. Moreover, those treaties and texts did not formulate the concept of a "system State" or of the international nature of a watercourse system based on affected uses, as the Commission has done.

2. The Government of Bangladesh feels that it is necessary to give a precise definition of an international watercourse and to base the provisions on the geographical concept of an international drainage basin. If no agreement is possible, the definition already accepted under customary international law should be adopted. It is also necessary to codify the principles relating to non-navigational uses of international watercourses, as far as possible, according to the well-established norms of international custom and practice, including provisions of treaties; and, in making the necessary rules to suit new uses with the progress of time, it is also necessary to guard against the temptation of introducing new or widely different concepts which, far from being of real benefit to States, might give rise to more complicated problems in the future. An attempt to make provisions to cover future uses of

<sup>7</sup> *Yearbook* . . . 1980, vol. II (Part Two), pp. 110 *et seq.*

<sup>8</sup> *Ibid.*, pp. 110-111, commentary to art. 1.

watercourses due to technological developments will involve speculation as to what, exactly, such technological developments will be. Hence, it is necessary to base the codification on existing principles and practice which have already proved their usefulness, instead of making such imprecise and novel provisions as the Commission has done in the draft articles.

#### Portugal

[Original: English/French]  
[15 June 1982]

1. The following information is provided in the light of the telegrams referred to in the letter from the Directorate-General for Political Affairs of the Ministry of Foreign Affairs dated 7 February 1980 and dispatched on 13 February 1980 by the Secretariat of State for Nature and the Environment to the National Commission for the Environment.
2. The Office for Water Resources Management of the National Commission for the Environment has consistently followed closely and with the utmost interest and attention, within the context of the United Nations, the legal problems relating to the use of international rivers and has studied the following documents:
  - (a) "Legal problems relating to the utilization and use of international rivers: Report by the Secretary-General".<sup>9</sup>
  - (b) *Legislative texts and treaty provisions concerning the utilization of international rivers for other purposes than navigation.*<sup>10</sup>
3. These documents contain a number of legislative texts and provisions of treaties concluded between Portugal and other countries.
4. The texts in question include a number relating to rivers having their sources in Spain and forming or traversing the frontier between Portugal and Spain, namely:<sup>11</sup>
  - Frontier Treaty between Spain and Portugal signed on 29 September 1864;
  - Regulation annexed to the Boundary Treaty between Spain and Portugal of 29 September 1864, signed at Lisbon, 4 November 1866;
  - Treaty between Portugal and Spain concerning commercial relations and navigation, signed at Madrid on 27 March 1893;
  - Regulations for fishing in the Miño River, drawn up by a Mixed Spanish-Portuguese Commission pursuant to article V of Appendix VI to the Treaty of Commerce and Navigation between Spain and Portugal of 27 March 1893, Madrid, 15 May 1897;
  - General Act demarcating the frontier between Spain and Portugal from the mouth of the River Miño to the confluence of the Caya and Guadiana, signed at Lisbon on 1 December 1906;
  - Exchange of Notes constituting an Agreement between Spain and Portugal on the exploitation of border rivers for industrial purposes, Madrid, 29 August and 2 September 1912;
  - Convention between Portugal and Spain delimiting the frontier between both countries, from the confluence of the River Cuncos with the Guadiana to the mouth of the latter, signed at Lisbon on 29 June 1926;
  - Convention between Spain and Portugal to regulate the hydroelectric development of the international section of the River Douro, signed at Lisbon, 11 August 1927;
  - Exchange of Notes amending article 14, paragraph 2, of the Convention of 11 August 1927, Lisbon, 2 June and 27 September 1951.
5. The above-mentioned documents also include the following texts of a similar nature relating to the former overseas territories:
  - River M'Poço [Angola—Belgian Congo]:  
Convention between Belgium and Portugal regarding questions of economic interest in the colonies of the Belgian Congo and Angola, signed at São Paulo de Loanda on 20 July 1927;<sup>12</sup>
  - Kunene River (Rua Cana Falls) [Angola—Territory of South West Africa]:  
Agreement between the Union of South Africa and Portugal regulating the use of the waters of the Kunene River, signed at Cape Town on 1 July 1926;<sup>13</sup>
  - River Rovuma [Mozambique—Tanganyika]:  
Exchange of Notes between the United Kingdom and Portugal regarding the boundary between Tanganyika and Mozambique, Lisbon, 11 May 1936;
  - River Shiré and Lake Nyasa [Mozambique—Rhodesia and Nyasaland]:  
Exchange of Notes between the United Kingdom and Portugal concerning the Shiré Valley Project, Lisbon, 21 January 1953;
  - Lake Nyasa [Mozambique—Rhodesia and Nyasaland]:  
Agreement between the United Kingdom (on its own behalf and on behalf of the Federation of Rhodesia and Nyasaland) and Portugal regarding the Nyasaland-Mozambique Frontier, signed at Lisbon on 18 November 1954;
  - Kwando River [Angola—Rhodesia and Nyasaland]:  
Agreement between the United Kingdom (on its own behalf and on behalf of the Federation of Rhodesia and Nyasaland) and Portugal with regard to certain natives living on the Kwando River, signed at Lisbon on 18 November 1954.
6. The Office for Water Resources Management also notes with interest more recent conventions and regulations concerning the use and hydroelectric development of rivers whose drainage basins lie partly in Portugal and partly in Spain. These include:
  - Convention and Additional Protocol to regulate the hydroelectric development of the international sections of the River Douro and its tributaries, signed at Lisbon on 16 July 1964 and entered into force on 19 July 1966;<sup>14</sup>
  - Convention and Additional Protocol to regulate the use

