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A/CN.4/447 and Add.1-3

The law of the non-navigational uses of international watercourses - Comments and observations received from Governments

Topic:

Law of the non-navigational uses of international watercourses

Extract from the Yearbook of the International Law Commission:-

1993, vol. II(1)

THE LAW OF THE NON-NAVIGATIONAL USES OF INTERNATIONAL WATERCOURSES

[Agenda item 4]

DOCUMENT A/CN.4/447 and Add.1-3

Comments and observations received from Governments

[*Original: Arabic/English/French/Spanish*]
[*3 March, 15 April, 18 May and 14 June 1993*]

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* The reply submitted jointly by Denmark, Finland, Iceland, Norway and Sweden is reproduced under **Nordic countries**.

NOTE

Multilateral instruments cited in the present document

	Source
Treaty of Versailles (Versailles, 28 June 1919)	G. F. de Martens, *Nouveau Recueil général de Traités*, 3rd series, vol. X (Leipzig, Weicher, 1923), p. 323.
Agreement on the International Commission for the Protection of the Rhine against Pollution (Bern, 29 April 1963)	United Nations, *Treaty Series*, vol. 994, p. 3.
Convention and Statutes relating to the development of the Chad Basin (Fort Lamy, 22 May 1964)	United Nations, *Treaties concerning the Utilization of International Watercourses for Other Purposes than Navigation: Africa*, Natural Resources/Water Series No. 13 (Sales No. E/F.84.II.A.7), p. 8.
Convention on the Protection of the Environment between Denmark, Finland, Norway and Sweden (The Nordic Environmental Protection Convention) (Stockholm, 19 February 1974)	United Nations, *Treaty Series*, vol. 1092, p. 279.
Convention on the Protection of the Marine Environment of the Baltic Sea Area (Helsinki, 22 March 1974)	UNEP, *Selected Multilateral Treaties in the Field of the Environment*, Reference Series 3 (Nairobi, 1983), p. 405.
United Nations Convention on the Law of the Sea (Montego Bay, 10 December 1982)	*Official Records of the Third United Nations Conference on the Law of the Sea*, vol. XVII (Sales No. E.84.V.3), p. 151, document A/CONF. 62/122.
Convention for the Protection and Development of the Marine Environment of the Wider Caribbean Region (Cartagena de Indias, Colombia, 24 March 1983)	UNEP, Nairobi, 1983.
Convention on Environmental Impact Assessment in a Transboundary Context (Espoo, 25 February 1991)	ECE, *Environmental Conventions*, 1992, p. 95.
Convention on the Transboundary Effects of Industrial Accidents (Helsinki, 17 March 1992)	*International Legal Materials*, Washington, D.C., vol. 31, No. 6, November 1992, p. 1313.
Convention on the Protection and Use of Transboundary Water Courses and International Lakes (Helsinki, 17 March 1992)	Ibid., p. 1335.
Convention on Biological Diversity (Rio de Janeiro, 5 June 1992)	Ibid., No. 4, July 1992, p. 822.

Introduction

1. At its forty-third session, held in 1991, the Commission provisionally adopted on first reading a set of draft articles on the law of the non-navigational uses of international watercourses.[1] At its 2237th meeting, on 9 July 1991, the Commission decided, in accordance with articles 16 and 21 of its statute, to transmit the draft articles, through the Secretary-General, to Governments for comments and observations, with the request that such comments and observations should be submitted to the Secretary-General by 1 January 1993.[2]

2. By paragraph 9 of resolution 46/54, and again by paragraph 12 of resolution 47/33, relating to the reports of the Commission on its forty-third and forty-fourth sessions respectively, the General Assembly drew the attention of Governments to the importance, for the Commission, of having their views on the draft articles on the

[1] *Yearbook . . . 1991*, vol. II (Part Two), para. 58.

[2] Ibid., para. 58.

law of the non-navigational uses of international watercourses, adopted on first reading by the Commission, and urged them to present in writing their comments and observations by 1 January 1993, as requested by the Commission.

3. Pursuant to the Commission's request, the Secretary-General addressed to Governments circular letters dated 20 December 1991 and 1 December 1992 respectively, inviting them to submit their comments and observations by 1 January 1993.

4. As of 14 June 1993, the Secretary-General had received 16 replies from Member States and one from a non-member State, the texts of which appear in the present document.

I. Comments and observations received from Member States

Argentina

[*Original: Spanish*]
[*15 March 1993*]

General comments

1. The Argentine Government's comments concern the subsidiarity of the draft articles on the non-navigational uses of international watercourses and the question of parties to watercourse agreements. In order to ensure that the draft articles do not affect pre-existing agreements on the uses of watercourses, it is recommended that an article should be included to establish beyond any doubt that the future instrument on non-navigational uses of watercourses will be supplemental in nature and will not apply to watercourses governed by a convention unless the States parties to that convention agree otherwise.

Specific comments on individual articles

Article 4

2. Article 4 as drafted provides that both in agreements affecting the entire watercourse and in those affecting only a part thereof, a third riparian State "is entitled" to take part in the negotiations and to become a party to the agreement or project in question.

3. The Argentine Government considers that this article unduly favours the third riparian State. Therefore, it is considered advisable to replace article 4 with an article making accession to the treaty a possibility rather than a right, in view of the fact that the rights of third parties are protected in other draft articles, for example, those concerning equitable and reasonable utilization of watercourses (arts. 5-6), and concerning the obligation not to cause appreciable harm (art. 7), to cooperate (art. 8), and to exchange data (art. 9) and information concerning planned measures (arts. 11 et seq.).

4. The Argentine Government therefore suggests that article 4 should be replaced by the following text:

> "1. Every watercourse State may become a party to a watercourse agreement that applies to the entire international watercourse, subject to the terms and conditions to be agreed on between the said State and the States Parties to the agreement. The latter shall negotiate in good faith with the former the terms and conditions of its accession to the agreement.
>
> "2. A watercourse State whose use of an international watercourse may be affected to an appreciable extent by the implementation of a proposed watercourse agreement that applies only to a part of the watercourse or to a particular project, programme or use may become a party to the same to the extent that its use of the water is affected by that agreement or by that particular project, programme or use, subject to the terms and conditions to be agreed on between the said State and the States Parties to the agreement or to the particular programme or use. The latter shall negotiate in good faith with the former the terms and conditions of its accession."

Canada

[*Original: English*]
[*30 March 1993*]

General comments

1. The Government of Canada commends the Commission on the preparation of the draft articles on the law of the non-navigational uses of international watercourses, an effort requiring considerable compromise that has spanned two decades. This effort has attempted to resolve the inevitable differences of opinion with respect to the appropriate international legal framework for rivers and lakes that cross and form political boundaries. That said, Canada nevertheless has some questions to raise and comments to make on the draft articles.

2. As an introductory comment, the Government of Canada recognizes that the draft articles deal with the traditional concerns of international water law, which are uses and pollution. However, it would be appropriate to integrate post-United Nations Conference on Environment and Development concepts with respect to sustainable development[1] into the document wherever possible.

3. Generally, Canada favours a framework of residual rules that would be legally binding when watercourse States do not otherwise agree on a governing regime. A concern that arises is how the residual rules might apply to a bilateral regime where one portion of the watercourse may be subject to such a regime and others not. Similarly, questions of the applicable legal regime may arise where an existing bilateral arrangement covers certain, but not all, of the matters governed by the articles.

[1] *Report of the United Nations Conference on Environment and Development, Rio de Janeiro, 3-14 June 1992* (A/CONF.151/26/Rev.1 (Vol. I and Vol. I/Corr.1, Vol. II, Vol. III and Vol. III/Corr.1)) (United Nations publication, Sales No. E.93.I.8 and corrigenda), vol. I: *Resolutions adopted by the Conference*, resolution 1, annexes I (Rio Declaration on environment and development) and II (Agenda 21).

SPECIFIC COMMENTS ON INDIVIDUAL ARTICLES

Article 3

4. Canada recognizes that the international management of water resources must apply to various geographic situations which are likely to call for different solutions. Thus, in some cases, the rules contained in a set of general articles may not produce the desired result. Recognizing that the most durable solutions are often those achieved through bilateral negotiation by the States involved, and mindful of the general obligation in international law to seek to resolve differences by negotiation, Canada strongly supports article 3 permitting States to adjust the provisions of the draft articles. An issue arises, however, as to the status of existing agreements dealing with water management or certain aspects thereof.

5. This issue is of considerable concern to Canada as the international legal regime governing Canada's transboundary rivers and lakes consists essentially of a number of bilateral treaties and practices between Canada and the United States of America. The Government of Canada wishes to ensure that these agreements could be continued within the framework of the draft articles without any further action by parties to the agreements. It is important therefore that it should be explicitly stated that the draft articles do not take precedence over existing agreements.

Articles 5 to 7

6. Canada wishes to express serious reservations regarding the formulation of the general principles contained in articles 5 to 7. While acknowledging that there is a great deal of support for the doctrine of reasonable and equitable utilization, it should be emphasized, however, that equitable utilization can be equal utilization, as has been seen in certain international conventions or as has evolved in certain regional practices. Indeed, the practice in Canadian-United States water management has generally been based on the principle of the equal apportionment of waters and has provided a sound basis for the management of bilateral water issues.

7. Another concern is that the draft articles have not resolved the inherent conflict between articles 5 and 7, as formulated. Under article 5 the issue of competing uses of international watercourses is resolved through a balancing of the interests of the parties concerned on the basis of a full understanding of all relevant factors. However, the proposed article 7 appears to preclude that balancing of interests once it is established that appreciable harm is likely to occur. The Commission's position, as stated in the commentary,[2] seems to be that the conflict between articles 5 and 7 can be made to disappear by adopting a non-rebuttable presumption that a utilization of the waters of an international watercourse system that causes appreciable transboundary harm is *ipso facto* unreasonable and inequitable and thus would be unlawful under both article 5 and article 7. However, it is noted that the Commission in its commentary has recognized that, in some cases, the attainment of equitable and reasonable utilization will depend on the toleration by one or more watercourse States of a measure of harm. In these cases the Commission suggests that the necessary accommodations would be arrived at through specific agreements.[3] Yet, it is precisely in these situations that the inclusion of a no-harm rule will make agreement difficult to reach. The Government of Canada is concerned that the doctrine of reasonable and equitable use set out in articles 5 and 7 will not permit a balancing of interests of States.

8. Further, the adoption of the no-appreciable-harm rule would seem to revive the principle of prior appropriation (first in time, first in right), for it would prevent an upstream State from undertaking any development that would cause appreciable harm to undertakings in a downstream State.

9. The conflict between articles 5 and 7 might be resolved in various ways. The Government of Canada wonders whether article 7 needs to be a separate article when the causation of harm would seem to be implicitly included in the weighing and balancing of the factors found in article 6, with respect to any particular utilization of an international watercourse.

10. Alternatively, a previous formulation of the principles of equitable use and of no appreciable harm proposed by a previous Special Rapporteur, Mr. Schwebel, in his third report balanced the two principles as follows:

> The right of a system State to use the water resources of an international watercourse system is limited by the duty not to cause appreciable harm to the interests of another system State, except as may be allowable under a determination for equitable participation for the international watercourse system involved.[4]

The interrelationship of these two principles should therefore be further reviewed.

11. With respect to article 6, in order to arrive at a reasonable determination of equitable use it is important to take the appropriate considerations into account. From the perspective of the management of Canada's international waters, it is essential that past uses and apportionment practice, as developed through bilateral relations with the United States, should be recognized and taken into account. While accepting that article 6 is not an exhaustive or exclusive list of considerations, it is suggested that the Commission should consider the addition of others that would reflect Canada's concerns. Possible formulations would be to add references to "regional State practice", "historical uses" and "traditional access".

Articles 11-18

12. Canada supports the process of notification and consultation with respect to the use of international watercourses. It notes, however, that in the event States continue to disagree after consultation, there is no provision for dispute settlement in the articles. As a result, should States fail to agree, once the time limit for consultations has been respected, the articles provide no further

[2] For the commentary on article 7, initially adopted as article 8, see *Yearbook . . . 1988*, vol. II (Part Two), pp. 35-41, in particular, p. 36, para. 2.

[3] Ibid., para. (3).

[4] *Yearbook . . . 1982*, vol. II (Part One), p. 103, document A/CN.4/348, para. 156 (art. 8, para. 1).

assistance. A provision to deal with dispute settlement would be a welcome addition to the draft articles.

13. Currently, article 16 provides that notifying States, in accordance with their obligations under the articles, may, in the absence of a response from the notified States, proceed with a planned measure, but subject to obligations under articles 5 and 7. The possibility exists that a notified State which chooses not to respond to notification can still raise its objections and possibly claim compensation at a later stage. As a result, a State complying with the notification provisions of the articles may find itself alleged to be in breach of the basic principles of the articles without having had the opportunity to consult about the proposed measures. It is important that an informed State should not be able to benefit from intentional delaying tactics. One possible solution would be to interpret the silence as acquiescence to the proposed measures, thus preventing the notified State which has failed to respond from raising objections later. The Commission should take another look at this issue.

Articles 19 and 26

14. Canada supports the use of joint management mechanisms for international watercourses as provided for in article 26. The International Joint Commission, established as a quasi-independent body to deal with a number of Canada-United States water issues, may provide a model for consideration elsewhere. The scope of the term "management" as provided in article 26 seems limited, and may benefit from further revision. Canada regrets the absence of stronger emphasis in the articles on the organizational aspects of implementing all of the relevant articles to achieve the management envisaged in article 26.

15. In general, the articles on management and implementation do not go far enough in developing legal rules on what, in daily practice, is the most important aspect of the utilization of international watercourses. Although the minimal rules proposed in the articles do not create difficulties for Canada, it would be desirable to have clear rules on procedures and remedies in the case of an insoluble dispute.

Article 21

16. With respect to the obligation not to cause harm by pollution, as formulated in article 21, paragraph 2, of the draft articles, however, the Government of Canada believes a strong argument can be made that pollution which causes appreciable harm is prima facie unreasonable and inequitable. Mindful that not all harm is proscribed—rather the prohibition is on appreciable harm—in these circumstances, Canada agrees that with respect to pollution the principle not to cause appreciable harm should be accorded primacy.

Other concerns

17. A number of the terms used in the draft articles are open to varying interpretations. It is suggested that the articles should be reviewed to ensure that those terms that would benefit from clarification are defined in the articles themselves. At the least, the following terms need to be defined: "vital human needs" (art. 10), "appreciable adverse effect" (art. 12) and "harm" and "appreciable harm" (arts. 7 and 21). Similarly, Canada suggests that these terms should be reviewed for consistency of usage with other international environmental agreements.

Article 22

18. This article, dealing with the introduction of new species, obliges States to take "all measures necessary to prevent the introduction of a new species". As this duty could be interpreted in an unduly expansive way, it might be appropriate to limit it.

Article 27

19. A gap in the draft articles that is of concern to Canada is the absence of any reference to the principle of sharing downstream benefits. There is no mention in article 27 of sharing the benefits accruing downstream from works in an upstream State. This issue should be considered.

Article 31

20. The article provides for a limited exception (national defence and security) with regard to a State's obligation to provide information under the procedures governing notification and consultation and exchange of information. As in many States, Canada's domestic legislation and its legal practices require that certain documents and confidences should not be divulged. Therefore article 31 should include a phrase stating that the obligations in the draft articles would be subject to national laws on the protection of information.

Article 32

21. This article, concerning access on a non-discriminatory basis to domestic judicial systems, reflects a growing realization by States that judicial systems often do not permit those harmed by transboundary pollution to seek redress because non-citizens and non-residents do not have equal access to judicial systems. Indeed, a similar and further-reaching provision was agreed to in Principle 10 of the Rio Declaration on environment and development, which states that "Effective access to judicial and administrative systems, including redress and remedy, shall be provided [by States]". In Canada, jurisdiction over water issues is shared between the provincial and federal levels of government. Thus, although access to the courts in certain federal matters and before certain federal administrative tribunals may be provided by the federal level of government, changes at the provincial level must be undertaken by the provinces. Accommodation of this issue could be considered by the Commission.

Conclusion

22. Finally, in view of the debate surrounding the draft articles, the Government of Canada urges the Commission to consider whether it may not be preferable to pursue the development of the draft articles as a set of principles or guidelines, rather than pursuing the goal of a multilateral convention that may or may not receive widespread support.

Chad

[*Original: French*]
[*10 March 1993*]

GENERAL COMMENTS

1. Chad is an entirely land-locked country and its geo-climatic circumstances are such that its watercourses are not navigable all year round. Most of its watercourses are temporary, save for the Chari and its affluent, the Logone, which are permanent and semi-navigable.

2. In the main, Chad's watercourses and those which it shares with neighbouring countries, known as international watercourses, can be used only for purposes other than navigation, such as irrigation, water supply, construction of small dams, and so forth. Unfortunately, however, since independence, various problems resulting from civil wars have served to delay the country's development, making it impossible to undertake projects for the reasonable utilization of watercourses.

3. The conservation measures dealt with in the draft articles on non-navigational uses of international watercourses should attract much more attention from the State, since Chad is a Sahelian country where the shortage of water is acute, and where what little water there is needs to be conserved and protected.

4. The country has not yet reached the stage of having industrial waste pollution, but it is necessary to start thinking now about implementing measures to protect against possible future pollutants. Consideration could also be given to measures to protect against natural pollutants. Chad could agree to a convention with its southern neighbour, the Central African Republic, with a view to regulating the flows of watercourses and preventing floods.

5. It would be desirable for the State to take account of the provisions of articles 3, 4 and 5, concerning international watercourse agreements, principally in the framework of the Lake Chad Basin Commission.[1] In part II of the draft articles, it should also take account of Recommendation 51 of the Action Plan for the Human Environment,[2] concerning the establishment of international river commissions to supervise the equitable utilization of international watercourses and the implementation of agreements between States, bearing in mind that such agreements should concern only those watercourses which extend over several States, as stipulated in article 1 of that Recommendation.

