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# Second report on the law of the non-navigational uses of international watercourses, by Mr. Stephen C. McCaffrey, Special Rapporteur

Topic:

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

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# THE LAW OF THE NON-NAVIGATIONAL USES OF INTERNATIONAL WATERCOURSES

[Agenda item 6]

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## Second report on the law of the non-navigational uses of international watercourses, by Mr. Stephen C. McCaffrey, Special Rapporteur

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# CHAPTER I

# Status of work on the topic

## A. Survey of developments from 1970 to 1979

1. The Commission included the topic "Non-navigational uses of international watercourses" in its general programme of work at its twenty-third session, in 1971,[1] in response to the recommendation made by the General Assembly in its resolution 2669 (XXV) of 8 December 1970. At its twenty-sixth session, in 1974, the Commission had before it a supplementary report by the Secretary-General on legal problems relating to the non-navigational uses of international watercourses.[2] At the same session, the Commission established a Sub-Committee on the Law of the Non-Navigational Uses of International Watercourses, chaired by Mr. Richard D. Kearney. The Sub-Committee submitted a report[3] which proposed the submission of a questionnaire to States. The Commission adopted the report of the Sub-Committee at the same session and also appointed Mr. Kearney Special Rapporteur for the topic.[4]

[1] See *Yearbook . . . 1971*, vol. II (Part One), p. 350, document A/8410/Rev.1, para. 120.

[2] *Yearbook . . . 1974*, vol. II (Part Two), p. 265, document A/CN.4/274.

[3] *Yearbook . . . 1974*, vol. II (Part One), p. 301, document A/9610/Rev.1, chap. V, annex.

[4] *Ibid.*, p. 301, para. 159.

2. At its twenty-eighth session, in 1976, the Commission had before it replies from the Governments of 21 Member States[5] to the questionnaire[6] which had been circulated to Member States by the Secretary-General, as well as a report submitted by the Special Rapporteur.[7] At that session, in the Commission's discussion on the topic, attention was devoted mainly to the matters raised in the replies from Governments, and dealt with in the report of the Special Rapporteur, concerning the scope of the Commission's work on the topic and the meaning of the term "international watercourse". The Commission's consideration of the topic at that session

led to general agreement . . . that the question of determining the scope of the term "international watercourses" need not be pursued at the outset of the work. Instead, attention should be devoted to beginning the formulation of general principles applicable to legal aspects of the uses of those watercourses.[8]

3. At its twenty-ninth session, in 1977, the Commission appointed Mr. Stephen M. Schwebel Special Rapporteur to succeed Mr. Kearney, who had not stood for re-election to the Commission.[9] Mr. Schwebel made a statement to the Commission in 1978 and, at the Commission's thirty-first session, in 1979, submitted his first report,[10] which contained 10 draft articles. At that session, the Commission held a general debate on the issues raised in the Special Rapporteur's report and on questions relating to the topic as a whole.

## B. Action taken by the Commission at its thirty-second session, in 1980

4. Mr. Schwebel submitted a second report, containing six draft articles, at the Commission's thirty-second session, in 1980.[11] At that session, the six articles were referred to the Drafting Committee after discussion of the report by the Commission. On the recommendation of the Drafting Committee, the Commission at the same session provisionally adopted draft articles 1 to 5 and X, which read as follows:

*Article 1. Scope of the present articles*

**1. The present articles apply to uses of international watercourse systems and of their waters for purposes other than navigation and to measures of conservation related to the uses of those watercourse systems and their waters.**

**2. The use of the waters of international watercourse systems for navigation is not within the scope of the present articles except in so far as other uses of the waters affect navigation or are affected by navigation.**

*Article 2. System States*

**For the purposes of the present articles, a State in whose territory part of the waters of an international watercourse system exists is a system State.**

*Article 3. System agreements*

**1. A system agreement is an agreement between two or more system States which applies and adjusts the provisions of the present articles to the characteristics and uses of a particular international watercourse system or part thereof.**

**2. A system agreement shall define the waters to which it applies. It may be entered into with respect to an entire international watercourse system, or with respect to any part thereof or particular project, programme or use provided that the use by one or more other system States of the waters of an international watercourse system is not, to an appreciable extent, affected adversely.**

**3. In so far as the uses of an international watercourse system may require, system States shall negotiate in good faith for the purpose of concluding one or more system agreements.**

*Article 4. Parties to the negotiation and conclusion of system agreements*

**1. Every system State of an international watercourse system is entitled to participate in the negotiation of and to become a party to any system agreement that applies to that international watercourse system as a whole.**

**2. A system State whose use of the waters of an international watercourse system may be affected to an appreciable extent by the implementation of a proposed system agreement that applies only to a part of the system or to a particular project, programme or use is entitled to participate in the negotiation of such an agreement, to the extent that its use is thereby affected, pursuant to article 3 of the present articles.**

*Article 5. Use of waters which constitute a shared natural resource*

**1. To the extent that the use of waters of an international watercourse system in the territory of one system State affects the use of waters of that system in the territory of another system State, the waters are, for the purposes of the present articles, a shared natural resource.**

**2. Waters of an international watercourse system which constitute a shared natural resource shall be used by a system State in accordance with the present articles.**

*Article X. Relationship between the present articles and other treaties in force*

**Without prejudice to paragraph 3 of article 3, the provisions of the present articles do not affect treaties in force relating to a particular international watercourse system or any part thereof or particular project, programme or use.**

5. As further recommended by the Drafting Committee, the Commission also accepted at its thirty-second session a provisional working hypothesis as to what was meant by the term "international watercourse system". The hypothesis was contained in a note which read as follows:

**A watercourse system is formed of hydrographic components such as rivers, lakes, canals, glaciers and groundwater constituting by virtue of their physical relationship a unitary whole; thus, any use affecting waters in one part of the system may affect waters in another part.**

**An "international watercourse system" is a watercourse system components of which are situated in two or more States.**

**To the extent that parts of the waters in one State are not affected by or do not affect uses of waters in another State, they shall not be treated as being included in the international watercourse system. Thus, to the extent that the uses of the waters of the system have an effect on one another, to that extent the system is international, but only**

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[5] *Yearbook . . . 1976*, vol. II (Part One), p. 147, document A/CN.4/294 and Add.1.