<sup>9</sup> See *Yearbook . . . 1974*, vol. II (Part Two), p. 33, document A/5409.

<sup>10</sup> United Nations Legislative Series, vol. 12 (Sales No. 63.V.4).

<sup>11</sup> *Ibid.*, pp. 892 *et seq.*, Nos. 241–249.

<sup>12</sup> *Ibid.*, p. 96, No. 3.

<sup>13</sup> For the text of this and the four following agreements, *ibid.*, pp. 132 *et seq.*, Nos. 29–33.

<sup>14</sup> Spain, *Boletín Oficial del Estado* (Madrid), No. 198 (19 August 1966), p. 10876.

and hydroelectric development of the international sections of the Rivers Miño, Lima, Tejo, Guadiana and Chança, and their tributaries, signed at Madrid on 29 May 1968 and entered into force on 7 April 1969;<sup>15</sup> and Second Additional Protocol of 12 February 1976, entered into force on 19 May 1977;

Regulations for fishing in the River Minho (Miño), in force since 1 July 1968, pursuant to the agreement of 22 June 1968, following approval and publication of the Regulations in both countries. In Portugal, approval was given on 20 March 1967.<sup>16</sup>

<sup>15</sup> *Ibid.*, No. 96 (22 April 1969), p. 726.

<sup>16</sup> Decree Law No. 47595 (Portugal, *Diário do Governo* (Lisbon), Series I, No. 67 (20 March 1967), p. 296).

7. As part of its functions, the Office for Water Resources Management has supplied information in the past concerning some of the legal and institutional aspects of international water-resources development; in this connection, attention is drawn to the communication dated 8 May 1976.

8. In replying to the Commission's questionnaire, an effort has been made to reflect what may be regarded as the spirit and scope of the legislative texts and treaties already concluded between Portugal and other countries, as has also been done in regard to the use of international waterways.