6. Another factor to be considered is that watercourses are gifts of nature, and the latter did not take equity into account when distributing them among States. Consequently, it would not be very logical for a State having a large part of a watercourse to have to agree to equitable utilization with other States which only have a small part of that same watercourse (as foreseen in article 5).

7. These draft articles are well conceived and could serve as a basis for regulations concerning international watercourses, as well as for cooperation between watercourse States.

SPECIFIC COMMENTS ON INDIVIDUAL ARTICLES

Article 9

8. Bearing in mind the observations regularly made in Chad, it would be desirable, in the framework of article 9, paragraph 3, to add the following:

> "Riparian States should at all times permit temporary installations, such as stakes, buoys, etc. . . for the purpose of taking measurements of international watercourses."

Costa Rica

[*Original: Spanish*]
[*1 September 1992*]

GENERAL COMMENTS

1. First, in the view of the Government of Costa Rica the draft is a remarkable achievement, not only as regards the regulation of the non-navigational uses of watercourses as such, but also as regards its compatibility with the work accomplished in various forums, through various instruments, in respect of environmental protection, and thus with the broad outlines set out in that connection in the United Nations Convention on the Law of the Sea, from the regime and terminology of which the draft frequently draws its inspiration.

2. Secondly, praise is also due to the work of the Drafting Committee, whose commentaries, based on a wide-ranging comparison of the literature and case-law, serve as guidelines for interpreting the scope of the proposed articles.

3. In this field, where the task is to elucidate and refine existing rules, thus progressively developing watercourse law, the draft is remarkable for its constant search for balance and negotiated solutions tailored to the reality of the various relationships involved.

4. The Costa Rican Government welcomes and supports the work of those responsible for preparing the draft articles. In so doing, it reaffirms the spirit which led Costa Rica to ratify the United Nations Convention on the Law of the Sea, as well as its devotion to and profound respect for international law.

5. Notwithstanding the foregoing and in the light of the interest aroused by the draft articles, Costa Rica takes this opportunity to convey a few brief concerns or reflections regarding the regime envisaged by the Commission.

6. Concerning the definition of an "international watercourse", as Costa Rica understands it, the draft makes the international character of a watercourse dependent solely on physical rather than political criteria. Thus, a watercourse is international when parts of it are situated in different States (art. 2 (*a*)). Consequently, a "watercourse

[1] Established under article 1 of the Convention and Statutes relating to the development of the Chad Basin.

[2] *Report of the United Nations Conference on the Human Environment, Stockholm, 5-16 June 1972* (United Nations publication, Sales No. E.73.II.A.14), chap. II.

State" is that State in whose territory part of an international watercourse is situated (art. 2 (*c*)).

7. The Commission states in its commentary that the most common example of an international watercourse would be a river that forms or crosses a boundary.[1] Could this concept be construed in such a way as to change the nature of a river which has been designated by treaty as a boundary between two countries but is recognized as belonging to only one of them? In other words, could a boundary river formally subject to the territorial sovereignty of one State but under a regime whereby it is freely navigable at all times by another State, because it is a boundary, and because two neighbouring States have ratified a convention of this kind, be regarded as an "international watercourse" for the various purposes of these draft articles?

8. Would the watercourses of the other State which feed the boundary river be regarded, because they flow into it, as international when they enter waters under the territorial sovereignty of the bordering neighbour State? Would the proportion of a watercourse which penetrates or infiltrates the boundaries of another State have any effect on whether it was regarded as international or not?

9. The Government of Costa Rica wonders, for example, if a medium-sized river whose channel runs for the most part in State X but whose lower reaches cross a certain small portion of the territory of a neighbouring State and from there drain into that State's tributaries, lakes and other watercourses, would the circumstance of crossing a small part of the territory of a neighbouring State and flowing into its waters be sufficient to qualify that entire river or tributary as an "international watercourse"? If the reply is in the affirmative, would this reasoning not make it possible to extend the character of "international" to the watercourse into which the hypothetical rivers flow, insofar as these form a water system "constituting *a unitary whole and flowing into a common terminus*" (art. 2 (*b*))?

10. What bearing does the distinction made by the Commission between watercourses and their waters (art. 1, para. 1), for the purposes of applying the regime envisaged in the draft articles, have on all this?

11. Attention may also be drawn to a number of other questions which, though different, are closely linked to what has been said above.

12. The Government of Costa Rica wonders if an eventual ratification of an instrument of this kind would be accompanied by a declaration indicating the rivers to which the States intend to apply the regime envisaged therein. Does the criterion of the residual character of the draft convention, as established in articles 2 and 3 particularly, continue to apply in respect of pre-existing agreements?[2] To what extent, by merely subscribing to a convention of this kind, and in the absence of any declaration indicating the watercourses to which a possible convention would apply, could those watercourses be used for non-navigational purposes when the existing regime governing them refers only to navigation?

13. Although it is true that many of the rules in the draft articles belong in the category of "soft" law[3] which is dependent on subsequent specific regulations, it is also true that a regime of responsibility emerges from this framework instrument. However, as is frequently the case in international law, although the principle of responsibility is established, it is not reinforced by any penalty regime. Is there no possibility of establishing such a regime? Further, would the regime of responsibility be extended to the management of the waters of tributaries of an international watercourse? The draft articles take as their starting point the "system" concept to cover the aspects of environmental protection. Does the indirect contamination of watercourses through the contamination of tributaries involve responsibility on the part of the State in which these are situated? Would failure to protect the land and forests of the basins referred to by the draft articles constitute a fault on the part of the State in which these are situated?

14. Do not the procedural aspects of the draft articles, such as those established in the rule on non-discrimination in article 32, need to be revised or made more specific, as in the case of article 3 of the Convention on the Protection of the Environment concluded among the Nordic countries, on which article 32 is based?

15. Lastly, in Costa Rica's view, a body of provisions on the peaceful settlement of disputes is absolutely indispensable.

16. It is hoped that the concerns outlined above will serve to encourage the Commission to continue its work, which has already produced fruitful results.

Denmark

[*See* ***Nordic countries***]

Finland

[*See* ***Nordic countries***]

Germany

[*Original: English*]
[*11 January 1993*]

GENERAL COMMENTS

1. Germany welcomes the provisional adoption by the Commission of draft articles on the law of the non-navigational uses of international watercourses. Germany attaches particular importance to the subject dealt with in this draft, not only because of its geographical situation in the centre of Europe, but especially in view of the fact that it shares several major international watercourses. It is of the opinion that the draft articles also meet a global need

[1] *Yearbook . . . 1991*, vol. II (Part Two), p. 70, para. (2) of the commentary to draft article 2.

[2] According to well-known principles of law, a later rule takes precedence over an earlier one, and the specific over the general provision. However, in this field, where innovations are also taking place, these principles may not be sufficient and it may be necessary to combine them with the principle governing the relationship between principal and residual rules.

[3] General and flexible rules.

for regulation in this matter, owing to the fact that since the Second World War the general use of watercourses has been the focus of attention, pushing navigational needs into the background.

2. For this reason the German Government is pleased to note that the Commission has reacted positively to the special challenge arising from the increased global demand for water over the past decades and the enormous level of water utilization. Germany welcomes the fact that in formulating this draft the Commission, from the start, considered other instruments of international law with a similar aim. Germany supports the idea of basing the future convention on existing regulations, particularly on regional agreements for the protection of specific watercourses, as this serves to create a highly comprehensive framework of complementary global and regional regimes for international watercourses.

3. Germany supports the underlying concept of a framework agreement, for various reasons. On the one hand, this approach does not deny the contracting parties the opportunity to deal with the specific characteristics and use of a certain international watercourse by means of bilateral and multilateral agreements. On the other hand, it provides them with general principles and thus establishes a minimum standard. In addition, it fills a regulatory gap for all those cases of international watercourses for which there are as yet no binding agreements.

SPECIFIC COMMENTS ON INDIVIDUAL ARTICLES

Article 1

4. The German Government welcomes the fact that the draft now begins with a clear statement as to the scope of its application (para. 1). The exception made in paragraph 2, namely that navigational use falls within the scope of the convention insofar as this use affects or is affected by the use described in paragraph 1, is appropriate and does not conflict with the primary content of the regulation. The formula "international watercourses and waters" rightly makes it clear that, for example, in the case of a river the regulation is not limited to the river bed. It thus serves to avoid misunderstanding.

Article 2

5. Another positive feature is that the Commission has dropped the idea of a "relative international character" of watercourses (subpara. (*a*)). This would merely have led to misinterpretations of the individual articles. The adoption of the concept of "watercourse systems" makes it clear that the use of all components of a system must be regulated so that it would not adversely affect other watercourse States or the watercourse itself.

6. It is a good sign that the concept of "international watercourse systems" has been adopted in the draft articles. The definition of watercourses as a system including surface water and groundwater corresponds to the idea of providing the most comprehensive and effective watercourse protection possible, which Germany supports. This broad approach is in line with physical and hydrologic reality. Thus, tributary watercourses far from State boundaries can be included, with the result that the waters in these remote areas fall within the framework of the draft articles. However, this common area is limited by the fact that the watercourses have a "common terminus". The significance of the inclusion of groundwater—except for "confined groundwater"—becomes particularly obvious when bearing in mind that it feeds the watercourses as part of the hydrologic cycle. The Commission was right not to include "confined groundwater" as it has no physical relationship to surface water and thus does not form part of a whole in need of protection. For this reason it was vital to replace the term "watercourse" by "watercourse system" in order to take into account the idea of the best possible use of a watercourse as a common resource, using environmental criteria.

Article 3

7. In this article, which codifies the framework character of the future draft convention, the second sentence of paragraph 2 is particularly significant: it makes clear that agreements concerning international watercourses must always consider their use by all watercourse States, even if they are not parties to the negotiations. Thus, the situation in which a few States agree on the use of the water at the expense of others is rightly avoided.

Article 4

8. Germany welcomes the fact that article 4 makes it clear who can become party to a watercourse agreement. Paragraph 2 can be positively singled out since it ensures that an agreement at the expense of a third party is not possible when it is affected to an "appreciable extent", even if the watercourse agreement applies to only part of an international watercourse.

Article 5

9. Germany supports the principle of "equitable utilization" or "equitable apportionment" laid down in article 5, which should ensure that the use of a watercourse by several States leads to optimal utilization and at the same time minimum limitation of other States' rights to utilize the water (para. 1, second sentence). Thus, the fact that article 5 contains both a right to utilize the water and a duty not to limit other States in their right to equitable utilization of that water is welcomed by Germany. The concept of "equitable participation" embodied in para-graph 2, ensures the goal of optimal utilization, which is only possible when the watercourse States cooperate by participating in the protection and development of the watercourses.

Article 6

10. This article contains an important aid to interpretation in deciding what constitutes "equitable and reasonable" use. It describes the main factors, although the list is not exhaustive, which is only natural in view of the framework character of the future convention. As the possibility of a dispute concerning the interpretation of this most important undefined legal term (equitable and reasonable utilization) cannot be ruled out, paragraph 2 obliges the parties to enter into consultations in a spirit of cooperation, thus reiterating a basic principle contained in many international conventions.

Article 7

11. This article, which establishes the level of protection, is the central element of the draft articles. It is especially important when formulating this article to strike a fair balance between conflicting interests. Thus, on the one hand, the principle of good neighbourliness means that States must tolerate as part of "normal relations between States" limited effects on their territory that cause irritation rather than actual physical damage. Even if the rule of common use and the compatibility of all such use is taken into account, it would be excessive and contrary to international practice to forbid all damaging effects, however minor, upon other riparian States. On the other hand, it has to be borne in mind that today the danger to international watercourses through pollution, warming, and the like, mostly originates with a number of users who, from their own point of view, do not individually cause grievous harm to the watercourse or damage to other States sharing that watercourse. Only when taken *in toto* does the damage become "serious" or "grave" for the international watercourse itself and for other riparian States. For this reason, Germany cannot but agree with the Special Rapporteur and the majority of the members of the Commission when they reject a level of protection described as "serious" or "grave".

12. The term "appreciable" used in the draft articles has the disadvantage of having a double meaning. "Appreciable" may mean "detectable" or "significant" in connection with risk or harm. As this double meaning involves considerable differences in substance, it is suggested that the term "significant" should be used, especially as this also corresponds to the Commission's interpretation of "appreciable". Thus, "appreciable" should be replaced by "significant" in article 7. Similar changes should be made in articles 3, 4, 12, 18, 21, 22, 28 and 32.

13. Regarding the relationship between articles 5 and 7, Germany would suggest that the Commission's appropriate commentary to the effect that any "appreciable" or, as Germany suggests, "significant" damage constitutes a violation of the principle of equitable and reasonable utilization pursuant to article 5 should be explicitly included in the future convention for the sake of clarity.

Article 8

14. Germany welcomes the fact that article 8, which regulates the general principles and objectives of cooperation between watercourse States, contains such long- recognized formulas as "sovereign equality", "territorial integrity", and "mutual benefit".

Article 9

15. Germany also supports the procedural obligation of States, codified in article 9, to inform and consult each other in good time when planning watercourse utilization. This obligation has rightly featured in numerous treaties concerning water and river use and results from the material legal duty to avoid doing anything which might lead to serious damage to another State. Germany regards the regular exchange of information as particularly important for the effective protection of international watercourses.

Article 10

16. Article 10 rightly says that no use of an international watercourse has priority over another in the absence of agreements to the contrary.

Articles 11 to 19

17. The fact that articles 11 to 19 envisage a highly detailed process for "planned measures", in which the positions and possible objections of watercourse States are considered when a project is to be undertaken which might have an "appreciable adverse effect" on these States (art. 12) meets with Germany's agreement. The process for the "planned measures" contains elements of international environmental impact studies.

18. The German Government welcomes the fact that by means of binding waiting periods of one year at most (arts. 13, 15, para. 2, and 17, paras. 1 and 3), the obligation to consult and negotiate is also procedurally guaranteed. While this entails quite considerable interference for the riparian State wishing to carry out the project, the exceptions made in article 19 in the case of urgent projects, provide the necessary balance. In addition, exhaustive national planning procedures where citizens' views are aired (for instance, the environmental impact study) are usually also envisaged for the projects, with the result that delays resulting from the simultaneous involvement of affected riparian States are unlikely.

19. However, the detailed process for "planned measures" can only be of assistance in the case of "large-scale" projects: the damage caused to international watercourses by cumulative pollution arising from several sources is not covered by the above regulations.

Articles 20 to 25

20. Germany attaches great importance to these articles, which deal on the one hand with environmental protection and, on the other, with harmful conditions and emergency situations connected with the utilization of international watercourses. As has already been mentioned (see paragraph 1 above), the Federal Republic of Germany, as a country sharing several large international watercourses, has a particular interest in developing international law in this area. This is especially true of the formulation of rules for environmental protection.

21. Important environmental law principles, such as the demand for use and development of international watercourses which is in keeping with their adequate protection (art. 20) or the listing of certain substances with the aim of preventing their introduction into certain media (art. 21, para. 3), rightly feature in these articles. What constitutes pollution according to article 21 should, however, be more clearly stated. International watercourses can only be protected on a long-term basis if the grave danger of damage by pollution is avoided. For this purpose, a definition of pollution which goes beyond the one set forth in article 21, paragraph 1, is needed. The United Nations Convention on the Law of the Sea in article 1, paragraph 1.4, contains such a definition which has been widely recognized and should be incorporated in this convention. Article 22 innovatively deals with the introduction of "new" animal and plant species into international

watercourses. Germany welcomes article 23, which states that rivers should not be freed from pollution at the expense of the seas. The reduction of pollution in the seas from land-based sources, especially in the North and Baltic Seas, is particularly important to Germany, since rivers play the largest role in sea pollution.

22. Finally, Germany regards the wide range of responsibility in article 24, as well as the obligation of States to cooperate in emergency situations with States not parties to the future convention (art. 25) as positive features.

Article 26 to 32

23. The regulation on non-discrimination (art. 32) is particularly welcome. This is in keeping with Germany's understanding of the law and recent trends in international environmental policy. Because of the highly successful treatment of the Rhine, which was due in no small measure to the excellent work of the International Commission for the Protection of the Rhine,[1] Germany would welcome the placing of greater emphasis on the joint management aspect of international watercourses. Thus, for example, article 26 could be taken out of what was part IV and moved to a prominent position. In order to specify the meaning of "joint management" in an institutionalized form, the clauses of article 26 could be extended, based on the principles of article 10, paragraph 2.

CONCLUSION

24. The 32 draft articles constitute a balanced set of rules. They guarantee effective river protection and supply a framework for more specific bilateral or regional watercourse agreements. All the main principles of international environmental law have been taken into account, such as limited territorial sovereignty, the ban on abuse of rights recognized in international law pertaining to State responsibility, and the procedural obligation to supply information in good time and to consult other parties when planning utilization, documented above all with regard to the use of water within an international drainage basin.

25. Germany would welcome an early diplomatic conference for the purpose of adopting a draft convention.

[1] Established under the Agreement on the International Commission for the Protection of the Rhine.

Greece

[*Original: French*]
[*3 February 1993*]

GENERAL COMMENTS

1. The provisions of the draft articles are generally acceptable to the Government of Greece. The draft manages, on the whole, to reconcile the opposing rights and interests in this field—those of upstream countries, on the one hand, and those of downstream countries, on the other. The draft is thus on the right track and constitutes an excellent basis for future work.

SPECIFIC COMMENTS ON INDIVIDUAL ARTICLES

Article 2

2. The Government of Greece notes that the Commission has adopted in draft article 2 the "system" concept in relation to international watercourses. However, it would have preferred the adoption of the modern concept of "international catchment area", which is more comprehensive and sounder from the scientific point of view. A positive point, however, is the fact that the underground waters of a system have been included within the scope of the draft articles.

Articles 5 to 7

3. Articles 5 and 6 may be considered as the keystone of the draft articles, for in reality they determine the conduct of watercourse States with respect to the utilization of a watercourse in their respective territories. Such utilization must be equitable and reasonable. The use of the notion of equity in connection with relations involving international watercourses is entirely apposite. It should be emphasized, however, that equity is not something that is outside the scope of the law, a sort of solution *ex aequo et bono*, but rather a legal standard imposed by customary international law. Equity is, therefore, a verifiable concept, meeting the specific criteria listed in article 6.