[6] The final text of the questionnaire, as communicated to Member States, is reproduced in *Yearbook . . . 1976*, vol. II (Part One), p. 150, document A/CN.4/294 and Add.1, para. 6; see also *Yearbook . . . 1984*, vol. II (Part Two), pp. 82-83, para. 262.

[7] *Yearbook . . . 1976*, vol. II (Part One), p. 184, document A/CN.4/295.

[8] *Yearbook . . . 1976*, vol. II (Part Two), p. 162, para. 164.

[9] *Yearbook . . . 1977*, vol. II (Part Two), p. 124, para. 79.

[10] *Yearbook . . . 1979*, vol. II (Part One), p. 143, document A/CN.4/320.

[11] *Yearbook . . . 1980*, vol. II (Part One), p. 159, document A/CN.4/332 and Add.1.

**to that extent; accordingly, there is not an absolute, but a relative, international character of the watercourse.**[12]

6. In its report to the General Assembly on its thirty-second session, the Commission drew attention to the fact that, from the outset of its work on the topic, it had recognized the diversity of international watercourses, in terms both of their physical characteristics and of the human needs they served. It also noted, however, that the existence of certain common watercourse characteristics had been recognized, and that it was possible to identify certain principles of international law already existing and applicable to international watercourses in general. Mention was made in that regard of such concepts as the principle of good-neighbourliness and *sic utere tuo ut alienum non laedas*, as well as of the sovereign rights of riparian States.

7. By its resolution 35/163 of 15 December 1980, the General Assembly, noting with appreciation the progress made by the Commission in the preparation of draft articles on the law of the non-navigational uses of international watercourses, recommended that the Commission proceed with the preparation of draft articles on the topic.

## C. Survey of developments from 1981 to 1983

8. The Commission did not consider the topic at its thirty-third session, in 1981, owing to the resignation of Mr. Schwebel from the Commission upon his election to the ICJ. At its thirty-fourth session, in 1982, the Commission appointed Mr. Jens Evensen Special Rapporteur for the topic.[13] Also at that session, the Commission had before it the third report of Mr. Schwebel, who had begun its preparation prior to his resignation from the Commission.[14]

9. At its thirty-fifth session, in 1983, the Commission had before it the first report submitted by Mr. Evensen.[15] That report contained an outline for a draft convention, to serve as a basis for discussion, consisting of 39 articles arranged in six chapters. At that session, the Commission discussed the report as a whole, focusing in particular on the question of the definition of the term "international watercourse system" and on that of an international watercourse system as a shared natural resource.

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

[13] *Yearbook . . . 1982*, vol. II (Part Two), p. 121, para. 250.

[14] *Yearbook . . . 1982*, vol. II (Part One), p. 65, document A/CN.4/348. That report contained, *inter alia*, the following draft articles: "Equitable participation" (art. 6); "Determination of equitable use" (art. 7); "Responsibility for appreciable harm" (art. 8); "Collection, processing and dissemination of information and data" (art. 9); "Environmental pollution and protection" (art. 10); "Prevention and mitigation of hazards" (art. 11); "Regulation of international watercourses" (art. 12); "Water resources and installation safety" (art. 13); "Denial of inherent use preference" (art. 14); "Administrative management" (art. 15); and "Principles and procedures for the avoidance and settlement of disputes" (art. 16).

[15] *Yearbook . . . 1983*, vol. II (Part One), p. 155, document A/CN.4/367.

## D. Consideration of the topic by the Commission at its thirty-sixth session, in 1984

10. At its thirty-sixth session, in 1984, the Commission had before it the second report submitted by Mr. Evensen.[16] That report contained the revised text of the outline for a draft convention on the law of the non-navigational uses of international watercourses; that text consisted of 41 draft articles arranged in six chapters, as follows:

CHAPTER I. INTRODUCTORY ARTICLES

*Article 1. Explanation (definition) of the term "international watercourse" as applied in the present Convention*

*Article 2. Scope of the present Convention*

*Article 3. Watercourse States*

*Article 4. Watercourse agreements*

*Article 5. Parties to the negotiation and conclusion of watercourse agreements*

CHAPTER II. GENERAL PRINCIPLES, RIGHTS AND DUTIES OF WATERCOURSE STATES

*Article 6. General principles concerning the sharing of the waters of an international watercourse*

*Article 7. Equitable sharing in the uses of the waters of an international watercourse*

*Article 8. Determination of reasonable and equitable use*

*Article 9. Prohibition of activities with regard to an international watercourse causing appreciable harm to other watercourse States*

CHAPTER III. CO-OPERATION AND MANAGEMENT IN REGARD TO INTERNATIONAL WATERCOURSES

*Article 10. General principles of co-operation and management*

*Article 11. Notification to other watercourse States. Content of notification*

*Article 12. Time-limits for reply to notifications*

*Article 13. Procedures in case of protest*

*Article 14. Failure of watercourse States to comply with the provisions of articles 11 to 13*

*Article 15. Management of international watercourses. Establishment of commissions*

*Article 15* bis. *Regulation of international watercourses* [based on article 27 of the original draft]

*Article 15* ter. *Use preferences* [based on article 29 of the original draft]

*Article 16. Collection, processing and dissemination of information and data*

*Article 17. Special requests for information and data*

*Article 18. Special obligations in regard to information about emergencies*

*Article 19. Restricted information*

CHAPTER IV. ENVIRONMENTAL PROTECTION, POLLUTION, HEALTH HAZARDS, NATURAL HAZARDS, SAFETY AND NATIONAL AND REGIONAL SITES

*Article 20. General provisions on the protection of the environment*

*Article 21. Purposes of environmental protection*

*Article 22. Definition of pollution*

*Article 23. Obligation to prevent pollution*

*Article 24. Co-operation between watercourse States for protection against pollution. Abatement and reduction of pollution*

[16] *Yearbook . . . 1984*, vol. II (Part One), p. 101, document A/CN.4/381.