## II. Replies to specific questions

[*Replies of Bangladesh (original: English), dated 27 August 1981, and of Portugal (original: English/French), dated 15 June 1982*]

**Question A.** *What would be the appropriate scope of the definition of an international watercourse, in a study of the legal aspects of fresh water uses on the one hand and of fresh water pollution on the other hand?*

### Bangladesh

An "international watercourse" or even an "international river system" is based on the river concept, even if it includes tributaries, canals and lakes. Since this concept is now obsolete and has been superseded by the modern concept of an international drainage basin, which is broader and more sound, the definition that should be adopted is that of an international watercourse *basin*, or international drainage *basin*, instead of merely an international watercourse or river system. Moreover, the international watercourse system should not have the connotation given by the Commission. In defining the international watercourse basin or drainage basin:

(a) The limits or boundaries of the watercourse basin or drainage basin should be specifically indicated with reference to the watershed limits or the limits of the catchment area;

(b) The definition should be such that the international drainage or watercourse basin cannot be interpreted to include more than one geographical basin, or even a part of a second drainage basin;

(c) The definition should be absolute with reference to geographical configuration, and not variable or contingent on one part of the basin or river being affected by the use of another part of the same.

It will be useful if the Commission roughly accepts the definition proposed by the Helsinki Conference of the International Law Association in 1966.<sup>17</sup> This defi-

inition should be the same in relation to fresh water uses and fresh water pollution; and, even if there is a slight difference in the event of technical difficulties arising, the geographical limits of the basin should not be different in the two cases.

### Portugal

For the purposes specified, and indeed for some others too, an "international watercourse" should be defined as one to which it is possible to apply the geographical concept of an international drainage basin; in other words, a drainage basin extending into the territories of two or more countries.

This definition therefore covers not only watercourses that flow successively through the countries whose frontiers they cross, but also those that form a frontier between countries.

**Question B.** *Is the geographical concept of an international drainage basin the appropriate basis for a study of the legal aspects of non-navigational uses of international watercourses?*

### Bangladesh

In view of this Government's reply to question A above, the answer to this question is in the affirmative. The concept of an international drainage basin has been universally adopted by most riparian States and jurists alike, and should not be changed without very strong justification. Moreover, the concept of an international drainage basin is practical, functional and effective in application, and should form a proper basis for a study of the aspects referred to. The precise limits of the drainage basin make this concept very useful and sound.

### Portugal

Yes. Terms to which preference was given in the past, such as "international river", should be regarded

<sup>17</sup> See "Helsinki Rules on the Uses of the Waters of International Rivers", I.L.A. *Report of the Fifty-second Conference, Helsinki, 1966* (London, 1967), pp. 484 *et seq.*; reproduced in part in *Yearbook . . . 1974*, vol. II (Part Two), pp. 357-359, document A/CN.4/274, para. 405.

as less suitable now than the concept of an "international drainage basin", as defined by the Helsinki Rules of 1966,<sup>18</sup> that is, a geographical area extending over two or more States determined by the watershed limits of the system of waters, including surface and underground waters, flowing into a common terminus.

**Question C.** *Is the geographical concept of an international drainage basin the appropriate basis for a study of the legal aspects of the pollution of international watercourses?*

**Bangladesh**

For the same reasons as those given in response to questions A and B, the reply of this Government to this question is in the affirmative. The same concept should underlie the studies of the legal aspects of both pollution and non-navigational uses of international watercourses. Otherwise, if two different concepts are used in the two cases, two entirely different and independent sets of rules will have to be formulated together, instead of formulating imprecise definitions to cover both cases and mixing them up.

**Portugal**

Yes. Water, in its natural state, has never respected political boundaries, and pollution of river water is one aspect that justifies the preference for the term "international drainage basin". Because of the waste discharged into rivers by upstream States, pollution of river water may, and frequently does, necessitate fairly expensive water-treatment arrangements in downstream States to avoid endangering public health and causing inconvenience to industry and other users, and also to facilitate other, later, development activities.