4. Article 7 lays down the obligation not to cause "appreciable harm". In the view of the Greek Government, the term "perceptible harm" would have been preferable, as it more closely reflects current practice in this regard. This comment also applies to the other draft articles in which this term appears.

Article 10

5. With regard to article 10, which deals with the relationship between uses, the Government of Greece maintains that, especially in the case of small rivers, account should be taken, even if only by way of exception, of certain specific interests, such as protection of public health and preservation of water quality for domestic and agricultural use, interests which may be of vital importance for some regions.

Articles 11 to 18

6. These articles establish a mechanism which appears to be both realistic and effective. However, in the view of the Greek Government, the six-month period provided for is too short. A period of at least one year should therefore be allowed, especially with respect to article 13. Otherwise, if States do not have sufficient time to study and evaluate the possible effects, they will be inclined to oppose projects of which they are notified in every case.

Article 19

7. This article, which allows a State to take unilateral action when a matter of the utmost urgency is involved, based on its own judgement, upsets the balance which the draft articles strive to achieve in this respect and undermines the system of safeguards based on articles 12 and the following. Abuses and faits accomplis will be inevi-

table. Accordingly, in the view of the Government of Greece, this article should be carefully reviewed.

Articles 20 to 25

8. The provisions of these articles appear to be satisfactory on the whole. They are patterned to a large extent on the United Nations Convention on the Law of the Sea and other relevant international legal instruments dealing, *inter alia*, with the prevention of water pollution. In particular, the Government of Greece supports the use of the term "ecosystem", which is a sound and scientifically accepted concept.

9. The Government of Greece considers that article 21, paragraph 2, does not yet succeed in striking the requisite balance between the rights of upstream and downstream countries. In addition to the prevention, reduction and control of pollution, the paragraph should also refer to the elimination of pollution, even if only in certain conditions. The words "control" and, possibly, "eliminate" should also be added after the words "prevent" and "mitigate" in article 24.

Articles 26 to 29

10. The importance of articles 26 and 27, which deal with the management and regulation of international watercourses, is obvious and the wording of the articles is, on the whole, satisfactory. The same applies to article 28, dealing with the maintenance and protection of installations. Article 29, on the protection of international watercourses and installations in time of armed conflict, deserves its place in the draft articles. It deals carefully with a sensitive issue.

Article 32

11. While not denying the importance of the principle set forth in article 32 (Non-discrimination), the Government of Greece believes that the issue is outside the scope of the draft articles. In fact, the provision relates to the right of access to justice, a matter governed by other international legal instruments. Accordingly, further thought should be given to whether the inclusion of such a provision is necessary.

12. Lastly, the draft articles should definitely be completed by the addition of provisions on the settlement of disputes. Given the nature of the matter, these provisions should relate to binding procedures for settlement, namely arbitration and judicial settlement.

13. The Government of Greece reserves the right to make further comments on the draft articles at a later stage.

Hungary

[*Original: English*]
[*13 May 1993*]

GENERAL COMMENTS

1. In evaluating the draft articles on the law of the non-navigational uses of international watercourses prepared by the Commission, the reply of the Hungarian Government to the Commission's 1975 questionnaire,[1] which *grosso modo* agreed with the necessity to codify this field of international law, may be used as a starting point. That reply strongly emphasized that the water management agreements that were in force with respect to Hungary had brought about only partial results from the point of view of Hungarian interests. The same reply expressed a preference for the application of the concept of hydrographic (drainage) basins.

2. In the opinion of Hungary, the latest draft *is, on the whole, worthy of support* and it may serve as a good basis for a legally binding international treaty. This view is not antithetical to the fact that this response also contains critical observations.

3. The results to date of the codification undertaken by the Commission reflect the fact that the international community has largely already accepted the existence of general international legal principles and rules governing the relations between States concerning the non-navigational uses of international watercourses. General international law—even in the absence of treaties—limits the freedom of action of the watercourse States. The draft articles identify these general principles and rules of international law, with greater authority than the resolutions adopted by international legal associations, such as the Institute of International Law and the International Law Association. As other examples too have proved, *even a draft may become part of international usage and a point of reference*, both in negotiations aimed at the conclusion of international treaties and in disputes related to international watercourse issues.

4. As for the structure of the draft, although it would seem more logical to include the various *definitions* (art. 21, para. 1, art. 25, para. 1, art. 26, para. 2, and art. 27, para. 3) in a single article—this possibility is mentioned in the commentary[2]—the approach taken, which is to give only the definition of an international watercourse (and by derivation that of the watercourse State) in article 2, has the advantage of stressing the special weight of this notion, by defining *the territorial scope of application* of the general rules set forth in the draft.

5. The inclusion of the *general obligation to cooperate* (art. 8) among the general principles (part II) is more problematic. This general obligation is presumably identical with the principle of cooperation (the only difference being that the practical purpose of cooperation is defined, namely to attain optimal utilization and adequate protection), which is more general in nature, since it appears in such documents as the Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations[3] or the Final Act of the Conference on Security and Cooperation in Europe.[4] Even from a practi-

[1] *Yearbook ... 1976*, vol. II (Part One), pp. 150 et seq., document A/CN.4/294 and Add.1.

[2] *Yearbook ... 1991*, vol. II (Part Two), p. 71, para. (8) of the commentary to article 2.

[3] General Assembly resolution 2625 (XXV), annex.

[4] *Final Act of the Conference on Security and Co-operation in Europe*, signed at Helsinki on 1 August 1975 (Lausanne, Imprimeries Réunies).

cal point of view it would be better to include the *various modes of cooperation* under a general obligation to cooperate, including the regular exchange of data (art. 9), procedural obligations concerning planned measures (arts. 11-19), management (art. 26) and regulation (art. 27), which should be moved up from the miscellaneous provisions.

SPECIFIC COMMENTS ON INDIVIDUAL ARTICLES

Article 1

6. The previous Hungarian reply to the Commission's questionnaire had already supported the broad interpretation of the non-navigational uses, which includes the utilization of the waters and measures of conservation and protection. This article of the draft fulfils this requirement.

Article 2

7. *By defining the term "international watercourse"* the draft also defines the territorial scope of the rules contained in the draft. During close to two decades of codification, the definition of the term "international watercourse" has been the most difficult and most controversial issue. From the very beginning the restrictive, so-called traditional, notion of the term "international watercourse" (which can be traced back to the 1815 Congress of Vienna), limiting it to watercourses forming or crossing boundaries, has been in conflict with the wider interpretation, which—largely as a result of the effect of the Helsinki Rules[5] identifies international watercourses with drainage basins (recently the expression "international catchment area" has been used) or with international river systems (the commentary[6] here refers to the Treaty of Versailles). The Commission's provisional working hypothesis of 1980[7] tried to solve the conflict of the two perceptions by introducing a functional term, creating a link between the international nature of the watercourse and the transboundary effects: if the consequences of an action taken with respect to a hydrological system affect the territory of another watercourse State, then the watercourse is an international one, in the absence of such consequence, however, it is not international.

8. It could still be useful to *enumerate examples of the most important elements of an "international watercourse"*, which may be found in the commentary, including aquifers,[8] while at the same time the exclusion of *confined groundwaters* not related to surface waters can be supported.

Articles 3 and 4

9. These may be considered two of the key provisions of the draft. They are premised on real situations, supported by precedents and underpinned by theoretical considerations, namely that the best way to regulate international relations with respect to non-navigational uses is for watercourse States to conclude *international treaties*, which the draft articles call *watercourse agreements*.

10. The utility of and need to conclude watercourse agreements are generally recognized in the commentary to article 3[9] and are in harmony with the basic idea expressed in the Hungarian response of 1976.

11. The result of this approach is the twofold nature of the regulations concerning international watercourses, relating on the one hand to watercourse agreements and on the other to the general principles and rules codified in the draft. *This parallel nature of the regulation of the matter under international law*, however, creates *problems* from both directions.

12. The commentary attributes two *functions* to the general principles and regulations codified in the draft: on the one hand—in the absence of watercourse agreements—they define the rights and obligations of watercourse States,[10] on the other hand—as a framework or umbrella treaty[11]—they provide guidelines on the watercourse agreements to be concluded. It is difficult to question the correctness of this latter function. However, it is also difficult to envisage how each and every one of these general principles and rules could be applied directly, and *whether—in the absence of an agreement—they describe the rights and obligations of watercourse States with the required precision.*

13. The draft articles leave it to the watercourse States to decide whether they want to conclude watercourse agreements and gives them the freedom to define the territorial and *ratione materiae* scope of application of these agreements. It means, in other words, that *there is no obligation to conclude agreements*[12] (here the draft follows the explanation of the arbitral award in the *Lake Lanoux* case),[13] but every watercourse State is entitled to a *pactum de contrahendo*, that is to say, it has the right to initiate negotiations with a view to concluding agreements.

14. If there are more than two watercourse States to an international watercourse, further problems are to be taken into account. The draft deals with the situation when one watercourse State's use of the watercourse *may be affected to an appreciable extent*. Hungary believes that the

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[5] The Helsinki Rules on the Uses of the Waters of International Rivers, adopted by ILA in 1966; see ILA, *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 et seq., document A/CN.4/274, para. 405.

[6] *Yearbook... 1991*, vol. II (Part Two), p. 71, para. (9) of the commentary to article 2.

[7] *Yearbook... 1980*, vol. II (Part Two), p. 108, para. 90.

[8] *Yearbook... 1991*, vol. II (Part Two), p. 70, para. (5) of the commentary.

[9] For the commentary to article 3, initially adopted as article 4, see *Yearbook... 1987*, vol. II (Part Two), pp. 27-30, in particular para (2) *in fine*.

[10] Ibid.

[11] Ibid., para. (3) *in fine*.

[12] Ibid., p. 29, paras. (18)-(20) of the commentary.

[13] United Nations, *Reports of International Arbitral Awards*, vol. XII (Sales No. 63.V.3), p. 281; partial translations in *International Law Reports, 1957* (London), vol. 24 (1961), p. 101; and *Yearbook... 1974*, vol. II (Part Two), pp. 194 et seq., document A/5409, paras. 1055-1068.

English expression "appreciable extent" and the French *de façon sensible* are not fully consonant with the application of a watercourse agreement limited in its territorial or *ratione materiae* scope. The State in question is entitled to participate in the negotiations of and to become a party to the agreement.[14] The problem, however, is not fully solved, because there is no mention of what will happen if the parties to a—presumably bilateral—agreement which affects to an appreciable extent the use of the watercourse by a third State, *do not recognize the rights of the latter, or make it impossible to apply the agreement.*

15. According to the draft articles, the purpose of the watercourse agreements is *to apply the general principles and rules and to adjust them to the particular situation.* The latter provides sufficient latitude for specific considerations, since these principles and rules should be taken into account when concluding agreements,[15] and are recognized as guidelines.[16] Even so, the provision of article 3 is still not unambiguous. It may be interpreted as containing a certain cogency, evidenced by the absence of the formula "unless otherwise provided by international treaty". Even in this latter case the problem may arise—as is apparent from the commentary to article 1 of the Rules of International Law Applicable to Transfrontier Pollution (Montreal Rules):

> ... States concerned are free to agree on a higher level of protection ... such an agreement cannot dispose of the rights of other States or free a State from the responsibility for the protection of the global environment.[17]

and similarly from article I of the Helsinki Rules.

16. If the rights of other (third) watercourse States, or simply other States (that is to say, "non-directly injured States"), as referred to by Mr. Arangio-Ruiz, the Special Rapporteur, in his third report on State responsibility[18] are being harmed by opting out from, excluding, or modifying the principles and rules contained in this draft, under the pretence of "apply and adjust", then *would it be sufficient to refer the case to the rules of international legal responsibility*, or would not the draft require some kind of *procedural solution of its own*?

17. Another problem of the relationship between the watercourse agreement and the general principles and rules is that these principles and rules also involve nations which are *per definitionem* in change, meaning that their importance and weight vary over time.[19] Such notions are the technical conditions influencing the measure of reasonable and equitable use, in the interests of the protection of the environment, and the like. In what way could the development of the general principles and rules in turn affect the watercourse agreements? Could this development be qualified as a significant change of circumstances, or is it necessary to adapt the treaties in force (especially the older ones) to the new circumstances? (This approach is envisaged, for example, in the Convention on the Protection and Use of Transboundary Watercourses and International Lakes).

Articles 5 to 10

18. The title of part II (General principles) is rather unfortunate. There are only three such obligations that may meet the traditional parameters of a legal principle, namely the principles of reasonable and equitable utilization, the obligation not to cause harm, and cooperation. In Hungary's view the regular exchange of data and information is rather a general obligation, while the lack of hierarchy in the uses of the watercourse is more a consequence of the principle of a reasonable and equitable share, therefore it should be more appropriately placed after article 6.

19. The above-mentioned principles of water utilization have their roots in *international customary law*, but a *progressive development of law* can also be detected. Rational and equitable utilization, as well as the obligation not to cause harm, have already appeared as a pair of principles in the resolution adopted by the Institute of International Law at its Salzburg session in 1961 (Salzburg resolution).[20] Contrary to this, the Helsinki Rules recognized only one key principle, that of reasonable and equitable share (art. V). While ILA, drifting away from this concept in its resolution on the law of international groundwater resources (Seoul Rules)[21] places the obligation not to cause harm next to the principle of reasonable and equitable share, the resolution on the pollution of rivers and lakes and international law (Athens resolution), adopted in 1979 by the Institute of International Law[22]—at least in the sphere of protection against pollution—neglects the principle of reasonable and equitable share.

20. With respect to the development of law, first the essence of the principles and then their interrelationship must be identified.

21. The principle of *reasonable and equitable utilization*, described in article 5, contains a prima facie axiomatic element, which the Hungarian Government considers to be especially important, namely the declaration of the right of the watercourse State to utilization as an attribute of sovereignty.[23] The immanent limit of this right is the equal and correlative right of other watercourse States to the utilization and benefits of the watercourse.

22. The inherent limitation within the reasonable and equitable utilization itself—apart from extreme cases (such as the obvious deprivation of the watercourse State

[14] See the commentary to article 4, initially adopted as article 5, in *Yearbook ... 1987*, vol. II (Part Two), p. 30, para. 2.

[15] See paragraph (5) of the commentary (footnote 9 above).

[16] See paragraph (2) of the commentary (ibid.).

[17] ILA, *Report of the Sixtieth Conference, Montreal, 1982* (London, 1983), p. 158, para. 2 of the commentary to article 1 of the Rules.

[18] *Yearbook ... 1991*, vol. II (Part One), p. 26, document A/CN.4/440 and Add.1, paras. 89-95.

[19] See the resolution of the Institut de Droit International about the inter-temporal problem in public international law *(Annuaire de l'Institut de droit international*, vol. 56, 1975, p. 340).

[20] "Utilization of non-maritime international waters (except for navigation)", *Annuaire de l'Institut de droit international*, vol. 49, part II (1961), pp. 381-384.

[21] ILA, *Report of the Sixty-second Conference, Seoul, 1986* (London, 1987), pp. 238 et seq.

[22] "La pollution des fleuves et des lacs et le droit international", *Annuaire de l'Institut de droit international*, vol. 58, part II (1980), p. 196.

[23] For the commentary on article 5, initially adopted as article 6, see *Yearbook ... 1987*, vol. II (Part Two), pp. 31-36, in particular, p. 32, para. (8) *in fine*.

of its rights to utilization[24]—does not secure delimitation of the rights to utilization and the obligations to protect the waters against harm. To put it differently, the *conclusion of an international treaty, a watercourse agreement, is required* for the realization of the principle mentioned in paragraph 21 above. In cases of conflicts of uses, adjustment and accommodation of these uses can be best achieved through special watercourse agreements,[25] at the same time the commentary to article 7 mentions that

*... a watercourse State may not justify a use that causes appreciable harm to another watercourse State on the ground that the use is 'equitable', in the absence of agreement between the watercourse States concerned**.[26]

23. The factors mentioned above determine the *relationship* of the principles of reasonable and equitable use and the no harm rule. Prima facie, they would be considered twin principles among which the interested parties may choose according to need. However, the Commission—as specifically recognized by McCaffrey[27]—*chose the primacy of the no harm rule* and gave a subordinate role to the principle of equitable use. The reasons for this decision are as follows: (*a*) the unambiguity and easier application of the no harm rule compared to the very flexible nature of the equitable utilization rule, which requires the balancing of a number of factors; (*b*) the no harm rule provides greater protection to the weaker or the downstream State; (*c*) the principle of reasonable and equitable use is less effective in solving problems related to pollution and environmental protection.

Article 7

24. The draft articles consider only *appreciable harm* to be relevant. The emphasis on the appreciable character of the harm causes not only a problem of interpretation, but also creates a legally relevant discrimination between two degrees of harm. The thesis that insignificant, minor harm is irrelevant, is obviously true. However, the maxim of *de minimis non curat praetor* tacitly forms part of every legal instrument. The underlining of the "appreciable" extent of the harm leads to the conclusion that there must be a harmful effect in the "grey area", between the *de minimis* harm (which requires no mention in the instrument) and appreciable harm.

25. Since the *no harm rule* prohibits the causing of appreciable harm, any act contrary to this is a violation of international law, the illegality of which may be excluded only through agreement, aimed at the realization of reasonable and equitable utilization.

26. In the Government of Hungary's judgement the *no harm rule* should be complemented with a general obligation of prevention, which should not be limited exclusively to the protection against pollution (as is done in article 21). This would harmonize with the theory of the impact assessment system, which is gaining ground. In the article cited above (see paragraph 23), McCaffrey mentioned that this problem came up also in the work of the Commission, raising the question of what is the standard of responsibility for the violation of the *no harm rule*. In Hungary's view this question could be adequately solved by a general obligation of prevention. The consequences of its violation, however, are to be established under the rules of international responsibility.

27. Article 28 concerning installations is closely related to the general obligation of prevention, which structurally should have been mentioned here. Also belonging to the obligation of prevention is the rule formulated in the *Lake Lanoux* case, according to which

*... construction and functioning of abnormal installations, i.e. installations exceeding normal technical and political risks are prohibited**.