*Article 25. Emergency situations regarding pollution*

*Article 26. Control and prevention of water-related hazards*

[Article 27 of the original draft was replaced by article 15 *bis*]

*Article 28. Safety of international watercourses, installations and constructions, etc.*

*Article 28* bis. *Status of international watercourses, their waters and constructions, etc. in armed conflicts* [new article]

[Article 29 of the original draft was replaced by article 15 *ter*]

*Article 30. Establishment of international watercourses or parts thereof as protected national or regional sites*

CHAPTER V. PEACEFUL SETTLEMENT OF DISPUTES

*Article 31. Obligation to settle disputes by peaceful means*

*Article 31* bis. *Obligations under general, regional or bilateral agreements or arrangements* [new article]

*Article 32. Settlement of disputes by consultations and negotiations*

*Article 33. Inquiry and mediation*

*Article 34. Conciliation*

*Article 35. Functions and tasks of the Conciliation Commission*

*Article 36. Effects of the report of the Conciliation Commission. Sharing of costs*

*Article 37. Adjudication by the International Court of Justice, another international court or a permanent or* ad hoc *arbitral tribunal*

*Article 38. Binding effect of adjudication*

CHAPTER VI. FINAL PROVISIONS

*Article 39. Relationship to other conventions and international agreements*

11. On the suggestion of the Special Rapporteur, the Commission focused its discussion on draft articles 1 to 9 as contained in the second report and on questions related thereto. At the conclusion of the discussion, the Commission decided to refer draft articles 1 to 9 to the Drafting Committee. It was understood that the Drafting Committee would also have available the text of the provisional working hypothesis accepted by the Commission at its thirty-second session, in 1980 (see para. 5 above), the texts of articles 1 to 5 and X provisionally adopted by the Commission at the same session (see para. 4 above) and the texts of draft articles 1 to 9 submitted by the Special Rapporteur in his first report.[17]

### 1. THE GENERAL APPROACH SUGGESTED BY THE SPECIAL RAPPORTEUR

12. The outline for a draft convention proposed by the Special Rapporteur in his first report had seemed broadly acceptable. Consequently, the Special Rapporteur had made only minor changes in and a few additions to the outline itself in his second report. More significant changes were proposed, however, in the texts of certain draft articles, as indicated below.

13. The "framework agreement" approach had likewise seemed to be broadly acceptable to the Commission and was also the approach that had been endorsed by the Sixth Committee of the General Assembly (see paras. 32-33 below). The Special Rapporteur believed that the term "framework agreement" should be applied in a broad and flexible manner, and shared the position of his predecessor, Mr. Schwebel, that

> . . . the product of the Commission's work should serve to provide . . . the general principles and rules governing international watercourses in the absence of agreement among the States concerned and to provide guidelines for the negotiation of future specific agreements. . . .[18]

It seemed to be generally recognized by the Commission that, in a framework text, it would be necessary or useful to use, to a reasonable extent, general legal formulations or standards such as "good-neighbourly relations", "good faith", participation in the benefits of a resource "in a reasonable and equitable manner" and the duty not to cause "appreciable harm" to the rights or interests of others. While some members supported this broad approach to the topic, others believed that the legal principles proposed were formulated too generally. Furthermore, certain members felt that recommendations and guidelines did not belong in a framework agreement, while others were of the view that recommendations and guidelines might be useful for the elaboration of specific watercourse agreements.

14. Finally, it was recognized that the general approach suggested by the Special Rapporteur in his second report was based on certain changes which he had introduced in his revised draft articles, most notably in article 1, where the term "international watercourse system" had been replaced by the term "international watercourse", and in article 6, where the expression "the watercourse system and its waters are . . . a shared natural resource" had been changed to "the watercourse States concerned shall share in the use of the waters of the watercourse in a reasonable and equitable manner". These changes also were the subject of different views within the Commission, as indicated below. While no final resolution of the various issues was achieved during the thirty-sixth session, it was expected that further discussions on those issues would assist the Commission in its future work. As stated in the Commission's report on its thirty-sixth session:

> . . . the Commission anticipates that it will continue its work on this topic in the light of the debate to be held in the Sixth Committee of the General Assembly on the report of the Commission on the work of its present session, in the light of future proposals and suggestions to be made by the Special Rapporteur, and on the basis of future reports of the Drafting Committee on its consideration of draft articles 1 to 9.[19]

### 2. ARTICLES 1 TO 9 AS SUBMITTED BY THE SPECIAL RAPPORTEUR IN HIS SECOND REPORT

15. As proposed by the Special Rapporteur, articles 1 to 9 comprise the first two chapters of the draft. Chapter I, entitled "Introductory articles", contains articles 1 to 5, and chapter II, entitled "General principles, rights and duties of watercourse States", contains articles 6 to 9. As indicated above (para. 11), the Commission focused its discussion at its thirty-sixth session, in 1984, on draft articles 1 to 9 and referred those articles to the Drafting Committee. Consequently, the present summary of the Commission's consideration of the topic at its 1984 session will concentrate on those articles.