**Question D.** *Should the Commission adopt the following outline for fresh water uses as the basis of its study:*

- (a) *Agricultural uses:*
  1. *Irrigation;*
  2. *Drainage;*
  3. *Waste disposal;*
  4. *Aquatic food production;*
- (b) *Economic and commercial uses:*
  1. *Energy production (hydroelectric, nuclear and mechanical);*
  2. *Manufacturing;*
  3. *Construction;*
  4. *Transportation other than navigation;*
  5. *Timber floating;*
  6. *Waste disposal;*
  7. *Extractive (mining, oil production, etc.);*
- (c) *Domestic and social uses:*
  1. *Consumptive (drinking, cooking, washing, laundry, etc.);*
  2. *Waste disposal;*
  3. *Recreational (swimming, sport, fishing, boating, etc.)?*

**Bangladesh**

The outline is quite satisfactory and fairly comprehensive. However, some of these uses are very neces-

sary while others are not. Thus a lower riparian's need for food production should prevail over an upper riparian's use for recreational purposes such as swimming and sport. Principles should be laid down as to which category of uses should have preference over which other category of uses, and to what extent the quantity of waters can be diminished, or qualitatively impaired, so as not to cause serious damage to a co-basin State. Such principles, of course, cannot be accurately provided for; but broad guidelines for competing uses can be indicated.

**Portugal**

*Reply to questions D and E*

One of the possible uses of fresh water would be in connection with the control of certain diseases, such as malaria, through the reduction or elimination of anopheles mosquito breeding grounds formed by stagnant pools alongside rivers.

Reduction of river pollution is another possible use of water with a wider application than waste disposal.

Similarly, the creation and improvement of open-air living conditions may provide a use of water with more diversified and wide-ranging aspects than those relating solely to the recreational purposes mentioned.

**Question E.** *Are there any other uses that should be included?*

**Bangladesh**

This Government has no other use to suggest for inclusion.

**Portugal**

[See the reply to question D.]

**Question F.** *Should the Commission include flood control and erosion problems in its study?*

**Bangladesh**

The reply to this question is in the affirmative. The necessity of conserving water by storage dams at flood time, for use during the lean or low-flow seasons, and the impact of erosion on the uses of water render the inclusion of these problems in the study quite appropriate.

**Portugal**

Yes. It should not be concerned solely with drainage and possible uses of drainage water. Other questions arise in the life of a river that have a decisive influence on its economic status since, in all the valleys of the world, what happens to rivers is profoundly affected by what happens on land.

When waters cross the political frontiers between States, varied and complex problems may be engendered by the occurrence of significant changes in either the quality or the quantity of the water, or even, over a period of time, in drainage patterns. For example, soil erosion in an upstream State can do damage to ports situated in a downstream State.

<sup>18</sup> Art. II; see footnote 17 above.

**Question G.** *Should the Commission take account in its study of the interaction between use for navigation and other uses?*

**Bangladesh**

The answer to this question is also in the affirmative, because withdrawals of water in very large quantities by an upper riparian for non-navigational uses may seriously affect navigational uses of the waters by a lower riparian, and also because navigation has an impact on other uses and on the question of water pollution.

**Portugal**

Yes. Such interaction is real and, in the majority of cases, of the utmost importance.

The establishment, upstream, of extensive irrigation zones may deprive a downstream State of the flow of water required for traditional shipping activities, for existing uses in agriculture and industry, or for the supply of the population.

Carrying out river projects downstream may deprive an upstream State of the possibility of using the river for shipping or timber floating.

**Question H.** *Are you in favour of the Commission taking up the problem of pollution of international watercourses as the initial stage in its study?*

**Bangladesh**

No. The uses of waters come first, and pollution is to be considered as a result of the uses. It will be difficult to study the two questions even simultaneously; so the study of uses should be taken up first, and the problem of pollution may be studied afterwards.

**Portugal**

Yes. This should be one of the points considered since it is of undoubted importance and current relevance.

**Question I.** *Should special arrangements be made for ensuring that the Commission is provided with the technical, scientific and economic advice which will be required, through such means as the establishment of a Committee of Experts?*

**Bangladesh**

Yes, the establishment of a Committee of Experts will be useful.

**Portugal**

We believe this could be done if need be; but it seems to us that the Commission should consider the matter itself in the course of its work.