Hungary *attaches great importance* to this rule.

28. The commentary identifies the obligation not to cause harm with the maxim of *sic utere tuo ut alienum non laedas*.[28] According to authoritative writers (Oppenheim, Lauterpacht, Starke, et al.),[29] the above-mentioned rule expresses the prohibition of the abuse of law, which is obviously much narrower than the general obligation not to cause harm.

Articles 11 to 19

29. Together with the prohibition on causing harm (and the provisions of environmental protection) articles 11 to 19 belong to a group of rules which do not require the conclusion of watercourse agreements for their application. Apart from the provisions setting specific deadlines, part III (Planned measures) of the draft articles codifies customary international law. Even so, it would have been useful to mention the dispute at the United Nations Conference on the Human Environment[30] over the obligation to provide notification. Hungary has only two observations on the formulation used in the draft.

30. First, it would be desirable to insert a *pactum de contrahendo* "with a view to negotiating in good faith for the purpose of concluding a watercourse agreement" into paragraph 1 of article 17, which would be in harmony with the logic and specific provisions (see articles 4 and 5) of the draft, and thus provide greater guarantees of respect for the general principles and rules of international law.

31. Secondly, paragraph 2 of article 17, as a reflection of the previous concept of reasonable and equitable share, prescribes that consultations and negotiations should be based on the principle that reasonable regard should be paid to the rights and legitimate interests of other States.[31] This formulation is difficult to justify, since rights are to be respected, not to be paid regard to; the obligation to pay regard therefore applies only to the interests. For a

[24] Ibid., p. 31, para. (2) *in fine*.

[25] Ibid., p. 33, para. (9) *in fine*.

[26] For the commentary to article 7, initially adopted as article 8, see *Yearbook... 1988*, vol. II (Part Two), pp. 35-41, in particular, p. 36, para. (3).

[27] "The International Law Commission and its efforts to codify the international law of waterways", in *Annuaire suisse de droit international*, vol. XLVII (1990), p. 32.

[28] See footnote 26 above.

[29] See J. Bruhács, *The Law of Non-navigational Uses of International Watercourses* (Dordrecht, Boston, Nijhoff, 1993).

[30] *Report of the United Nations Conference on the Human Environment, Stockholm, 5-16 June 1972* (United Nations publication, Sales No. E.73.II.A.14), part 3, chap. VIII, para. 60.

[31] See articles VII and VIII of the Helsinki Rules.

similar interpretation see the award in the *Lake Lanoux* case.

32. Hungary's objection to the notification-consultation mechanism is based on the fact that it limits the *procedure* to a "single instance". This follows, *inter alia*, from the wording of paragraph 3 of this article and paragraph 4 of the commentary, which states that: "After this period has expired, the notifying State may proceed with implementation of its plans".[32]

33. It could be argued, however, that the existing uses and functioning installations might also have such adverse effects, resulting, for example, from the accumulation of effects that were latent or were unforeseen. (An example which takes account of the latter is the 1957 Agreement between Norway and the Union of Soviet Socialist Republics on the utilization of water-power on the Paatsojoki (Pavsik) River.)[33] While the extension of the obligation to consult-notify to this case would be in harmony with the no-harm rule and the obligation to cooperate, it would not terminate the application of the utilization rights stemming from territorial sovereignty, it would merely restrict it to a small degree.[34]

Articles 20 to 23

34. Part IV (Protection and preservation) of the draft articles contains those principles and rules of customary international law that evolved in the areas of protection of the environment and defence against pollution. This part also deals with norms of international law *in statu nascendi* pertaining to the subject, among which—interestingly enough—the provisions of the United Nations Convention on the Law of the Sea and the instruments drafted by ECE also play an important role (para. (2) of the commentary to art. 20,[35] para. (1) of the commentary to art. 23,[36] and the whole of art. 24 have been based on the Convention on the Law of the Sea).

35. It would be correct to amend article 20 (Protection and preservation of ecosystems) to include an obligation to restore the original state of the environment in case of damage. Such a solution would harmonize with paragraph 2 of article 21 (Prevention, reduction and control of pollution), which requires the reduction and control (the English verb "to control" and the French *maîtriser* are not totally identical in meaning) of pollution, because presumably it could also refer to the cleaning up of damage that had already occurred.

36. Finally, it should be noted that it would be more logical to move the definition of "ecosystem" from paragraph (2) of the commentary[37] to the text of article 20.

37. Article 21 adequately reflects the need for stricter measures to protect the water quality of international watercourses. However, the enumeration of the different kinds of harm in paragraph 2 seems superficial, even troubling. What is the purpose of singling out harm to the living resources from all the types of ecological damage? It is undoubtedly true that the various forms of harm need to be defined. However, that would best be achieved through watercourse agreements—perhaps agreements on civil law liability damages.

Articles 26 to 32

38. As mentioned above, some of the provisions grouped as miscellaneous provisions (arts. 27, 28, 30 and 31) are logically connected to other articles. They should therefore have been included in those articles.

39. The Government of Hungary agrees with the provision of article 29 dealing with rights and obligations in time of armed conflict.

Iceland

[*See* ***Nordic countries***]

Iraq

[*Original: Arabic*]
[*28 January 1993*]

General comments

1. All the articles and provisions of the draft on the law of the non-navigational uses of international watercourses and the comments thereon are useful and accord with Iraq's concept of the non-navigational uses of international watercourses.

2. In paragraph (4) of the commentary to article 8,[1] reference is made to the term "transboundary waters" as used in the "Principles regarding cooperation in the field of transboundary waters" adopted by ECE in 1987. This is incompatible with the definition of an international watercourse. In Iraq's view, this term is unacceptable in instances where it occurs.

Specific comments on individual articles

Article 6

3. Iraq proposes that the following should be added to the end of draft article 6, paragraph 1 (*d*):

"taking into account that particular importance is to be accorded to existing uses over potential uses in the event they should conflict."

4. Iraq also proposes that a subparagraph (*g*) should be added to article 6, paragraph 1, of the draft to take account of the quality of the water entering any watercourse State in determining equitable and reasonable quantity.

Article 8

5. Iraq proposes that the word "possible" should be added after "optimal utilization" because this expression is non-restrictive and is tied to scientific and technological development.

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[32] *Yearbook . . . 1988*, vol. II (Part Two), p. 52.

[33] United Nations, *Treaty Series*, vol. 312, p. 274.

[34] See analogy with the *Lake Lanoux* case.

[35] Initially adopted as article 22. For the commentary, see *Yearbook . . . 1990*, vol. II (Part Two), pp. 57-60.

[36] Initially adopted as article 25. For the commentary, ibid., pp. 64-65.

[37] See footnote 35 above.

[1] Initially adopted as article 9. For the commentary, see *Yearbook . . . 1988*, vol. II (Part Two), pp. 41-43.

Netherlands

[*Original: English*]
[*4 June 1993*]

GENERAL COMMENTS

1. Before examining each article individually, the Netherlands Government will first give a general assessment of the draft articles on the law of the non-navigational uses of international watercourses as a whole and then make a number of general comments on the nature of the instrument to be proposed after adoption on second reading, as well as pointing out some inconsistencies, and a number of issues on which regulations have not been included.

General assessment

2. The Netherlands Government is of the opinion that the draft articles should generally be assessed as positive. The Commission has formulated very adequate regulations on these very complex issues. To be more specific, however, its assessment of the draft as a whole and of the articles individually depends to a significant extent on whether the draft is to be regarded as a draft recommendation, a draft declaration or a draft treaty. For the reasons referred to in paragraph 5 below, the Netherlands Government believes that preference should be given to the first of these options, namely that the draft should be regarded as a draft recommendation. In this event, the draft is found to be satisfactory and, subject to some amendments, the Netherlands would favour its adoption.

3. The second part of these comments examines those articles which should be amended. However, if it is finally decided to make the draft articles into a draft treaty, other parts of the draft would require amendment and the text would thus need to be re-examined.

Nature of the instrument

4. As stated in paragraph 2, the Netherlands Government is of the view that the draft articles should not become a legally binding instrument, but that they should be adopted as a recommendation by the United Nations General Assembly. It is acknowledged that a number of arguments may be put forwad in favour of turning the draft into a treaty. Legally binding regulations on the uses of international watercourses could, in a number of cases, help to clarify the rights and obligations of riparian States and thus contribute towards international agreement on the use of international watercourses. Partly, at least, the issue covered by the draft articles has been sufficiently refined to warrant regulation in a treaty.

5. However, the Netherlands Government attaches greater weight to the case for a form which is not legally binding. In particular, it questions whether the issue involved lends itself to a worldwide treaty which specifies the rights and obligations of States to a sufficient degree. In view of the differences between rivers, the largely opposing interests of upstream and downstream States, and the great differences between regions, it will be no easy matter to reach agreement on a framework treaty which includes such specific provisions. For these reasons, its preference would be to incorporate the draft articles in a recommendation providing guidelines for the conclusion of binding agreements on individual watercourses.

6. In this connection, the Netherlands would observe that the recommendation option does not preclude regarding parts of the draft articles as a reflection of existing customary law.

Inconsistencies

7. The Netherlands Government notes that there are a number of inconsistencies in the formulation of the articles, in some cases for no apparent reason. In other cases, reasons may well exist, but they are insufficiently clear in the accompanying commentary. The inconsistencies relate in particular to the way in which obligations are qualified. It is not always clear why, in the articles concerned, different adjectives are used to qualify obligations. For example, article 21, paragraph 2, obliges States to prevent the occurrence of "appreciable harm", article 24 refers to the prevention of circumstances that are "harmful", and article 25 relates to situations in which "serious harm" may occur. In a number of cases, the reasons for the various modifiers given to thresholds are clearly indicated and are convincing (for example, in the case of the notification threshold in article 12), but in other cases a satisfactory commentary is not given.

8. The draft articles would gain in clarity if the terminology used were consistent. Whenever a different formulation is chosen the commentary should indicate the reasons and the effect it will have on the substance and extent of the obligations in question.

Issues not included in the regulations

9. The Netherlands Government is of the view that a number of issues have wrongly been excluded from the draft articles, such as the lack of a provision on environmental impact assessment (para. 11 below) and, in particular, of provisions on the settlement of disputes.

10. The absence of dispute settlement provisions from the draft articles is perceived as a shortcoming. In view of the fact that should the draft articles be regarded as a recommendation, they will serve as a model for the conclusion of treaties on individual watercourses, the Netherlands Government regards a reference to suitable and effective regulations for the settlement of disputes as essential.

SPECIFIC COMMENTS ON INDIVIDUAL ARTICLES

Article 1

11. The Netherlands Government stresses the importance of the indication in the commentary[1] that the term "uses" of international watercourses is to be interpreted in its broad sense. Although, for example, the construction of dykes by an upstream State to counter possible damage to its land may affect the use of water by the downstream State, such an activity may not be regarded as a "use"

[1] Initially adopted as article 2. For the commentary, see *Yearbook ... 1987*, vol. II (Part Two), pp. 25-26, in particular, p. 26, para. (1) *in fine*.

within the meaning of article 1. In view of the close connection between such activities and the issues regulated in the draft articles, the commentary should be adapted accordingly.

Article 2

12. The Netherlands Government would observe that the use of the term "watercourse" may lead, in practice, to a lack of clarity. According to this definition, the Maas and the Rhine, which flow into a common terminus, should be regarded as one watercourse. Although the riparian States may themselves define the extent to which they wish to cooperate under the provisions of article 3, in the absence of such agreements a number of the obligations contained in the draft agreement will apply to the watercourse as a whole. This problem could be solved if the definition were to be amended to the effect that those watercourses which follow their own course but flow into a common terminus are to be regarded as separate watercourses for the purposes of the draft articles. An alternative solution would be to delete the words "and flowing into a common terminus", although this would entail the loss of a restrictive element.

13. This article does not define where a watercourse terminates in the seaward direction. This may occasionally be of importance to the scope of the draft articles, and it might therefore have been desirable to examine the matter, at least in the commentary.

Article 3

14. In the event of the draft articles finally being submitted as a treaty for ratification, the words "apply" in paragraph 1 and "application" in paragraph 3 are superfluous and should be deleted. There is no objection, however, to their retention in the event of the draft articles being submitted as a recommendation.

Article 6

15. It is noted that the criterion "potential uses of the watercourse" in article 6, paragraph 1 (*d*), has not been further defined. It is relevant to emphasize that not every conceivable future use can be taken fully into account in the consideration of interests on the basis of article 6. Only potential uses which may be regarded as feasible in the near future may be considered.

Article 7

16. The Netherlands Government regards it as desirable for the commentary to emphasize that this is a due diligence obligation which does not imply strict liability. A similar clarification has in fact been included in the commentary accompanying a number of the other articles, to wit article 21, paragraph 2,[2] article 24,[3] and article 28, paragraph 1.[4]

Article 10

17. The words "or custom" in paragraph 1 of this article should be deleted or at any rate qualified. In its present form, article 10 could lead to absolute priority being given to existing uses over new uses. The Netherlands Government regards this as an undesirable construction. Moreover, such a priority would not be consistent with article 6, paragraph 1, which stipulates that existing uses constitute only one of the factors to be taken into consideration. This is, of course, different if the protection of existing uses is based on a rule of (regional) customary law. The commentary could contain a separate provision to cover this eventuality.

Article 16

18. It is unclear how the liability of the notifying State will be affected in the event of the notified State failing to respond to the notification. According to this article, the notified State retains scope to hold the notifying State liable under the provisions of articles 5 to 7. According to paragraph (1) of the commentary,[5] the notified State's failure to respond may be interpreted as tacit consent. It might therefore be regarded as inconsistent if the said State were then to invoke draft articles 5 to 7 at a later date should the notifying State conduct the activities in accordance with the notification.

19. The procedural obligations contained in articles 12 and those following do not in principle affect the substantive obligations contained in articles 5 to 7. The regulation proposed by the Commission should therefore be maintained. Failure to respond to a notification may, of course, affect the extent to which the notifying State may foresee damage arising from its planned activity and, thus, the extent to which it may be held liable. The Netherlands Government therefore regards it as desirable that the commentary accompanying article 16 should make it clear that failure to respond may not automatically be interpreted as consent.

Article 20

20. The relationship between draft article 20 and the other articles contained in part IV should be clarified. The statement in the commentary that

> . . . in view of the general nature of the obligation contained in [this] article . . . , the Commission was of the view that it should precede the more specific articles in part IV[6]

leads to the conclusion that the purpose of the article is not to grant individual subjective rights but to serve as an introduction to the further provisions of part IV. In the view of the Netherlands Government, a separate obligation to protect the ecosystems of international watercourses is required to supplement the obligations arising from the subsequent, more specific provisions of part IV. This obligation should relate, *inter alia*, to the protection of fauna and flora, including the preservation of diversity

[2] Initially adopted as article 23. For the commentary, see *Yearbook . . . 1990*, vol. II (Part Two), pp. 60-63, in particular para. (4).

[3] Initially adopted as article 26. For the commentary, ibid., p. 65, para. (2).

[4] For the commentary, see *Yearbook . . . 1991*, vol. II (Part Two), pp. 75-76, in particular para. (2).

[5] *Yearbook . . . 1988*, vol. II (Part Two), p. 51.

[6] Initially adopted as article 22. For the commentary, *Yearbook . . . 1990*, vol. II (Part Two), pp. 57-60, in particular para. 1.

of species, insofar as this is not guaranteed by the obligation to prevent pollution.

21. Article 20 has been formulated in more general terms than article 21, paragraph 2. In particular, it does not contain restrictive definitions such as "appreciable harm". Should it indeed be the intention to attach a separate meaning to article 20, the Netherlands Government would recommend that the scope of the obligation be defined and the reasons for possible differences with article 21, paragraph 2, indicated.

22. A definition of the ecosystem has been included in the commentary only. This article therefore departs from other draft articles which themselves contain a definition of the terms determining the obligation in question. Should article 20 indeed be interpreted as a provision from which subjective rights may be derived, the Netherlands Government considers it essential to define the term "ecosystem" more precisely, particularly if the draft articles were ultimately to lead to a treaty.

Article 21

23. The wording of the objectives of article 21, paragraph 2, should be altered. The obligation "(to) prevent, reduce *and* control pollution" should be replaced by the obligation "(to) prevent, reduce *or* control pollution" in view of the fact that these measures cannot be taken simultaneously.

24. It is important that the observations made with regard to article 7 concerning the due diligence nature of the obligation should also apply to article 21, paragraph 2. The commentary accompanying article 21, paragraph 2, would seem to imply that the due diligence element is restricted to the obligation "(to)... reduce and control pollution...",[7] leaving it unclear as to whether another standard is to be applied to prevention. The fact that there is no question of liability in this case either should be clarified.

Article 24

25. As stated in paragraph 7 above, in contrast to article 21, paragraph 2, this obligation is not restricted to a prohibition of activities leading to appreciable harm but relates to all harmful consequences. The Netherlands Government regards it as desirable to give an explanation of the reasons for this distinction.

26. Partly in view of the inconsistent wording, the Netherlands Government regards the distinction drawn between the obligations contained in article 21, paragraph 2, in particular those relating to "harm to human health or safety", and those contained in article 24, in particular those relating to "water-borne diseases", as insufficiently clear. It would be desirable to limit the application of article 24 to damage arising from causes other than pollution. In addition, the Netherlands Government is of the opinion that the obligations relating to pollution and other causes of damage should be harmonized.

Article 25

27. The observation relating to the wording of article 21, paragraph 2, applies in this case too. The word "and" in "prevent, mitigate and eliminate pollution" in paragraph 3 should be replaced by the word "or".

Article 26

28. It is noted that article 26 does not refer to the desirability or need to institutionalize cooperation between riparian States. In view of the importance attached in practice to institutions such as river commissions, the Netherlands Government perceives this to be a shortcoming. It would be desirable to amend article 26 in this respect by the inclusion of a reference to opportunities to institutionalize cooperation and by ensuring that under "joint mechanisms" provision is made for the establishment of river commissions and other possible institutional frameworks, particularly if the draft articles are to become a recommendation.