[17] *Yearbook . . . 1983*, vol. II (Part Two), pp. 68 *et seq.*, footnotes 245 to 250.

[18] *Yearbook . . . 1982*, vol. II (Part One), p. 67, document A/CN.4/348, para. 2.

[19] *Yearbook . . . 1984*, vol. II (Part Two), p. 89, para. 290, *in fine*.

16. Views were divided in the Commission on the revised text of draft article 1[20] submitted in the Special Rapporteur's second report. While article 1 as submitted in his first report had been patterned closely on the provisional working hypothesis accepted by the Commission in 1980 as to what was meant by the expression "international watercourse system" (see para. 5 above), the Special Rapporteur, in his second report, had recommended abandonment of the "system" concept in favour of the simpler notion of an "international watercourse". The Special Rapporteur had recommended this change because of his conclusion that there was opposition to the "system" concept, both in the Commission and in the Sixth Committee of the General Assembly, on the ground that it represented a doctrinal approach similar to the "drainage basin" concept earlier discarded by the Commission.

17. Some members of the Commission endorsed the change in approach suggested by the Special Rapporteur in the revised text of article 1. They believed the abandonment of the "system" concept removed a major stumbling-block to progress on the topic and resulted in a purely geographical definition which could form the basis of a comprehensive draft, while avoiding the territorial connotations which, in their view, the "system" concept had implied.

18. Some members viewed the abandonment of the "system" concept as regrettable but indicated that they did not object to the suggested change, provided it represented nothing more than a change of wording. In their view, however, the elimination of the "system" concept presented the conceptual problem of dealing with the relativity aspect highlighted in the provisional working hypothesis accepted by the Commission in 1980: there could be different systems with respect to different uses of the same watercourse at one and the same time.

19. To other members, the revised draft article 1 represented a major departure from the approach adopted by the Commission at its thirty-second session, in 1980. Those members were of the view that the articles provisionally adopted in 1980 (see para. 4 above) constituted a coherent whole and that the elimination of the "system" concept necessitated a rethinking of all the provisions, in particular articles 4, 5 and 6.

20. Finally, certain members questioned the omission from the text proposed by the Special Rapporteur of an indication, even a non-exhaustive one, of the possible hydrographic components of an international watercourse. Those members thought it preferable to include in the text of the article the examples given in the Special Rapporteur's second report (rivers, lakes, canals, tributaries, streams, brooks and springs, glaciers and snow-capped mountains, swamps, ground water and other types of aquifers),[21] with a view to determining whether they should form the subject of separate articles or at least a very detailed commentary.

21. Draft articles 2[22] and 3[23] as submitted in the Special Rapporteur's second report did not give rise to significant differences of view. Draft article 4[24] was the subject of some comment, principally on the question whether the revised text of paragraph 1 was preferable to that submitted in the first report. There was general agreement, however, that the article should safeguard and protect existing agreements and give every possible encouragement to States to enter into agreements concerning international watercourses.

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[20] Revised draft article 1 as submitted in the second report read as follows:

*"Article 1. Explanation (definition) of the term 'international watercourse' as applied in the present Convention*

"1. For the purposes of the present Convention, an 'international watercourse' is a watercourse—ordinarily consisting of fresh water—the relevant parts or components of which are situated in two or more States (watercourse States).

"2. To the extent that components or parts of the watercourse in one State are not affected by or do not affect uses of the watercourse in another State, they shall not be treated as being included in the international watercourse for the purposes of the present Convention.

"3. Watercourses which in whole or in part are apt to appear and disappear (more or less regularly) from seasonal or other natural causes such as precipitation, thawing, seasonal avulsion, drought or similar occurrences are governed by the provisions of the present Convention.

"4. Deltas, river mouths and other similar formations with brackish or salt water forming a natural part of an international watercourse shall likewise be governed by the provisions of the present Convention."

[21] *Yearbook . . . 1984*, vol. II (Part One), p. 106, document A/CN.4/381, para. 24.

[22] Revised draft article 2 as submitted in the second report read as follows:

*"Article 2. Scope of the present Convention*

"1. The present Convention applies to uses of international watercourses and of their waters for purposes other than navigation and to measures of administration, management and conservation related to the uses of those watercourses and their waters.

"2. The use of the waters of international watercourses for navigation is not within the scope of the present Convention except in so far as other uses of the waters affect navigation or are affected by navigation."

[23] Revised draft article 3 as submitted in the second report read as follows:

*"Article 3. Watercourse States*

"For the purposes of the present Convention, a State in whose territory relevant components or parts of the waters of an international watercourse exist is a watercourse State."

[24] Revised draft article 4 as submitted in the second report read as follows:

*"Article 4. Watercourse agreements*

"1. Nothing in the present Convention shall prejudice the validity and effect of a special watercourse agreement or special watercourse agreements which, taking into account the characteristics of the particular international watercourse or watercourses concerned, provide measures for the reasonable and equitable administration, management, conservation and use of the international watercourse or watercourses concerned or relevant parts thereof.

"The provisions of this article apply whether such special agreement or agreements are concluded prior to or subsequent to the entry into force of the present Convention for the watercourse States concerned.

"2. A special watercourse agreement should define the waters to which it applies. It may be entered into with respect to an international watercourse in its entirety, or with respect to any part thereof or particular project, programme or use, provided that the use by one or more other watercourse States of the waters of such international watercourse is not, to an appreciable extent, affected adversely.

"3. In so far as the uses of an international watercourse may require, watercourse States shall negotiate in good faith for the purpose of concluding one or more watercourse agreements or arrangements."

22. Comments on draft article 5[25] focused particularly on paragraph 2. The usefulness of the criterion of "an appreciable extent", although it had been taken verbatim from article 4, paragraph 2, as provisionally adopted by the Commission in 1980, was questioned by some members of the Commission. Others expressed doubts concerning the fact that paragraph 1 allowed watercourse States to become parties to watercourse agreements, whereas paragraph 2 allowed them only to participate in the negotiation thereof.

23. Chapter II, containing articles 6 to 9, was considered by some members to be the most important chapter of the draft articles, since it set out the rights and obligations of watercourse States. Draft article 6[26] was the subject of extensive discussion relating in particular to the replacement of the words "the watercourse system and its waters are . . . a shared natural resource" by the words "the watercourse States concerned shall share in the use of the waters of the watercourse in a reasonable and equitable manner". The Special Rapporteur indicated that, while it had been accepted in the Commission and in the Sixth Committee that watercourse States were entitled to a reasonable and equitable share of the benefits arising from an international watercourse, the use of the term "shared natural resource" as a concept had given rise to strong objection.

24. Some members of the Commission considered that the revised text of article 6 constituted a major improvement, since the new wording provided a more acceptable basis for an equitable international watercourse régime. Some members, however, thought it should not be excluded that a watercourse agreement for a particular project could be facilitated by using the concept of shared natural resources, if the watercourse States concerned so agreed.

25. Other members of the Commission questioned the deletion of the "shared natural resource" concept. According to this view, the proposition that water constituted a shared natural resource was supported by various international instruments and was only a reflection of a fact of nature. It was also remarked that it would be necessary to determine how the removal of this central concept would affect the remainder of the draft.

26. In his summing-up on draft article 6, the Special Rapporteur said that the deletion of the "shared natural resource" concept in the revised text appeared to be generally acceptable. He stated, however, that he could not accept the suggestion made during the debate that all reference to "sharing" be deleted from article 6. According to the Special Rapporteur, the whole idea of drawing up a framework agreement was that there existed a unity of interests and an interdependence between watercourse States which, by their very nature, entailed the sharing of the utilization and benefits of the waters of an international watercourse.

27. Draft article 7[27] was generally supported by some members, who noted that it introduced the important concept of development, use and sharing of the waters of an international watercourse in a reasonable and equitable manner. Different views were expressed on the inclusion in the article of the principles of good faith and good-neighbourly relations: while certain members approved of their inclusion, certain others considered those concepts, particularly the latter, to be too vague and uncertain. Doubts were also voiced concerning the reference to "optimum utilization". The Special Rapporteur concluded that at least the first part of the article had received considerable support and thus merited retention. He recognized that the second part posed certain difficulties, which he hoped could be satisfactorily resolved. He also expressed the view that the notion of "good-neighbourly relations" had emerged as a concept of international law.

28. Draft article 8[28] was viewed by some members of the Commission as an important element of the draft, since it would facilitate the determination of what constituted "reasonable and equitable" use in concrete

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[25] Revised draft article 5 as submitted in the second report read as follows:

"*Articles 5. Parties to the negotiation and conclusion of watercourse agreements*

"1. Every watercourse State is entitled to participate in the negotiation of and to become a party to any watercourse agreement that applies to that international watercourse as a whole.

"2. A watercourse State whose use of the waters 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 is entitled to participate in the negotiation of such an agreement, to the extent that its use is thereby affected."

[26] Revised draft article 6 as submitted in the second report read as follows:

"*Article 6. General principles concerning the sharing of the waters of an international watercourse*

"1. A watercourse State is, within its territory, entitled to a reasonable and equitable share of the uses of the waters of an international watercourse.

"2. To the extent that the use of the waters of an international watercourse within the territory of one watercourse State affects the use of the waters of the watercourse in the territory of another watercourse State, the watercourse States concerned shall share in the use of the waters of the watercourse in a reasonable and equitable manner in accordance with the articles of the present Convention and other agreements and arrangements entered into with regard to the management, administration or uses of the international watercourse."

[27] Revised draft article 7 as submitted in the second report read as follows:

"*Article 7. Equitable sharing in the uses of the waters of an international watercourse*

"The waters of an international watercourse shall be developed, used and shared by watercourse States in a reasonable and equitable manner on the basis of good faith and good-neighbourly relations with a view to attaining optimum utilization thereof consistent with adequate protection and control of the international watercourse and its components."

[28] Revised draft article 8 as submitted in the second report read as follows:

"*Article 8. Determination of reasonable and equitable use*

"1. In determining whether the use by a watercourse State of the waters of an international watercourse is exercised in a reasonable and equitable manner in accordance with article 7, all relevant factors shall be taken into account, whether they are of a general nature or specific for the international watercourse concerned. Among such factors are:

"(*a*) the geographic, hydrographic, hydrological and climatic factors together with other relevant circumstances pertaining to the watercourse concerned;

situations. Other members considered a non-exhaustive list of factors such as that contained in article 8 to be of limited value. The latter members were of the view that article 8 should be limited essentially to the first sentence of paragraph 1.