Article 27

29. In the opinion of the Netherlands Government, the words "where appropriate" should be deleted from paragraph 1 of this article, as they entail an unwarranted restriction of the scope of the obligation to cooperate.

30. For the sake of consistency, for example with article 21, preference should be given to the inclusion in paragraph 1 of the definition now contained in paragraph 3.

Article 29

31. In view of the fact that this article does not envisage imposing new obligations but serves only to remind States of the application of the law concerning armed conflict, it will probably have no practical implications. It is also questionable whether the riparian States of international watercourses will include this provision in specific agreements they conclude to implement the framework treaty to which these draft articles are intended to lead. It would probably be preferable to delete this article.

Article 30

32. The Netherlands Government finds the proposed formulation of this article unsatisfactory. In particular, the qualification in the concluding words "accepted by them" could render the obligation of no practical significance. The obligation would be reinforced if these words were replaced by "available to them" or if they were deleted entirely.

Article 32

33. It is noted that the scope of article 32 is very limited. The article only prohibits discrimination in relation to access to judicial or administrative procedures, but it does not stipulate that such access must be available. The Netherlands Government would regard it as desirable to amend article 32 to ensure the availability of national judicial procedures and to provide for access to procedures and possibly rights to compensation. In addition, this would bring the draft articles more closely into line with

[7] See footnote 2 above.

the Convention on Environmental Impact Assessment in a Transboundary Context (Espoo Convention).

Special issues

Compulsory cooperation and institutional regulations

34. The obligations to cooperate as stipulated in the draft articles are found to be largely satisfactory. Comments on article 16 have already been made in paragraphs 18 and 19 above.

35. The Netherlands Government would observe that articles 11 to 19 concerning the procedural rights and obligations applicable when States plan to undertake activities which might affect other States overlap to some extent with the obligations laid down in the Espoo Convention. In some respects the obligations are not entirely consistent. Paragraphs 43 to 45 below concerning the connection with State practice contain some observations on this matter.

36. As it already noted with regard to the observations on article 26 (para. 28 above), the Netherlands Government regrets that the draft articles contain very few provisions with regard to institutional regulations and is of the opinion that they should be amended in this regard. Reference may also be made to the Convention on the Protection and Use of Transboundary Watercourses and International Lakes (Helsinki Convention) in which provision is expressly made for the "establishment of joint bodies" (art. 9) to which certain responsibilities have been assigned.

The terms "equitable use" *and* "pollution"

37. In addition to the remarks already made, the Netherlands Government would regard the provisions relating to equitable use (arts. 5-6) and pollution (in particular art. 21) as satisfactory. However, some comments on the relationship between these provisions are deemed desirable.

38. The regulation envisaged by the Commission gives priority to article 21 over the principle of equitable use. Article 21, paragraph 2, does not make an exception for appreciable harm caused by activities conducted in accordance with this principle. The Netherlands Government concurs with this construction. The importance currently attached to the prevention of transboundary water pollution within many international frameworks appears difficult to reconcile with a regulation which regards such pollution, even if it led to appreciable harm, as lawful, in view of the interests involved in the activity giving rise to it. Even the more recent conventions provide no point of contact. Although equitable use is regulated in the Helsinki Convention, the latter does not appear to subordinate it to the ban on appreciable harm.

39. However, the Netherlands Government regards the relationship between the provisions relating to equitable use and the ban on appreciable harm contained in article 7 as less satisfactory. In this case too, the Commission would seem to give priority to article 7; this is evident from both the unconditional formulation of the article and the accompanying commentary, according to which the use of a watercourse is inequitable prima facie if it causes appreciable harm to another State. This option has the advantage of providing a certain measure of objectivity. Article 7 has been formulated in considerably less flexible terms than article 5. Should appreciable harm be caused, a consideration of interests under the provisions of article 5 is no longer relevant. However, attention should be drawn to the possible consequences of this regulation.

40. As existing uses of a watercourse are protected against the appreciable harm to which new uses might give rise, the draft articles would seem to give priority to existing uses over new uses. Partly as a result of this, the downstream States would enjoy a stronger position than they would under the principle of equitable use. In addition, if it is accepted that the definition of unlawfulness under article 7 may conflict with the outcome under article 5, the proposed regulation could have an undesirable effect in that the draft articles stipulate an outcome that is "inequitable". Finally, the construction chosen departs from what is largely regarded as customary law doctrine, as formulated in the Helsinki Rules,[8] under which the principle of equitable use has priority. In view of these considerations, the Netherlands Government regards it as desirable to adjust the relationship between article 5 and article 7 with a view to permitting appreciable harm if it is reconcilable with the principle of equitable use.

Environmental impact assessment

41. The Netherlands Government has established that the draft contains no explicit provisions on environmental impact assessment. A number of provisions are, however, relevant, in particular those which relate to notification and consultation (see paragraph 35 above) and which serve to establish the transboundary effects of planned measures. These may be regarded as elements of environmental impact assessment procedures.

42. The absence from the draft articles of specific provisions on environmental impact assessment is perceived as a shortcoming. The inclusion of a general provision recommending the conduct of environmental impact assessments is desirable.

State practice

43. A number of the draft articles relate to issues already dealt with in the obligations arising from existing conventions. Reference has already been made to differences between the provisions of the draft article and those of the Espoo and the Helsinki Conventions in particular. A number of the differences may be regarded as improvements.

44. The above applies, for example, to article 12, which obliges States to give notification in cases in which their activities might lead to appreciable adverse effects in other States. This criterion represents a departure from the "appreciable harm" criterion which, under the provisions of article 7 and article 21, paragraph 2, is the determining

[8] The Helsinki Rules on the Uses of the Waters of International Rivers, adopted by ILA in 1966; see ILA, *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 et seq., document A/CN.4/274, para. 405.

factor in establishing the lawfulness of activities. Bringing the criteria into line would have the undesirable consequence of obliging a notifying State to give notification that it was planning to commit an unlawful act. Article 12 is therefore more satisfactory than the corresponding provisions of the Espoo Convention, which links the obligation to avoid "significant adverse transboundary impact from proposed activities" to the obligation of States to give notification of activities which may lead to "significant adverse transboundary impacts".

45. On some points, the draft articles represent an unfavourable departure from existing conventions. This applies to article 32, which provides the public with less protection than the Espoo Convention, and to draft article 26, which, due to the failure to include a provision on institutionalized cooperation, compares unfavourably with the Helsinki Convention. In addition, there are no references to the principle of precaution, which is enshrined in the Helsinki Convention, or to environmental impact assessment, provisions which figure in both the above-mentioned Conventions.

Nordic countries

[Original: English]
[18 December 1992]

General comments

1. The Nordic countries have a special interest in these draft articles, not only because General Assembly resolution 2669 (XXV), which recommended that the Commission should take up the study of the law of the non-navigational uses of international watercourses, resulted from a Nordic initiative, but also because of the importance of legal problems relating to the use of international watercourses and the need to coordinate the work carried out by many international organs. The draft articles adopted by the Commission may now be regarded as a decisive step towards the final codification of the law of the non-navigational uses of international watercourses.

2. In the opinion of the five Nordic countries, the framework agreement approach adopted by the Commission in drafting the articles provides a good basis for further negotiations. It leaves the specific rules to be applied to individual watercourses to be set out in agreements between the States concerned, as has been the current practice. However, this approach should not lead solely to producing recommendations.

3. As a general comment the Nordic countries would like to draw attention to the two conventions concluded recently under the auspices of ECE, namely the Convention on the Protection and Use of Transboundary Watercourses and International Lakes (Helsinki Convention) and the Convention on Environmental Impact Assessment (Espoo Convention). Both conventions and the draft articles on the non-navigational uses of international watercourses are partly similar in scope and deal with analogous legal problems, but the solutions are not necessarily always consistent. In order to avoid a situation where conflicting rules may apply, the Nordic countries submit that attention should be paid to harmonizing the draft articles with the above-mentioned conventions where possible.

Specific comments on individual articles

Article 2

4. The Nordic countries consider the term "international watercourse" somewhat unclear and ambiguous. Admittedly, the use of other terms already rejected by the Commission, such as "drainage basin", would also entail difficulties. Of course, it is of fundamental importance that whichever concept is used in article 1, it should encompass an adequate definition in article 2. However, it is submitted that the Commission might still consider as a new alternative to "international watercourse" the term "transboundary waters", which is used in a very similar context in the above-mentioned Helsinki Convention.

5. One of the most important questions relating to the adoption of the term "watercourse" is whether the rules governing surface waters would be applicable also in regard to groundwater and, more specifically, so-called confined groundwater. There are rich and important confined groundwater resources intersected by State boundaries in many parts of the world, but which are physically unrelated to any surface water systems. Nevertheless, such confined groundwater resources may react like any other hydrologic unit.

6. Although the present definition of the term "watercourse" seems not to encompass confined groundwater, it should not be deduced that aquifers without any physical relationship with surface waters must be left outside all legal regulation. There might be reason to take up once again the question of confined groundwater, for the purpose of making clear the essence of that concept and preparing draft rules on its application.

Articles 5 and 7

7. Since the early stages of the work of the Commission the question of the relationship between equitable and reasonable utilization and participation on the one hand (art. 5), and the obligation not to cause appreciable harm on the other hand (art. 7), has proved to be problematic. The principle of equitable utilization should probably not be subordinated to the prohibition on causing appreciable harm, because it was originally introduced in order to modify that prohibition. It is the view of the Nordic countries that in cases of uses not involving pollution, the obligation not to cause appreciable harm should perhaps rather be subject to the principle of equitable utilization. But then it would follow that prevention, reduction and control of pollution should also be subject to more explicit safeguards under article 7.

8. It might also be mentioned that the doctrine of equitable utilization is still lacking precise procedural machinery for implementation in concrete cases. It sets no a priori standards that are universally applicable concerning the uses of international watercourses.

Parts III and IV

9. Finally, it is suggested that the relationship of part III (Planned measures) and part IV (Protection and preserva-

tion) of the draft articles should be further elaborated. This is important since the implementation of planned measures in accordance with part III may in many cases also entail the probability of pollution of an international watercourse dealt with in article 21.

Norway

[*See* ***Nordic countries***]

Poland

[*Original: English*]
[*29 March 1993*]

General comments

1. The draft articles on the law of the non-navigational uses of international watercourses is an abstraction of a very high level. It is therefore a typical "framework agreement" which clearly takes into consideration the concluding of detailed agreements between watercourse States. The practical significance of control seriously decreased for Poland, and for Europe, after the changes which occurred in this part of the world after 1989. In the new situation in Europe, and as a result of the initiatives of the Conference on Security and Cooperation in Europe there were three vital conventions signed under the auspices of ECE which to a greater extent specify the subject matter of the draft on the law of the non-navigational uses of international watercourses, namely the Convention on Environmental Impact Assessment in a Transboundary Context (Espoo Convention), the Convention on the Transboundary Effects of Industrial Accidents, and the Convention on the Protection and Use of Transboundary Watercourses and International Lakes (Helsinki Convention). Covering a smaller territorial area, more detailed cooperation is provided for in the Convention on the Protection of the Marine Environment of the Baltic Sea Area.

Specific comments on individual articles

Articles 1 to 4

2. Part I (Introduction) consists of four articles. Article 1 outlines the subject matter of the draft, which actually concerns everything except navigation, unless navigation influences the non-navigational uses of watercourses, which is often the case of small and medium-sized rivers used for transport (such as, for example, the Oder). The most significant, but also the most controversial aspect of this part is article 2, which defines "international watercourse" and "watercourse". The latter is understood as surface and underground waters which are in physical relationship and flow into a common terminus. This interpretation of "watercourse" in an international context means that the basins of the Vistula (as *the* "national river") and of the Oder constitute international watercourses. Apart from the main subject matter of the draft, there are underground waters of a particular type—those which are not in relationship with the surface waters. The Commission's approach seems questionable for at least two reasons: (*a*) the significance of underground waters near the borders is continuously increasing; and (*b*) the principles and procedures concerning such underground waters are identical or similar to the principles adopted for the waters which are the subject of the draft articles. Taking into consideration the conflict which may arise from the unsolved problem of underground waters, and the Commission's slow progress (there were suggestions in the commentary that this issue could be the subject of a separate study by the Commission),[1] the solution adopted is not very satisfactory.

Articles 5 to 10

3. The articles included in part II (General principles) constitute the foundation on which the whole draft has been based. Its key elements are articles 5 and 7. Article 5 provides that "watercourse States shall in their respective territories utilize an international watercourse in an equitable and reasonable manner . . .". Such a policy should be accompanied by an active attitude towards the proposals for cooperation put forward by other watercourse States. An attempt to give more details on the principle of equitable and reasonable use is made in article 6. Actually, it is an open list of factors and circumstances which should be considered when assessing given behaviour and "weighing" the interests of the watercourse States. Those two articles reflect quite faithfully the emerging practical aspect of the treaty and the relatively well-established opinions of scholars.

4. The difficulties start in article 7, which puts the watercourse States under an obligation to utilize an international watercourse in such a way as not to cause appreciable harm to other watercourse States. According to most scholars the acceptance of the "appreciable harm" threshold is a step backwards in the development of international law, and a departure from a famous principle expressed in the Latin maxim, *sic utere tuo ut alienum non laedas*. The issue is complicated because in practice States tolerate "appreciable harm" (as opposed to substantial harm) as the inevitable consequence of having neighbours, but the acceptance of it in a document as significant as the draft under discussion, would mean more than just passive tolerance of the harm done by the neighbour. What is more, the lack of objective criteria for the "appreciable harm" seems to create new, "legal" possibilities of ignoring the interests of other States. It also seems that such assessment lessens the preventive value of the principle of equitable and reasonable use. Poland, being for the most part a country located in the lower reaches of a watercourse exposed to high pollution, should solicit a reduction of the "appreciable harm" threshold. The obligation of "non-harmful behaviour" fails to meet the sense of realism: a happy medium should be found. Poland has no ready solution, but in searching for such a medium, one thing should not be forgotten, namely that article 7 provides a certain safety net for article 5—that is in situations where negotiations fail.

Articles 11 to 19

5. Part III (Planned activities) is of a procedural character and as such raises fewer doubts. In the case of Poland and its neighbours, these issues will better be settled by the provisions of the Espoo Convention (the Convention

[1] *Yearbook . . . 1991*, vol. II (Part Two), p. 70, para. (5) *in fine* of the commentary to article 2.

has not come into force because it has not been ratified by the minimum 16 countries. Poland has not so far ratified the Convention, although it is in its interest to do so because it is a basic instrument for the establishment of ecological security in the areas near the borders). The provisions of this part could be completed by including public participation in the consultations concerning the planned activities which affect the public interest. It does not seem that this issue could be dealt with under the provisions of article 32 (Non-discrimination). The institution of public participation is making progress in treaty practice, and is a sign of the democratization of international law. Such an initiative may be expected to win the support of the majority of States in the United Nations.

6. Article 18 should be completed by the inclusion in paragraph 2 of a precise time limit for the reply (for example, one month). Otherwise there will be a lack of balance on the side of the State which makes the investment without prior consultations because it could delay unduly the reply and the consultations.

Articles 20 to 25

7. Part IV (Protection and preservation) and part V (Harmful conditions and emergency situations) do not give rise to any objections. From the point of view of Poland's interests these issues will be settled by the above-mentioned ECE conventions (the comment that Poland has not ratified the Espoo Convention applies also to the Convention on Transboundary Effects of Industrial Accidents).

Articles 26 to 32

8. Part VI (Miscellaneous provisions) was added at the last moment and attracts attention because of the lack of a central idea or an internal logic. This does not mean, however, that the provisions included therein are meaningless. Article 27 of the draft, which concerns the cooperation of watercourse States in flow regulation, and particularly in the construction and maintenance of hydraulic works, or appropriate cost-sharing, is of greater interest. In practice, the wording of paragraph 2 may raise the question whether a State which did not participate in the investment on the watercourse, but turned out to benefit from it, will be obliged to cover part of the costs of this investment. The answer to this question can only be negative, unless the watercourse States had reached prior agreement on the defrayal of costs. It would appear appropriate to reformulate paragraph 2 in such a way as to indicate that the agreement should form the basis for the calculations.

9. Article 32 (Non-discrimination) is one of the most significant provisions of the draft. It concerns guaranteeing access to courts and to proceedings before other compensation bodies to foreign natural and juridical persons, and protection from damage. The acceptance of such a provision will be a great step forward in international practice. It is a kind of civil-legal substitute for international responsibility of the State-responsibility and strict-liability type. There are objections to the title of the article. The notion of "non-discrimination" in international practice has a much broader sense, and is, moreover, associated with the material norm. The expression "Access to judicial and other procedures" would appear better to reflect the content of the article.

10. The draft lacks even general provisions concerning the transfer of water between basins. The general principles of the draft do not constitute a sufficient basis.

11. To sum up, it should be stated that the law under discussion will be mainly of significance in those regions of the world where the degree of treaty regulation is limited or non-existent. This basically concerns the areas with the most conflicts, where there has long been a water deficit. This is mainly the case in the Middle East (Islamic Republic of Iran, Iraq, Syrian Arab Republic, Turkey), but also in Asia (Bangladesh and India) and Africa (Egypt, Ethiopia, Sudan). The passing of this law and its implementation in the above-mentioned areas would improve the situation in the world and decrease the number of armed conflicts.

12. In general, the proposed draft is deserving of Poland's support. It constitutes a fairly accurate reflection of the state of international law, in the development of which Poland has actively participated. The provisions of the future convention appear to provide a good starting point for negotiating more detailed international instruments, when formulating new treaty-based cooperation agreements on transboundary waters with the new neighbouring countries.

Spain

[*Original: Spanish*]
[*27 January 1993*]

General comments

1. In the view of the Spanish Government, the draft articles constitute an acceptable basis for discussion.

2. The Spanish Government believes that it would also be appropriate to prepare draft articles relating to the utilization of "confined" groundwater in cases where a frontier crosses the aquifer in which such groundwater exists;[1] such articles could perhaps be incorporated into the draft under consideration.