29. Draft article 9[29] was the subject of extensive comment. Certain members generally approved of the text submitted in the Special Rapporteur's second report and considered that the entire draft could be built upon the basic principle enunciated in this article, namely *sic utere tuo ut alienum non laedas*, which was the basis of the principles contained in articles 7 and 8. Some members, however, urged that the article be clarified in order to specify that the obligation to refrain from an activity that might cause "appreciable harm" was not applicable where a watercourse agreement provided for the equitable apportionment of benefits resulting from that activity. Moreover, certain members believed that the criterion of "appreciable harm" was too strict and that a formula such as "exceeding a State's equitable share" or "depriving another State of its equitable share" would be preferable. It was pointed out in that connection that the use of the term "harm" could give rise to a conflict between the concept of an "equitable share" under article 6 and that of not causing "appreciable harm" under article 9. It was suggested that those two articles could be reconciled by having article 9 prohibit the infliction of appreciable harm except to the extent allowable under an agreed determination of equitable allocation of the watercourse concerned. Finally, it was pointed out that the article as drafted did not clearly cover future harm in the sense of lost opportunity to construct a project or to put the water to a given use.

30. In his summing-up of the discussion on the topic at the thirty-sixth session, the Special Rapporteur recognized that, on certain basic issues concerning draft articles 1 to 9, opinions seemed to vary considerably. He therefore proposed that those articles be "provisionally referred" to the Drafting Committee so as to give him the opportunity to receive guidance from the Committee as to the drafting of formulations that might be more acceptable to the Commission for its future work. It was so agreed by the Commission.[30]

## E. Comments made in the Sixth Committee of the General Assembly on the Commission's consideration of the topic at its thirty-sixth session[31]

### 1. General observations

31. The Commission was congratulated for having achieved appreciable progress in its consideration of the topic. It was stressed that, despite certain conceptual difficulties which had arisen both in the Commission and in the Sixth Committee, the revised draft articles provided a general basis on which further work on the topic could be pursued. Despite certain disagreements which seemed to remain within the Commission, it appeared that the draft articles had already reached an advanced stage and that work on the topic constituted a priority task for the Commission.

### 2. Comments on the general approach suggested by the Special Rapporteur

32. Many representatives who addressed themselves to the issue commended the "framework agreement" approach to the topic, which followed the approach adopted by the Commission in 1980. It was said that, since political relationships and disposition to co-operate among riparian States varied greatly, the general rules included in a framework agreement should be precise and detailed enough to safeguard the rights of

"(*b*) the special needs of the watercourse State concerned for the use or uses in question in comparison with the needs of other watercourse States;

"(*c*) the attainment of a reasonable and equitable balance between the relevant rights and interests of the watercourse States concerned;

"(*d*) the contribution by the watercourse State concerned of waters to the international watercourse in comparison with that of other watercourse States;

"(*e*) development and conservation by the watercourse State concerned of the international watercourse and its waters;

"(*f*) the other uses of the waters of an international watercourse by the State concerned in comparison with the uses by other watercourse States, including the efficiency of such uses;

"(*g*) co-operation with other watercourse States in projects or programmes to obtain optimum utilization, protection and control of the watercourse and its waters, taking into account cost-effectiveness and the costs of alternative projects;

"(*h*) pollution by the watercourse State or States concerned of the international watercourse in general or as a consequence of the particular use, if any;

"(*i*) other interference with or adverse effects, if any, of such use for the uses, rights or interests of other watercourse States including, but not restricted to, the adverse effects upon existing uses by such States of the waters of the international watercourse and its impact upon protection and control measures of other watercourse States;

"(*j*) availability to the State concerned and to other watercourse States of alternative water resources;

"(*k*) the extent and manner of co-operation established between the watercourse State concerned and other watercourse States in programmes and projects concerning the use in question and other uses of the waters of the international watercourse in order to obtain optimum utilization, reasonable management, protection and control thereof.

"2. In determining, in accordance with paragraph 1 of this article, whether a use is reasonable and equitable, the watercourse States concerned shall negotiate in a spirit of good faith and good-neighbourly relations in order to resolve the outstanding issues.

"If the watercourse States concerned fail to reach agreement by negotiation within a reasonable period of time, they shall resort to the procedures for peaceful settlement provided for in chapter V of the present Convention."

[29] Revised draft article 9 as submitted in the second report read as follows:

"*Article 9. Prohibition of activities with regard to an international watercourse causing appreciable harm to other watercourse States*

"A watercourse State shall refrain from and prevent (within its jurisdiction) uses or activities with regard to an international watercourse that may cause appreciable harm to the rights or interests of other watercourse States, unless otherwise provided for in a watercourse agreement or other agreement or arrangement."

[30] *Yearbook . . . 1984*, vol. II (Part Two), p. 98, para. 343.

[31] This survey is based on section F of the "Topical summary, prepared by the Secretariat, of the discussion in the Sixth Committee on the report of the Commission during the thirty-ninth session of the General Assembly" (A/CN.4/L.382), in which a more detailed account will be found.

interested parties in the absence of specific agreements. With regard to whether the framework agreement should consist strictly of legal rules, some representatives supported the Special Rapporteur's view that such an agreement should contain, in addition to such rules, guidelines and recommendations which might be adapted to specific watercourse agreements. But it was stated that the general concepts and language had to be complemented by precise mechanisms that could give them specific content and avoid conflict in actual cases.

33. Certain representatives expressed doubts concerning the framework agreement approach. One view was that it was difficult to envisage cases in which all States sharing the same watercourse would become parties to the framework agreement and not conclude a specific watercourse agreement. The idea that the draft articles could serve as a set of model rules still had some appeal. Whatever their final form, however, the draft articles could serve as a guide for the conclusion of watercourse agreements and for crystallizing the few substantive rules on the subject. The view was expressed that it was far from evident that the draft under consideration quite fitted the definition of a framework agreement that States could adapt to their particular needs. According to that view, such an agreement should be a more flexible and freer text.

34. Some representatives expressed concern that the Special Rapporteur had reworked some of the basic concepts underlying the draft articles, such as the "system" concept, the definition of an "international watercourse" and the concept of "shared natural resources". It was asked whether the new definitions really constituted progress. Finally, the Commission and the Special Rapporteur were urged to avoid an annual reconsideration of texts that had already been provisionally adopted by the Commission.

### 3. Comments on articles 1 to 9 as submitted by the Special Rapporteur in his second report

35. Comments in the Sixth Committee on draft articles 1 to 9 largely paralleled the views expressed in the Commission. A brief summary will be provided here for ease of reference. Particular attention will be devoted to the articles that received most attention both in the Commission and in the Sixth Committee, namely articles 1, 6 and 9.

36. Views expressed in the Sixth Committee on draft article 1, and specifically on the deletion of the "system" concept, varied. Some representatives endorsed the Special Rapporteur's replacement of the term "international watercourse system" by the term "international watercourse". Specifically, it was said that the use of the "system" concept had been somewhat ambiguous because it might have connoted the idea of jurisdiction over land areas. Certain representatives welcomed the Special Rapporteur's assurances that the new wording in draft article 1 was a purely terminological and not a conceptual change. Other representatives, however, expressed regret at the abandonment of the "system" concept, which they considered to be a rich, modern notion. The abandonment of that concept, in their view, meant that one of the corner-stones of the draft had been removed. It was thus urged that the Commission return to the "system" approach, since the natural connection between various elements—namely that they formed a system—could not be overlooked.

37. The few observations made in the Sixth Committee on draft articles 2 and 3 largely echoed those made in the Commission. Among other comments on draft article 4, some representatives criticized the new paragraph 1 as going too far towards giving the provisions of the framework agreement a status from which watercourse States would be unable to derogate by special agreement. With regard to paragraph 2 of article 4, several representatives criticized the vague import of the expression "to an appreciable extent" and suggested that criteria be set down to clarify the expression. Similar observations were made with respect to the same expression appearing in draft article 5. With regard to draft article 5 as a whole, certain representatives expressed their qualified approval of it, whereas others expressed doubts or reservations.

38. Several representatives welcomed the Special Rapporteur's replacement in draft article 6 of the concept of a "shared natural resource" by the notion of "sharing in the use of waters in a reasonable and equitable manner" and considered the revised text a major improvement which struck a better balance in the article as a whole. Some representatives welcomed the Special Rapporteur's assurances that the changes introduced were of a terminological nature and not intended to affect substance. They considered that, while the notion of sharing still formed the basis of the draft, it did so in a more general manner and avoided the doctrinal overtones implicit in the concept of a "shared natural resource".

39. Certain representatives believed that the revised text still did not strike the right balance, since it appeared to place more emphasis on the "sharing" notion than on the principle of permanent sovereignty over natural resources, on which greater emphasis was required. Thus, according to certain representatives, the notion of sharing in any form should be eliminated altogether from the article.

40. On the other hand, certain other representatives regretted or deplored the elimination of the concept of a "shared natural resource". In their view, the concept underlined the necessary interrelationship between the rights of adjacent riparian States and was the basis for certain essential obligations in that area. They believed that the abandonment of the concept, coupled with the deletion of the "system" concept in draft article 1, called into question the arguments underlying some of the draft articles. Doubts were also voiced with regard to the notion of "reasonable and equitable" sharing.

41. Draft article 7 was supported by some representatives as a necessary corollary to draft article 6. Doubts were, however, expressed regarding the terms "optimum utilization", "good-neighbourly", "protection and control" and "shared", because they could give rise to misinterpretation or abuse. Draft article 8 was the subject of mixed views. Certain representatives considered that the factors laid down therein could provide non-binding, non-exhaustive reference points for deter-

mining whether waters were used in a reasonable and equitable manner. Other representatives questioned the utility of including a long non-exhaustive list of factors and requested the Commission to re-examine the matter.

42. Draft article 9 was approved of by some representatives, who considered it to be one of the core provisions of the draft as a whole. They believed that the maxim *sic utere tuo ut alienum non laedas* should occupy a privileged place in the draft, since the obligation not to cause harm to other States was a basic obligation which was recognized as a generally accepted principle of international law. At the same time, the draft reflected modern trends by excluding from the scope of the prohibition those injurious effects which did not exceed the threshold of "appreciable harm", thus creating a link between the present topic and that of international liability for injurious consequences arising out of acts not prohibited by international law.

43. Certain representatives considered that the term "appreciable harm" required further clarification in order to become acceptable. Other representatives found the notion of "appreciable harm" to be too vague to be appropriately employed in article 9. Finally, certain representatives referred to a potential conflict between the determination of reasonable and equitable use of a watercourse under articles 6 to 8 and the prohibition of activities causing appreciable harm under article 9.

44. Chapters III, IV, V and VI of the Special Rapporteur's revised draft were also commented upon in the Sixth Committee, although less extensively than chapters I and II. Since attention was focused on the first two chapters both in the Commission and in the Sixth Committee, the comments on the other chapters are not summarized in the present report.

## F. Preliminary report of the present Special Rapporteur

### 1. Proposals for the future programme of work on the topic

45. In his preliminary report,[32] submitted at the Commission's thirty-seventh session, in 1985, the present Special Rapporteur made two recommendations in relation to the Commission's future programme of work on the topic: first, that draft articles 1 to 9, which had been referred to the Drafting Committee in 1984, be taken up by the Committee at the thirty-eighth session, in 1986, to the extent possible and not be the subject of another general debate in plenary session; secondly, that, in elaborating further draft articles on the topic, he should follow the general organizational structure provided by the outline for a convention proposed by his predecessor.

46. With regard to his first recommendation, the Special Rapporteur indicated his intention to provide, in his second report, a concise statement of his views concerning the nine articles referred to the Drafting Committee in 1984. He suggested that the Commission's work might be expedited most effectively if discussion of those articles in plenary were confined, in principle, to any responses there might be to the views expressed on them in the Special Rapporteur's second report.