Specific comments on individual articles

Article 3

3. Attention is drawn to the reference made in article 3 to the application of the draft articles. As currently drafted, paragraphs 1 and 3 imply that the rights and obligations enumerated in the draft articles would be applicable only in the event of an agreement between watercourse States. A close reading of all the draft articles and the commentaries thereto shows that that is not the intention of the Commission.[2] One possible solution would be to delete the words "or application" from paragraph 3; the

[1] See paragraph (5) of the commentary to article 2, *Yearbook ... 1991*, vol. II (Part Two), p. 70.

[2] For the commentary to article 5, initially adopted as article 6, see *Yearbook ... 1987*, vol. II (Part Two), p. 32, para. (5) *in fine*.

words "apply and" could also be deleted from paragraph 1, for greater clarity.

Article 6

4. In paragraph 1, the Spanish Government would like to insert a new subparagraph between subparagraphs (*d*) and (*e*), which could read as follows: "the extent of the dependence of each watercourse State upon the waters in question;". In the view of the Spanish Government, while the idea reflected in the above wording is implicit in several subparagraphs of paragraph 1 of article 6, it has not been made sufficiently explicit in that paragraph as currently drafted. Furthermore, the proposed text has been taken from the United States Memorandum of 1958 on juridical aspects of the use of international water systems, to which paragraph (7) of the commentary to the article under consideration refers.[3]

Article 8

5. It might perhaps be appropriate to mention explicitly in this article the principles of good faith and good neighbourliness, to which paragraph (2) of the commentary refers.[4]

Article 9

6. In the Spanish version of paragraph 2, the words *recogida* or *recolección* [collection] could be used in lieu of the word *reunión*.

Article 11

7. The article as currently drafted lays down a number of obligations for watercourse States which, in the view of the Spanish Government, would be difficult to apply in practice. It is suggested that the wording should be changed so as to limit the scope of the article to those planned measures which are likely to have appreciable effects or, alternatively, to eliminate the obligation to consult.

Article 18

8. It is suggested that paragraph 3 should be amended with a view to establishing a more balanced system which would take into account the various interests involved. The proposed amendment could read as follows:

> "3. During the course of the consultations and negotiations, the State planning the measures shall refrain from implementing or permitting the implementation of those measures for a period not exceeding six months if the other State, at the time it requests the initiation of consultations and negotiations, submits a request to that effect accompanied by a documented explanation setting forth the reasons for the request."

Article 24

9. In the Spanish version, the conjunction *y* [and] should be inserted at the end of the paragraph, before the words *que puedan ser nocivos para otros Estados del curso de agua* [that may be harmful to other watercourse States].

Sweden

[*See* ***Nordic countries***]

Syrian Arab Republic

[*Original: English*]
[*10 April 1992*]

SPECIFIC COMMENTS ON INDIVIDUAL ARTICLES

Article 7

1. Insert a new paragraph reading as follows:

> "In utilizing an international watercourse, watercourse States shall undertake not to cut off or reduce the watercourse discharge below the sanitary discharge needed in the river bed under any circumstances."

Article 8

2. Insert a new paragraph reading as follows:

> "Cooperation, in this context, means, *inter alia*, that watercourse States shall determine and agree upon their reasonable and equitable shares of water uses in accordance with the water resources of the international watercourse concerned."

Article 9

3. Reformulate paragraph 1 as follows:

> "1. Pursuant to article 8, watercourse States shall, on a regular basis, through joint committees, exchange reasonably available data and information on the condition of the watercourse, in particular that of a hydrological, meteorological, hydro-geological, ecological and reservoir operational nature, as well as related forecasts; and this before and after reaching the final agreement(s) on water uses of the international watercourse concerned."

4. The Government of the Syrian Arab Republic attaches great importance to the reflection of these comments and observations in the draft articles by the Commission when it again considers the draft with a view to its adoption.

Turkey

[*Original: English*]
[*25 January 1993*]

GENERAL COMMENTS

1. If it is to be realistic, a general draft of articles prepared by the Commission, which codifies and improves upon the rules of law on the non-navigational uses of international watercourses, has to take the form of a non-detailed framework law, on account of the variety of

[3] Initially adopted as article 7. For the commentary, ibid., p. 37.

[4] Initially adopted as article 9. For the commentary, see *Yearbook . . . 1988*, vol. II (Part Two), p. 41.

geographical locations, hydrological constructions, demographic features and characteristics of international watercourses.

2. One main point of possible criticism as regards the draft articles is that those on environmental damage do not take the problems of development of States into proper consideration. The general emphasis on the "damage" factor has resulted in a text constraining utilization by the upstream States. There is a need for a more balanced approach on this subject.

3. The draft articles should be a set of rules that can be applied in the context of good neighbourliness rather than general principles to be applied to all international watercourses.

4. In determining the regime to be applied to international watercourses, Turkey believes that the sovereignty of States over their own natural resources and their right to manage these resources have not been taken sufficiently into consideration.

5. The term "watercourses", as it is used in the draft, is a term that might create difficulties in the future. This term has a broad definition which also includes underground waters. Additionally, the term "watercourse system" has also been given too broad a meaning. This term includes glaciers, canals and, especially, underground waters, and naturally leads to the sharing of these resources. This result would be inconsistent with the generally accepted principle of international law concerning the permanent sovereignty of States over their own natural resources. For this reason, only if the application of the draft articles is limited to surface waters could Turkey give its approval.

SPECIFIC COMMENTS ON INDIVIDUAL ARTICLES

Article 5

6. According to paragraph 1, a watercourse State has both the right to utilize an international watercourse in an equitable and reasonable manner and the obligation not to deprive other watercourse States of their right to equitable utilization.

7. Paragraph 2 covers cooperation between the watercourse States. Although article 5 contains some positive elements for the upper riparian State, it needs to be more balanced. For the sake of a well-balanced article, it will be appropriate to expand this paragraph to include a clause which restricts use (and especially new uses) by the lower riparian States. If this balance cannot be obtained, the subject of "participation" should be excluded from article 5. The resulting general article, containing the principles of equitable, reasonable and optimal use, would be equitable and sufficient.

Articles 11 to 19

8. The provisions of part III of the draft are too detailed. They need to be simplified. The arrangements on notification and consultation procedures should be left to regional and local agreements, which can better consider the actual needs in each and every case. Those arrangements may complete the framework agreement.

Article 20

9. Article 20 deals with the protection and preservation of the ecosystems of watercourse States. However, the article does not contain the criteria of what constitutes "important damage". It would be appropriate to include such criteria in the article.

Article 26

10. Paragraph 1 stipulates the initiation of consultations concerning the management of an international watercourse, which may include the establishment of a joint management mechanism, at the request of any of the watercourse States. The clause "at the request of any of them" has a mandatory character. Turkey believes that this article should be rephrased in order to ensure flexibility. The formulation of paragraph 1 of the article may lead to the obligation to negotiate an agreement in order to establish a joint management mechanism. This point needs to be clarified.

United Kingdom of Great Britain and Northern Ireland

[*Original: English*]
[*15 January 1993*]

GENERAL COMMENTS

1. The Government of the United Kingdom commends the Commission for the draft articles on the law of the non-navigational uses of international watercourses. Although the United Kingdom is not a major international watercourse State, it nonetheless welcomes these draft articles as a valuable contribution to the international protection of the environment as well. It is largely on this basis that the following comments are made.

2. It is opportune to consider the work of the Commission in the light of recent developments in international environmental law, including the Convention on Environmental Impact Assessment in a Transboundary Context (Espoo Convention), the Convention on the Protection and Use of Transboundary Watercourses and International Lakes (Helsinki Convention) and the United Nations Conference on Environment and Development. That Conference marked the adoption of an ambitious programme of environmental action into the next century, Agenda 21,[1] which devotes a chapter to freshwater resources (chap. 18). This acknowledges that sustainable development of water resources is essential both for the satisfaction of basic needs and for the safeguarding of ecosystems.

3. The draft articles provide a good basis on which to build legal arrangements which address the international dimension of watercourse development. But if the draft articles, amended and refined in the light of these and other comments and further discussion, are to provide a sound foundation for future action, it is important that

[1] *Report of the United Nations Conference on Environment and Development, Rio de Janeiro, 3-14 June 1992* (A/CONF.151/26/Rev.1 (Vol. I, Vol.I/Corr.1, Vol. II, Vol. III and Vol. III/Corr.1)) (United Nations publication, Sales No. E.93.I.8 and corrigenda), vol. I: *Resolutions adopted by the Conference*, resolution 1, annex II.

they should accurately reflect the current state of international environmental law. The recently concluded Helsinki and Espoo Conventions and Rio Declaration on Environment and Development (Rio Declaration)[2] should be taken fully into account, and particularly their emphasis upon preventing significant adverse impacts or effects upon the environment. The international community attaches importance to work by the Commission on this and other environmentally related topics. Paragraph 39.1 (*e*) of Agenda 21 states, *inter alia*, that

> Future projects for the progressive development and codification of international law on sustainable development should take into account the ongoing work of the International Law Commission.

4. On previous occasions the United Kingdom had indicated its reservations concerning the final form of the instrument containing the text drawn up by the Commission. The United Kingdom still believes the work of the Commission on this topic is best embodied in a set of model rules, recommendations or guidelines, to be applied and modified as the circumstances of the case require. Such rules, recommendations or guidelines would provide authoritative guidance respecting the legal rules to be applied, yet would have the flexibility necessary to accommodate the wide diversity of international watercourse systems. Their character would be essentially residual, leaving States free to enter into agreements on specific watercourses. In this form the draft articles would be more likely to meet with general acceptance. If, however, the Commission continues to favour a convention, the United Kingdom would suggest that it should consider amending the articles so as to form a framework convention which would serve as a guide to watercourse States for the conclusion of bilateral arrangements tailored to the circumstances of the particular watercourse concerned.

5. There remains also the issue of overlap between the present topic and those of State responsibility and international liability for injurious consequences arising from acts not prohibited by international law. Although the United Kingdom would not wish to urge any delay in the completion of the Commission's work on international watercourses, it is vital that its work on all these topics should be consistent. In particular, the threshold of harm set in article 7 should accord with the work of the Commission on the other topics and with current generally accepted principles of international law. For example, the draft articles on international liability for injurious consequences arising out of acts not prohibited by international law which have been produced to date[3] are broadly consistent with the Helsinki and Espoo Conventions. This point is returned to in the consideration of the details of the draft articles.

6. Against the background of these introductory remarks, the United Kingdom has a number of detailed comments to offer on the draft articles.

[2] Ibid., annex I.

[3] For the text, see *Yearbook... 1990*, vol. II (Part Two), footnotes 341-345, 347, 349, 352 and 359.

SPECIFIC COMMENTS ON INDIVIDUAL ARTICLES

Article 2

7. The United Kingdom supports the application of the draft articles to "international watercourse systems" defined to include groundwater. This reflects scientific and geographic reality. In many areas of the world groundwater provides the main source of fresh water needed for all forms of life. The Commission's definition accords with the approach taken in Agenda 21, which views the freshwater environment as part of the hydrological cycle encompassing both surface water and groundwater (paras. 18.1 and 18.3). It is also consistent with the definition of "transboundary waters" contained in article 1, paragraph 1, of the Helsinki Convention.

8. While the inclusion of groundwater is welcome, the United Kingdom considers that the potential scope of the draft articles is too wide. As they stand, they impose obligations on States which would be very difficult to define and are likely to be unacceptable if the draft articles are embodied in legally binding form. The draft articles depend upon States being able to define the scope of their obligations by reference to the physical presence of international watercourses within their territory. Such identification is difficult and expensive in the case of groundwater. One of the seven action programmes contained in Agenda 21 (para. 18.27 (*a*) (iv)) is addressed to the problem of water resources assessment, including the identification of potential sources of freshwater supply. It encourages all States, according to their capacity and available resources, to

> Cooperate in the assessment of transboundary water resources, subject to the prior agreement of each riparian State concerned.

In addition, research-and-development programmes, at the national, subregional, regional and international levels in support of water resources assessment activities, are to be established or strengthened. Model rules, recommendations or guidelines would overcome these difficulties. They would permit States to conclude specific agreements with respect to those watercourses they had identified, rather than assuming general obligations, the extent of which could not readily be determined.

Article 3

9. The United Kingdom would urge the Commission to reconsider the wording of paragraph 1, which reflects the present uncertainty regarding the final form of these draft articles. On the one hand, these provisions are stated in article 1 to be of general application, yet, on the other, they are adjustable on a case-by-case basis under article 3, paragraph 1. Whilst flexibility is a desirable feature which should be retained, the function of these articles needs to be clearly identified and reflected in the draft text.

10. Paragraph 2 includes the phrase "adversely affect, to an appreciable extent". On numerous occasions the United Kingdom has expressed its reservations regarding use of the word "appreciable". It remains its view that "significant" is a more accurate reflection of the meaning of these articles, particularly when used to modify "harm". The term "appreciable harm" is at the heart of several key provisions of the draft articles, most notably article 7, yet its meaning is far from clear. Paragraph 5 of the commentary to article 7 states that "appreciable" embodies a factual

standard. The harm must be capable of being established by objective evidence ... [it] is not insignificant or barely detectable, but it is not necessarily "serious".[4] The United Kingdom is in agreement with the meaning attributed to "appreciable" in the commentary, but does not consider that "appreciable" adequately conveys the intended meaning. The word used should convey a sense of harm which is significant, not of a transitory or limited effect. And it should convey this sense in the text, rather than requiring recourse to the commentary for clarification. (This comment applies also where the word "appreciable" appears elsewhere in the draft, namely in art. 4, para. 2, arts. 7 and 12, art. 18, para. 1, art. 21, para. 2, art. 22 and art. 28, para. 2.)

11. Nor does "appreciable" reflect the threshold of responsibility that has been adopted in the most recent treaties in the environmental field, most notably the Convention on Biological Diversity. Articles 7 and 14 of that Convention, which has been signed by nearly all the States which participated in the United Nations Conference on Environment and Development, uses the terms "significant adverse impacts" and "significant adverse effects", respectively. Principles 17 and 19 of the Rio Declaration refer to "significant adverse impact" and "significant adverse transboundary environmental effect", respectively. Article 1, paragraph 2, of the Helsinki Convention refers to "significant adverse effect", while article 2, paragraph 1, of the Espoo Convention employs the phrase "significant transboundary environmental impact".

Articles 5 and 7

12. It is clear that the reason for qualifying "harm" is to ensure that the draft articles do not unnecessarily hamper the utilization of international watercourses. This balance between utilization and environmental protection was the direct focus of the Rio Conference. The Commission is to be commended for its approach to the present topic, which has placed the utilization of watercourses firmly in the context of sustainable development. International watercourse States may utilize an international watercourse in an equitable and reasonable manner, but this obligation of equitable use in draft article 5 is subordinate to the obligation not to cause "appreciable" harm contained in article 7.

13. In principle, the United Kingdom supports the subordination of the obligation of equitable utilization to the obligation not to cause "appreciable" harm, but considers that the balance between environmental protection and utilization would be clearer if the word "significant" modified "harm". (See comments on article 3 above.) This is consistent with Agenda 21 which attaches equal importance to the satisfaction of basic needs and safeguarding of ecosystems in the programme area of integrated water resources development and management (paras. 18.6-18.12).

[4] For the commentary to article 7, initially adopted as article 8, see *Yearbook ... 1988*, vol. II (Part Two), pp. 35-41.

Article 8

14. This article prescribes a duty to cooperate, a duty which is recognized in many treaties in the environmental and other spheres. The Convention on Biological Diversity includes in article 5 such a duty with respect to matters beyond national jurisdiction, and on other matters of mutual interest. While welcoming the inclusion of a general obligation to cooperate, the United Kingdom maintains certain reservations regarding the practical working of article 8. In particular, the United Kingdom questions whether the concepts of "optimal utilization" and "adequate protection" are measurable in a way which allows States to meet the obligation set forth in article 8, and to identify failures to attain the required standard. The Commission might wish to reconsider setting forth in detail the objectives of cooperation, thereby fleshing out the substance of the duty to cooperate.

Article 9

15. The duty to exchange data and information is likewise found in a wide range of existing international instruments, and gives concrete expression to one facet of the duty to cooperate in article 8. It is important to ensure that the obligation to exchange "reasonably available data and information" (para. 1) does not become excessively burdensome for the States concerned. For this reason the United Kingdom welcomes use of the term "reasonable". What is "reasonable" will vary from case to case, depending upon a variety of factors ranging from technological capability to national laws regarding data protection. It would be helpful, however, to provide guidance in the form of a (non-exhaustive) list of what constitutes "reasonably available data", such an approach is to be found in article 13, paragraph 1, of the Helsinki Convention.

Article 10

16. The United Kingdom doubts whether the reference in paragraph 2 to "vital human needs" is sufficiently specific to perform a useful function additional to the criteria already specified in the article. If the intention of this paragraph is to assign priority to the satisfaction of specific vital human needs, such as the availability of clean drinking water, then it would be preferable to redraft the article so as to make specific reference to such needs.

Articles 11 to 19

17. Subject to the specific comments in the following paragraphs, the United Kingdom welcomes articles 11 to 19, which achieve an adequate balance between the interests of the State planning the measure and other watercourse States potentially affected thereby. These provisions, particularly article 12, are consistent with Principle 19 of the Rio Declaration.

Article 12

18. The United Kingdom would prefer this article to refer to "significant adverse effect" in place of "appreciable adverse effect" (see comments on article 3). It is important to distinguish between the level of impact which triggers the duty to notify and the level of harm which breaches the duty contained in article 7. The clear inten-

tion of article 12 is to ensure that the duty to notify is triggered at a lower level than the duty contained in article 7. This suggestion is also consistent with article 14 of the Helsinki Convention, which imposes the duty to inform other riparian parties of "any critical situation that may have transboundary impact". "Transboundary impact" is defined in article 1, paragraph 2, of that Convention as "any significant adverse effect on the environment".

Articles 20 to 23

19. Protection and preservation of the ecosystems of international watercourses is an essential component of the draft articles. Another of the seven action programmes detailed in Agenda 21 is devoted to protection of water resources, water quality and aquatic ecosystems (paras. 18.35-18.39). The draft articles are broadly consistent with one of the targets set by the action programme, which is "to initiate programmes for the protection, conservation and rational use of these resources on a sustainable basis" (para. 18.39 (*a*)). The United Kingdom is in favour of the approach adopted in this part of the draft articles which distinguishes between pollution and environmental protection. Agenda 21 also includes an action programme directed at marine environmental protection (paras. 17.18-17.35). The provisions of part IV are welcome also as a positive contribution to the fulfilment of the objectives of that chapter.

Article 21

20. The United Kingdom welcomes paragraph 1, which provides a factual definition of "pollution of an international watercourse". The trigger for the obligation of States to prevent, reduce and control pollution of an international watercourse is contained in paragraph 2, which refers to "appreciable harm". The United Kingdom regrets the use of "harmonize" in the last sentence of this paragraph. This conveys an impression that national policies should be rendered similar, rather than the milder obligation intended by the article of avoiding policy conflicts.

21. The United Kingdom would therefore prefer the final sentence of paragraph 2 to be replaced by:

> "Watercourse States shall take steps to coordinate their policies to this end."

Article 22

22. To achieve drafting consistency, the United Kingdom suggests the addition of the phrase "or to their environment" at the end of the article. The reason for inclusion of this in article 21 would seem equally to apply to this article.

Article 23

23. The United Kingdom welcomes this article, which is consistent with the provisions of article 192 of the United Nations Convention on the Law of the Sea. It recognizes that damage could be caused to the marine environment, including estuaries, without violating the duty not to cause "appreciable [or, as we would prefer, "significant"] harm" to other watercourse States, the latter being the focus of article 22. The importance of article 23 is underlined by the fact that 70 per cent of marine pollution emanates from land-based sources.

Article 26

24. The United Kingdom welcomes this article, which complements the first action programme contained in Agenda 21, concerned with integrated water resources development and management (paras. 18.6 et seq.). Effective implementation and coordination mechanisms are recognized as necessary for the sustainable development of water resources. In this connection paragraph 2 (*a*) is particularly welcome, with its emphasis upon the sustainable development of an international watercourse and providing for the implementation of any plans adopted. The Commission might, however, follow the lead given by article 9 of the Helsinki Convention, which provides for the establishment of joint bodies under bilateral or multilateral agreements which embrace relevant issues covered by the Convention, and specifies some of the tasks which might be performed by such bodies.

Article 27

25. The United Kingdom remains unconvinced of the need for this article, which is no more than a specific application of the obligation to cooperate contained in draft article 8.

Article 29

26. The United Kingdom has previously voiced its reservations regarding the inclusion of a draft article dealing with international watercourses and installations in time of armed conflict. The protection of the environment, and specifically of watercourses and related installations, facilities and other works, is already provided for under existing rules of international law relating to armed conflicts. The United Kingdom believes it is thus undesirable to insert such a general article in a text otherwise devoted to a quite different topic. This does not of course foreclose discussion of the issue in other, more appropriate, forums. The United Kingdom would invite the Commission to consider redrafting the article along the following lines:

> "These articles are without prejudice to the application to international watercourses of the principles and rules of international law applicable in international and internal armed conflicts."

Article 30

27. It is difficult to see what this article adds to the obligations of States under articles 9 to 19. There is no mention of "direct contacts" under the preceding articles, and it would be assumed that in carrying out their obligations in good faith States would employ both direct and indirect means, as appropriate.

Article 32

28. The United Kingdom welcomes the principle of non-discrimination contained in this article, which facilitates the application of the "polluter pays" principle in domestic legal systems. However, since it is for each domestic legal system to set the threshold of harm which

gives rise to a cause of action, the use of "appreciable" is inappropriate. Given the particular purpose of this article, it is not necessary to qualify "harm".

United States of America

[*Original: English*]
[*4 January 1993*]

General comments

1. The United States appreciates the Commission's efforts in completing a first reading of the draft articles. The United States fully supports the decision to structure the draft as a framework document, which sets forth general rights and obligations that will guide watercourse States in developing management practices tailored to their circumstances. The emphasis on cooperation among watercourse States is particularly salutary. The following general comments and observations apply to the text as a whole:

Appreciable harm

2. The draft articles impose obligations not to cause "appreciable" harm to watercourse States. "Appreciable" harm is established by "objective evidence" of a "real impairment of use, i.e. a detrimental impact of some consequence upon, for example, public health, industry, property, agriculture or the environment in the affected States".[1]

3. The United States endorses the Commission's effort to exclude insignificant or trivial harm from the articles. The United States is concerned, however, that "appreciable" sets too low a threshold. The landmark Helsinki Rules[2] set a standard of "substantial" in 1966. As more is learned about the effects of human activity on the environment, it becomes possible to identify impacts at ever lower thresholds. Recent international agreements relevant to watercourses adopt "significant"[3] or "serious"[4] as the standard. The United States believes that the Commission should bring its standard into accord with these documents.

Public participation

4. The involvement of the public in a State's consideration of activities affecting transboundary watercourses can enhance protection and use of those watercourses and is an approach followed recently in various conventions.[5] The United States recommends that the Commission should consider ways in which the articles could encourage public involvement. The most appropriate articles appear to be articles 12 and/or 15, as part of the obligations of both the notifying and notified States, and article 25, in emergency planning and response measures. As redrafted, these articles would supplement current article 32, which provides that States shall not discriminate against a person who has suffered harm "on the basis of nationality or residence" in granting access to "judicial and other procedures", but does not describe those procedures. In the view of the United States, however, the redrafted articles need not and should not create private causes of action or require States to establish proceedings beyond those available to their own citizens. For ideas on the content of revisions to these articles, the proposals made by the Special Rapporteur in his sixth report[6] might be given further consideration.

The primacy of equitable and reasonable utilization

5. "Equitable and reasonable" utilization is the fundamental rule regarding international watercourses, as article 5 notes. Article 6 sets forth the factors relevant to determining when use is equitable and reasonable. (Article 7 is also relevant, although it serves as an independent legal requirement as well.) Unfortunately, subsequent articles appear to blur the meaning of this rule. Article 26, paragraph 2, for example, speaks of management for "sustainable development" of watercourses and for "rational and optimal" use of watercourses. The relationship of these terms to "equitable and reasonable" is not specified, and their meaning in international law is not clear. Part IV (Protection and preservation) also appears to set forth specific obligations that may supersede the obligation declared in article 5.

6. The United States favours making clear that all subsequent articles are subordinate to the requirement of "equitable and reasonable" utilization in article 5. The lone exceptions to this might be those articles reflecting legal responsibilities already well established (for example, the obligation not to harm another's property or marine protection obligations accepted in the customary law of the sea). In the view of the United States, the Commission should consider redrafting these subsequent articles to incorporate the terms used in article 6, paragraph 1; alternatively, the terms in the later articles could be incorporated into article 6, paragraph 1, if they can be properly defined.

7. In addition, the United States believes that close attention should be paid to the relationship between the rules of equitable utilization and the "no harm" rule of article 7. While the commentary to article 7 states that the "no harm" rule prevails in the event of conflict, this is not apparent in the articles as drafted, and indeed there may be circumstances where this should not be the case.

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[1] For the commentary to article 7, initially adopted as article 8, see *Yearbook . . . 1988*, vol. II (Part Two), pp. 35-41, especially p. 36, para. (5).

[2] The Helsinki Rules on the Uses of the Waters of International Rivers, adopted by ILA in 1966; see ILA, *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 et seq., document A/CN.4/274, para. 405.

[3] See Convention on Protection and Use of Transboundary Watercourses and International Lakes (Helsinki Convention), art. 1, para. 2; Convention on Environmental Impact Assessment in a Transboundary Context (Espoo Convention), art. 2.

[4] See Convention on Transboundary Effects of Industrial Accidents, art. 1 (*d*).

[5] See footnotes 3 and 4 above.

[6] *Yearbook . . . 1990*, vol. II (Part One), p. 41, document A/CN.4/427 and Add.1.

SPECIFIC COMMENTS ON INDIVIDUAL ARTICLES

Article 3

8. The United States recommends replacing, in paragraph 2, the phrase "adversely affect, to an appreciable extent" by "cause significant harm to". The reason for changing "appreciable" to "significant" was explained in the general comments above. The meaning of "extent" is not clear, and is confusing since it does not appear in other articles, such as article 7. Under the United States' approach, localized harm, if "significant", would fall within the proposed articles, even if its "extent" were not "significant".

9. The United States supports the framework approach of the article, which is mirrored by the Helsinki Convention. It also recommends moving articles 8 and 26 to precede article 3, to give those two articles a greater sense of priority. The primary objective of the draft articles is cooperation in the use and protection of a transboundary watercourse. An agreement is merely one means to that end, as article 3, paragraph 1, acknowledges by not making agreements mandatory.

Article 4

10. The United States questions the meaning of paragraph 2 of this article, on the ground that "applies to" is ambiguous. If it is synonymous with "affects appreciably", it adds nothing to paragraph 2. If "applies to" means "governs" or "regulates", then the paragraph is tautological, because every watercourse State must be involved in an agreement that regulates a watercourse within its territory.

11. For the same reasons as those given in paragraph 8 above, the phrase "may be affected to an appreciable extent" in paragraph 2 should be replaced by "may incur significant harm".

Article 5

12. The United States supports the principle of equitable utilization. It notes that, once use by one State becomes inconsistent with its obligations not to cause effects in another State, there is an inexorable tension between uses. Although accommodations for these competing principles can be fashioned, often on a case-by-case basis, the tension should be avoided when possible. It is therefore important that article 7 should not be triggered by harm that is less than "significant".

Article 6

13. The United States supports the concept of paragraph 2, but suggests that it is redundant to article 8 and article 10, paragraph 2. Accordingly, the Commission should consider its deletion.

Article 7

14. In addition to the points mentioned in paragraph 2 above, the United States believes that either in the draft article itself or in the commentary thereto, it should be made clear that this article expresses a rule of responsibility (in effect, due diligence) rather than one of liability.

15. The United States also urges the Commission to evaluate this article's possible effects on market-oriented mechanisms, such as tradeable quantity and emissions allowance systems. Market-oriented mechanisms allow market actors to decide (within certain limits) whether it is more efficient for them to curtail individual activities or to pay a premium for their continuation. Because persons other than States are responsible for deciding about specific uses that may harm a watercourse, it is not clear that these mechanisms are consistent with article 7. The Commission should ensure that the article does not inhibit adoption of such policies.

Article 10

16. The United States proposes that paragraph 2 of this article should refer to article 8, which sets forth bases for State cooperation, as one of the articles to be consulted in resolving competing uses.

Article 25

17. The United States attaches great importance to preventing emergencies and mitigating damage from them. For example, it has concluded joint marine emergency contingency plans with Canada, Mexico and the former Soviet Union and has actively participated in the development of emergency response measures within ECE, OECD and IMO, as well as within regional agreements such as the Convention for the Protection and Development of the Marine Environment of the Wider Caribbean Region, which contains a protocol on emergency response to oil spills.

Article 26

18. See paragraph 4 above. The United States questions whether the components of "management" mentioned in paragraph 2 exemplify States' obligations concerning "equitable and reasonable" utilization (art. 5). It does not support adding obligations to the one expressed in article 5. As suggested above, to the extent that they have independent meaning, "sustainable development" and "rational and optimal utilization" should be incorporated into article 6, paragraph 1, which sets forth the factors relevant to determining whether use is "equitable and reasonable". If they do not have independent meaning, the phrases should be replaced with phrases used in article 6, paragraph 1.

Article 29

19. The United States supports the conclusion that the applicable rules in this area are those of armed conflict.

Article 32

20. The United States strongly supports the principle of non-discrimination, especially as it pertains to the public's participation in proceedings relating to threats to an international watercourse. It notes, however, that a claimant could be denied standing in a suit in a United States court in part based on the fact that the claimant is not resident in the area of the international watercourse and therefore cannot show any harm. International law does

not, and should not, require that standing be granted in such circumstances.

21. In our view, this article should not be interpreted as requiring a State to provide proceedings or relief beyond those available to its own citizens. Recent practice in ECE, for example, calls for an opportunity for the affected public to participate in proceedings "equivalent to that provided to the public of the Party of origin" (see Espoo Convention, art. 2, para. 6). The Convention on Transboundary Effects of Industrial Accidents contains comparable wording in article 9, paragraphs 2 and 3.

CONCLUSION

22. The United States appreciates the opportunity to provide these comments and observations.

II. Comments and observations received from a non-member State

Switzerland

[*Original: French*]
[*14 January 1993*]

GENERAL COMMENTS

1. The Swiss Government wishes to express its appreciation to the members of the Commission and the Commission's Special Rapporteurs who have been studying the substantive and procedural rules on the non-navigational uses of international watercourses since 1974. The draft articles adopted on first reading by the Commission in 1991 are a valuable contribution to the law of international watercourses. The continuing lacunae and uncertainties in this law stem mainly from the nature of the subject: problems relating to the utilization of shared natural resources are particularly difficult to solve. The Commission's task was made easier, to a certain extent, by the previous work of two learned societies, the Institute of International Law[1] and ILA.[2] Although the Commission's draft differs from those two documents in certain respects, the three texts agree on a fundamental point: they accept the principle of equitable and reasonable utilization (and participation).

2. On the whole, the Swiss Government takes a favourable view of the draft articles prepared by the Commission. The observations made here are intended to be constructive. In an area as crucial to the future of mankind as the sharing of water resources, it is very much in the international community's interest to achieve rapid results.

Scope of the draft articles

3. The Commission proposes that its work should lead to a "framework agreement", that is to say, a model convention which could be used by States preparing to enter into an agreement on the use of the resources of a shared watercourse (art. 3, para. 1). The formula thus proposed makes it possible to link elements of *lex ferenda* to *lex lata* without having to identify either, which could facilitate the adoption of the text by the community of States. It can nevertheless be assumed that most of the substantive rules contained in the draft are supposed to reflect customary law, while procedural rules, by their very nature, fall in the category of the progressive development of international law. Generally speaking, the Swiss Government endorses this approach.

4. The Commission suggests the drawing up of a model convention with which States parties may choose to comply entirely or in part when entering into watercourse agreements. This should mean (*a*) that even if States become parties to the model convention, they will be free when they enter into an agreement on an international watercourse or part thereof to do so either within or outside the framework of the model convention (art. 3, para. 1); and (*b*) that the very many existing watercourse agreements will remain in force until the States that are parties both to such agreements and to the framework convention decide to adjust the former to the latter. This second point, unlike the first, is not clarified in the draft articles. The Swiss Government would like this lacuna to be filled by means of an indication in the same article that the framework convention does not affect in any manner whatsoever the validity and content of existing watercourse agreements.

5. Article 1 provides that the articles shall apply to "international watercourses". The term "watercourse" as defined in subparagraph (*b*) of article 2 means

> . . . a system of surface and underground waters constituting by virtue of their physical relationship a unitary whole and flowing into a common terminus.

Paragraph (5) of the commentary to article 2 indicates that a "system" of waters is composed of a number of different components, including "rivers, lakes, aquifers, glaciers, reservoirs and canals", and that so long as these components are interrelated they constitute "a unitary whole".[3] This definition covers both surface and underground components, at least insofar as the underground components are related to surface water and are therefore integrated into the system; the definition does not include "confined" groundwater. The "watercourses" thus defined are "international" under article 2, subparagraph (*a*), if their parts are situated in different States.

[1] In 1961, the Institute of International Law adopted a resolution entitled "Utilization of non-maritime international waters (except for navigation)", *Annuaire de l'Institut de droit international*, vol. 49, part II (1961), pp. 381-384.

[2] In 1966, ILA adopted the Helsinki Rules on the Uses of the Waters of International Rivers; see ILA, *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 et seq., document A/CN.4/274, para. 405.

[3] *Yearbook . . . 1991*, vol. II (Part Two), p. 70.

6. The decision to exclude the concepts of a drainage basin[4] and a watercourse system is to be welcomed because many countries would have found them unacceptable, given their scope. But the concept of a watercourse, which has traditionally been confined to surface water, has been given such a wide definition in the draft that it in fact bears a resemblance to concepts that the Commission had wanted to exclude. As defined at present, this concept is likely to give rise to difficulties, especially for upstream States. Moreover, it is difficult to understand why in article 2 the definition of an "international watercourse" (subpara. (*a*)) precedes the definition of a "watercourse" (subpara. (*b*)); the Swiss Government believes that the order of the two provisions should be reversed.

The content of the draft articles

7. The main provisions of the draft articles will now be considered, and the issue of whether the draft takes a balanced approach to the interests of upstream and downstream States will be left aside for the time being; that issue will be considered below.

8. The key provisions of the Commission's draft are undoubtedly article 7, which prohibits causing appreciable harm (*sic utere tuo ut alienum non laedas*), article 5, on equitable and reasonable utilization, and article 6, on the application of article 5. The Swiss Government feels that these two precepts are now part of international customary law. Their inclusion in the draft articles is therefore fully justified. However, some additions or changes may prove desirable.

9. The question arises, first of all, as to whether articles 5 and 6 should be supplemented by a provision stipulating the modalities through which they are to be implemented, namely territorial apportionment, or the allotment of areas or segments of the watercourses to each State concerned, as was done in the Indus Waters Treaty between India and Pakistan of 19 September 1960;[5] sharing by rotation, where the waters or their use are reserved for a given watercourse State for one period, and for another State for another period, as provided for in the Final Act of 11 July 1868 concerning the delimitation of the international frontier of the Pyrenees between France and Spain;[6] or sharing of the stream flow, its use or the energy generated (see, for example, the Agreement of 8 November 1959 between the Syrian Arab Republic and the Sudan for the full utilization of the Nile waters[7] and the Franco-Swiss Convention of 23 August 1963 concerning the Emosson hydroelectric project[8]). Moreover, it should be recalled that equal apportionment between two parties on the basis of a treaty is common in respect of contiguous rivers. Other methods, such as the allotment of exclusive uses to various watercourse States, or setting up compensation systems, such as that provided for in the Agreement of 4 December 1959 between India and Nepal on the Gandak irrigation and power project,[9] can also be envisaged, as can a combination of several of these methods.

10. A description of possible methods, which would be the subject of an additional provision, might be of some use, since the text prepared by the Commission is intended to serve as a framework agreement, that is to say, it would provide States which are contemplating the conclusion of a watercourse agreement with information concerning the various possible means of implementing the principle of equitable and reasonable utilization.

11. Article 7, as has been noted, calls upon watercourse States to utilize an international watercourse "in such a way as not to cause *appreciable** harm to other watercourse States". This provision departs from what might have been regarded as the general rule, namely the prohibition of not just "appreciable", but rather "major", "substantial", "significant" or "serious" harm.[10] By confining itself to the prohibition of "appreciable" harm, article 7, in its current wording, raises two problems. First, the adjective "appreciable" seems to reflect the intention to lower the threshold of allowable causes of harm, which is likely to antagonize upstream States, in particular. Secondly, this adjective is ambiguous. On the one hand, it is even vaguer than such adjectives as "major", "substantial", "significant" or "serious" and, accordingly, makes the application of the *sic utere tuo* rule more difficult. On the other hand, the word "appreciable" can have two meanings: it can serve either to distinguish harm which has certain consequences from harm which does not have such consequences, or to designate harm which can be "appreciated", that is to say, perceived and estimated, as opposed to harm which cannot.[11] In view of these prob-

[4] Article II of the Helsinki Rules defines an international drainage basin as "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".

[5] United Nations, *Treaty Series*, vol. 419, p. 125.

[6] United Nations, *Legislative Texts* . . ., p. 674, Treaty No. 186. For summary in English, see *Yearbook* . . . *1974*, vol. II (Part Two), p. 182, document A/5409, paras. 979-984.

[7] United Nations, *Treaty Series*, vol. 453, p. 51.

[8] RGDIP, 3rd series, vol. XXXVI, No. 1 (January-March 1965), p. 571; see also *Yearbook* . . . *1974*, vol. II (Part Two), p. 311, document A/CN.4/274, paras. 228-236.

[9] United Nations, *Legislative Texts* ..., p. 295, Treaty No. 96; see also *Yearbook* ... *1974*, vol. II. (Part Two), p. 105, document A/5409, paras. 347-354. India agrees to construct, in Nepalese territory, a hydroelectric power station and transmission lines; it also agrees to supply Nepal with a certain quantity of power. For its part, Nepal agrees to construct, in its territory, a transmission and distribution system for the power generated.

[10] See, for example, J. Andrassy, "Les relations internationales de voisinage", *Recueil des cours ... 1951-II*, vol. 79, pp. 77-181. In support of his statement, this author cites several decisions of United States courts, a resolution adopted in 1911 by the Institute of International Law and treaty provisions. With regard to the assessment of harm, Andrassy states as follows:

> "The magnitude of harm must be assessed in relation to the two parties concerned. The proportion or disproportion between the benefit gained by one party and the disadvantage suffered by the other must be taken into consideration. The diversity of cases admits of no fixed rules, and allows broad scope for equity. It has been taken into account in the above-mentioned cases, in which the principle of equitable apportionment has been applied." (p. 112.)

It can be inferred from this passage that the prohibition against causing harm is an element of the principle of equitable utilization, rather than vice versa.

[11] Cf. M. Solanes, "The International Law Commission and legal principles related to the non-navigational uses of the waters of international rivers", *Natural Resources Forum*, vol. 11 (1987), pp. 353-361, especially p. 357. The author states that:

> ". . . the principle [proscribing 'appreciable' harm] does not prohibit 'minor' or irrelevant harm, but 'appreciable' harm meaning such

(*Continued on next page.*)

lems, the Swiss Government would support the replacement of the adjective "appreciable" by one which more faithfully reflects the status quo in customary law.

12. Articles 8 to 19 contain procedural rules. Articles 11 to 19 indicate the course to be followed where a State envisages a new (or increased) watercourse activity. In general, these provisions appear to be acceptable to the Swiss Government. Two questions, however, warrant consideration.

13. As a commentator on the draft articles rightly indicates, a State which notifies other watercourse States of its intention to use a watercourse in a new way will, for a certain period, be prevented from implementing the planned measures (art. 14) and will, if objections are raised, be subject to a complex process of consultations and negotiation. For their part, notified States retain all their international rights, even if they do not reply to the notification within the prescribed period, as their situation continues to be governed by articles 5 to 7.[12] It would appear to be desirable to adopt a stricter approach towards notified States by acknowledging, in accordance with the maxim *qui tacet consentire consentire videtur si loqui debuisset ac potuisset*, that a watercourse State which has failed to raise objections within the prescribed period to a new activity announced by another watercourse State is deemed to have consented thereto.

14. Article 15 indicates that planned measures may give rise to objections if a notified State "finds that implementation of the planned measures would be inconsistent with the provisions of articles 5 (equitable utilization) or 7 (*sic utere tuo* . . .)". It is this unilateral and subjective finding which triggers the negotiation process and the six-month moratorium provided for in article 17. Thus, a unilateral finding by the State or States concerned suffices to block a new activity temporarily, without giving the State which wishes to undertake that activity the least opportunity to have its merits validated by an impartial third party. This situation is likely to be especially prejudicial to developing countries wishing to undertake a new activity and which request financial support to that end from international financial institutions. Such support may be temporarily denied solely on the basis of another watercourse State having raised an objection pursuant to article 15.

15. This observation leads to another, more general one. The problem just outlined illustrates the special importance of an effective system of dispute settlement within the framework of the law of international watercourses, as recognized, moreover, by ILA in its Helsinki Rules and by the Special Rapporteur of the Commission, Mr. McCaffrey. In his sixth report, in the proposed annexes I and II to his draft articles, he in fact proposed mechanisms for the settlement of disputes between States and the means to facilitate private recourse for actual and potential damages.[13] While the wording of the relevant article in annex II leaves something to be desired,[14] both texts have the merit of having raised the question. For their part, the draft articles which have now been submitted to Governments for comments maintain total silence on this question. Filling this gap would appear to be one of the Commission's primary tasks.

Achieving a balance among the draft articles

16. If the future framework convention is to fulfil its aim, it must be balanced. It should not, for instance, favour either upstream or downstream States. Does the Commission's draft meet this requirement? In order to answer this question, two aspects must be considered: the relationship between, on the one hand, the prohibition against causing "appreciable" harm and the principle of equitable utilization and, on the other hand, the participation of watercourse States in agreements concluded among other States sharing the same watercourse.

17. The Commission had initially juxtaposed the *sic utere tuo* rule with the principle of equitable utilization, without specifying the relationship between these two elements, although the inclusion of the possible adverse effects of an activity among the factors determining the extent of the right of equitable participation would suggest subordination of the first element to the second. Some members of the Commission, however, desired a clearer rule. Two of the Special Rapporteurs—Schwebel and McCaffrey—proposed wording which gave priority to the principle of equitable utilization. Article 8, paragraph 1, of the text suggested by Schwebel called upon system States to use the water resources of a watercourse system in such a manner as not to cause

> . . . appreciable harm to the interests of another system State, except as may be allowable under a determination for equitable participation for the international watercourse system involved.[15]

18. Mr. Evensen, on the other hand, wished to afford priority to the *sic utere tuo* rule by not including any text on this subject in the draft articles and by deleting the possible adverse effects of a use from the list of factors determining the extent of the right of equitable participation.[16] This is the solution which finally prevailed, as shown by the notion that even minor harm—for example, to the environment—cannot be tolerated, whether or not it

(*Footnote 11 continued*)

injury apt to cause international liability. The term 'appreciable', *meaning enough to be perceived or estimated**, ought to be distinguished from 'substantial', meaning of considerable size or amount, or in more ordinary terms large."

[12] C. B. Bourne, "The International Law Commission's draft articles on the law of international watercourses: principles and planned measures", *Colorado Journal of International Environmental Law and Policy* (Boulder), vol. 3 (1992), No. 1, pp. 65-92, particularly pp. 68-70.

[13] *Yearbook . . . 1990*, vol. II (Part One), p. 41, document A/CN.4/427 and Add.1, chap. III, sect. B and chap. IV, sect. F.

[14] At issue is article 5, which provides that a State party to a dispute concerning the interpretation or application of the future framework convention (cf. art. 3 of annex II) may, if other methods fail to produce a settlement

> ". . . submit the dispute to binding arbitration by any permanent or ad hoc arbitral tribunal that has been accepted by all of the parties to the dispute".

Such a provision would be doubly inadequate because: (*a*) it should apply not to disputes relating to the framework convention—which is only a model and, as such, is hardly likely to give rise to difficulties—but to those arising from the interpretation or application of watercourse agreements concluded on the basis of the model; and (*b*) it should suggest that the parties to such agreements submit their disputes to binding, rather than discretionary, arbitration.

[15] *Yearbook . . . 1982*, vol. II (Part One), p. 103, document A/CN.4/348, para. 156.

[16] *Yearbook . . . 1983*, vol. II (Part One), pp. 171-172, document A/CN.4/367.

comes under the heading of the right of equitable utilization by the State of origin. This notion is expressed in paragraph (2) of the commentary to draft article 7:

> A watercourse State's right to utilize an international watercourse . . . in an equitable and reasonable manner has its limit in the duty of that State not to cause appreciable harm to other watercourse States. In other words—prima facie, at least—utilization of an international water-course . . . is not equitable if it causes other watercourse States appreciable harm.[17]

This solution, which is subject to criticism from the doctrinal point of view,[18] seems infelicitous, as the Swiss representative on the Sixth Committee of the General Assembly suggested in the statement which he made on 31 October 1991.[19]

19. Since the problem outlined above has a substantial bearing on the fate of the draft articles, it seems advisable to give it thorough consideration.

20. Mr. McCaffrey argued in support of the solution finally adopted: (*a*) that it would be simpler to establish the existence of "appreciable" harm than to judge the equitable nature of a use; (*b*) that this solution would favour the "weaker" watercourse States; and (*c*) that it would afford better protection to the environment.[20] These arguments are either inaccurate or not compelling.

21. It is not clear why it would be easier to apply the vague notion of "appreciable" harm than to gauge a right of "equitable" utilization on the basis of the series of factors listed in draft article 6; and, even if the contention were correct, the easiest solution is not necessarily the best. Nor is it clear that the hierarchy of norms suggested by the Commission would favour economically weak States. Quite the contrary, giving priority to the prohibition against causing "appreciable" harm is tantamount to giving almost unlimited protection to the current users of the watercourse, since any harm suffered necessarily has to do with existing uses. In other words, acquired rights are given preference. To assert that protecting acquired rights is the same as helping the weak is something of a paradox, especially in the area at issue here, because newcomers are, generally, less economically developed than first users and are, historically, upstream rather than downstream States.[21] Lastly, while it may be that McCaffrey and the Commission are correct in thinking that the environment would be better served by the article 7 rule than by the principle of equitable utilization, the desired objective could be achieved without elevating the *sic utere tuo* precept, and with it the protection of existing uses, to the status of a priority rule. The protection sought could be just as easily ensured by restricting the priority of the *sic utere tuo* rule where the environment is concerned or, as Lammers has suggested, by considering the application of a "mitigated" no-substantial-harm principle.[22]

22. Thus, the system being proposed by the Commission does not offer compelling advantages. Furthermore, it entails serious disadvantages. First, as was indicated, it gives pre-eminence to the status quo, protecting the more developed watercourse States from heeding the inclinations of less developed States. The principle of equitable utilization would in effect be eclipsed by the *sic utere tuo* rule; priority would be given to existing uses over future activities.[23] Such a system might, moreover, imply that each user has a veto when a watercourse State plans to undertake a new activity or increase an existing activity. Secondly, the pre-eminence of the prohibition against causing "appreciable" harm, ostensibly prompted by the desire to give better protection to the environment, might actually work to protect the sovereignty of watercourse States: for to speak of equitable participation is to speak of apportionment of uses and resources, and the concept of apportionment transcends that of sovereignty. The concern to give priority to safeguarding sovereignty would in any case run counter to the commonly accepted idea that watercourse States form a community of interests and law[24] and that, consequently, the sovereignty of each of the States is and must be restricted. Under the guise of full protection of the environment, the new hierarchy of rules advocated by the Commission would mean that State sovereignty would be better protected than it has been in the past. That, in the view of the Swiss Government, is an unwelcome trend. Lastly, this hierarchy departs from State practice, as pointed out in a recent study on United States-Canadian relations.[25]

23. For all these reasons, the Swiss Government would like the Commission to reconsider its draft articles in the light of this important point and, in that case, to endorse the concept which for more than 30 years has underlain the work of ILA: the pre-eminence of the principle of

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[17] *Yearbook . . . 1988*, vol. II (Part Two), p. 36.

[18] See, for example, Bourne, loc. cit., pp. 72-91.

[19] *Official Records of the General Assembly, Forty-sixth Session, Sixth Committee*, 26th meeting, paras. 40-44.

[20] "The law of international watercourses: some recent developments and unanswered questions", *Denver Journal of International Law and Policy*, vol. 17, No. 3 (1989), pp. 505-526 particularly pp. 509-510 and "The International Law Commission and its efforts to codify the international law of waterways", in *Annuaire suisse de droit international*, vol. XLVII (1990), pp. 32-55, particularly pp. 51-52.

[21] McCaffrey, "The International Law Commission . . .", loc. cit., pp. 49-50.

[22] J. P. Lammers, "Balancing the equities' in international environmental law", *The Future of the International Law of the Environment, Hague Workshop, 12-14 November 1984*, Hague Academy of International Law (Dordrecht, Boston, Lancaster, Martinus Nijhoff Publishers), 1985, pp. 153-165. The prohibition against causing substantial harm would thus not apply (*a*) if its application affected objects or activities especially sensitive to transboundary pollution; (*b*) if the State of origin could not be held liable for the polluting activity according to the classic rules governing international liability; or (*c*) if the sacrifice that the cessation of the polluting activity constituted for the State of origin was disproportionate to the advantages that the victim State would gain from such cessation.

[23] The Helsinki Rules satisfactorily regulate how existing uses are to be dealt with. Article VIII, paragraph 1, of the Rules reads as follows:

> "1. An existing reasonable use may continue in operation unless the factors justifying its continuance are outweighed by other factors leading to the conclusion that it be modified or terminated so as to accommodate a competing incompatible use."

This provision gives existing activities presumptive pre-eminence. The potential user may overturn this presumption by establishing that the activities in question no longer fall within the framework of the right of equitable utilization of the States conducting them.

[24] *Territorial Jurisdiction of the International Commission of the River Oder, Judgment No. 16, 1929, PCIJ, Series A*, No. 23, p. 27.

[25] P. K. Wouters, "Allocation of the non-navigational uses of international watercourses: Efforts at codification and the experience of Canada and the United States", *Canadian Yearbook of International Law* (Vancouver), 1992, vol. XXX, pp. 43 et seq.

equitable and reasonable utilization. This result could be achieved by deleting draft article 7, by reintroducing the possible adverse effects of an activity as one of the factors listed in draft article 6 by which the scope of the right of equitable utilization is determined, and by restricting the priority of the *sic utere tuo* rule where protection of the environment is concerned, possibly by mitigating that rule.

24. In the view of the Swiss Government, the balance between downstream and upstream States is also compromised by draft article 4, paragraph 2. When some of the States sharing a watercourse negotiate an agreement *inter se* that applies to a part of the watercourse or to a particular use of the watercourse, any other watercourse State which may be affected to an appreciable extent by the agreement is entitled to participate in the negotiations and even to become a party to the agreement. Because such agreements are more likely to be concluded among downstream States, they are the ones whose freedom to conclude agreements is primarily curtailed by article 4, paragraph 2. Since the usefulness of such a provision is unclear, it would appear to be more appropriate to provide that all States wishing to regulate a new use by means of an agreement *inter se* are bound by the obligations stipulated in articles 11 to 19.

Recapitulation

25. The foregoing remarks are not exhaustive. In recent years, the Swiss representative on the Sixth Committee has commented on three occasions—3 November 1988, 31 O ctober 1990 and 31 October 1991—on the articles proposed for inclusion in the draft by the Commission.[26] Some of his comments have been reiterated or expanded in these remarks. Others—those, for example, having to do with the protection and preservation of the environment[27] and those on draft article 26 concerning management[28]—have not been recalled but are still valid and must also be considered an integral part of this statement.

26. By way of conclusion, the Swiss Government offers this recapitulation of the points in respect of which it believes changes could be made in the draft articles adopted on first reading by the Commission:

(*a*) Reversal of the order of the text in sub-paragraphs (*a*) and (*b*) of article 2;

(*b*) Deletion of article 4, paragraph 2;

(*c*) Addition of the adverse effects of a use to the factors listed in article 6;

(*d*) Possible addition of a provision enumerating ways of giving effect to the principle of equitable and reasonable use;

(*e*) Deletion of article 7;

(*f*) Introduction of a procedure in article 15 allowing the watercourse State providing notification of a new activity to seek the objective opinion of an impartial third party as to whether the activity would be consistent with articles 5 or 7 (or only article 5);

(*g*) Amendment of article 16 to include a provision that any State failing to respond to a notification within the prescribed period shall be presumed to have approved the planned use;

(*h*) Use of identical terms in articles 20 and 21 (either "environment" or "ecosystems");

(*i*) Restriction to the States actually threatened of the obligation provided in article 25 to cooperate in the development of contingency plans;

(*j*) Deletion of article 26; and

(*k*) Establishment of binding arrangements for the peaceful settlement of disputes between States and of disputes involving individuals.

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[26] *Official Records of the General Assembly, Forty-third Session, Sixth Committee*, 28th meeting, paras. 30-45; ibid., *Forty-fifth Session, Sixth Committee*, 25th meeting, paras. 55-64; ibid., *Forty-sixth Session, Sixth Committee* (see footnote 19 above) respectively.

[27] Statement of 31 October 1990 (ibid., *Forty-fifth Session, Sixth Committee* (see footnote 26 above)).

[28] Statement of 31 October 1991 (ibid., *Forty-sixth Session, Sixth Committee* (see footnote 19 above)).