47. With regard to his second recommendation, the Special Rapporteur indicated that he intended to present, in his second report, a set of draft articles of manageable size and scope concerning a limited number of the issues covered in chapter III of the outline for a convention.

### 2. Consideration of the Special Rapporteur's proposals by the Commission at its thirty-seventh session, in 1985[33]

48. Members of the Commission who commented on the Special Rapporteur's preliminary report expressed general support for his intention to build as much as possible on the progress already achieved. Emphasis was placed on the importance of continuing with the work on the topic with minimum loss of momentum, especially in view of the urgency of the serious problems of fresh water currently confronting mankind.

49. At the same time, it was recognized that the subject was a difficult and sensitive one. Attention was drawn to the fact that no consensus had been reached in 1984 on some of the major issues raised by articles 1 to 9, referred to the Drafting Committee that year. The view was therefore expressed that further discussion of these issues was needed. It was noted that such a discussion could well take place during consideration of the Special Rapporteur's second report, which would contain a brief statement of his views on the major issues raised by those articles.

## G. Comments made in the Sixth Committee of the General Assembly on the Commission's consideration of the topic at its thirty-seventh session[34]

50. In commenting on the Commission's consideration of the present topic at its thirty-seventh session, in 1985, a number of representatives expressed agreement with the proposals of the present Special Rapporteur concerning the manner in which the Commission might proceed with its work. Satisfaction was expressed that the Commission intended to build on the progress already achieved and to aim at further progress in the form of the provisional adoption of draft articles.[35] Several representatives referred to the importance and urgency of the topic.[36]

[32] *Yearbook . . . 1985*, vol. II (Part One), p. 87, document A/CN.4/393.

[33] See *Yearbook . . . 1985*, vol. II (Part Two), p. 71, paras. 284-289.

[34] See "Topical summary, prepared by the Secretariat, of the discussion in the Sixth Committee on the report of the Commission during the fortieth session of the General Assembly" (A/CN.4/L.398), sect. G.

[35] *Ibid.*, para. 448.

[36] *Ibid.*, paras. 445-446.

51. A few representatives, however, doubted whether the subject lent itself to codification or universal regulation because of the different types of, and views concerning, watercourses. Due to these considerations, it was said, obligations concerning international watercourses were more appropriately established in regional agreements than in an international convention. In the view of these representatives, the Commission should therefore confine itself to the formulation of guidelines and general recommendations.[37]

52. Other representatives, however, maintained that it would in fact be possible, on the basis of the work already accomplished, to formulate general rules concerning international watercourses, as well as rules to facilitate co-operation among riparian States with a view to improving the management of such watercourses.[38] Support was also expressed for the framework-agreement approach,[39] as well as for the use by States of the outline for a convention prepared by the previous Special Rapporteur as a model for the elaboration of agreements on the subject.[40]

53. As indicated above (para. 50), a number of representatives expressed satisfaction at the Commission's intention to build on the progress already achieved. At the same time, some representatives noted that the possibility of discussing the substance of some of the draft articles already referred to the Drafting Committee should not be ruled out, in view of the importance and complexity of the subject-matter, and since, in their view, no consensus had been reached on some major questions.[41]

[37] *Ibid.*, para. 452, and, for example, the observations by the representative of the USSR (*Official Records of the General Assembly, Fortieth Session, Sixth Committee*, 25th meeting, para 56) and by the representative of Viet Nam (*Official Records . . .*, 27th meeting, para. 79).

[38] See "Topical summary . . ." (A/CN.4/L.398), para. 454, and, for example, the observations by the representative of Spain (*Official Records . . .*, 32nd meeting, para. 78). The representative of Iraq expressed "puzzlement" at having heard statements of doubt concerning the viability of the topic and its vital importance to States, "given the absence of such views in the Commission" (*Official Records . . .*, 29th meeting, para. 10).

[39] "Topical summary . . ." (A/CN.4/L.398), para. 455.

[40] *Ibid.*, para. 456.

[41] *Ibid.*, para. 458, and the observations by the representative of Bulgaria (*Official Records . . .*, 27th meeting, para. 30).

## CHAPTER II

## Articles 1 to 9 as submitted by the previous Special Rapporteur and referred to the Drafting Committee at the thirty-sixth session, in 1984

54. In his preliminary report, the present Special Rapporteur, while recommending that articles 1 to 9 as referred to the Drafting Committee in 1984 not be the subject of another general debate in 1986, stated that he considered it appropriate to provide, in his second report, a brief indication of his views on those articles. The articles cover many of the same issues dealt with in the articles provisionally adopted by the Commission in 1980: scope of the draft; definition of "system States" or "watercourse States"; definition of "system agreements" or "watercourse agreements" and identification of the States entitled to participate in the negotiation of, and to become parties to, such agreements; and the sharing of the uses of the waters of an international watercourse. The articles referred to the Drafting Committee in 1984 also set forth an "explanation" (definition) of the term "international watercourse" (art. 1); provided a non-exhaustive list of factors to be taken into account in determining what constitutes a reasonable and equitable use (art. 8); and contained a prohibition of activities which cause appreciable harm to other watercourse States (art. 9). The articles adopted in 1980 also included an article X entitled "Relationship between the present articles and other treaties in force", and were accompanied by a "provisional working hypothesis" as to the meaning of the term "international watercourse system" (see para. 5 above).

55. In referring to the Drafting Committee draft articles 1 to 9 submitted by the previous Special Rapporteur, the Commission indicated its understanding that "the Drafting Committee would also have available the text of the provisional working hypothesis adopted by the Commission at its thirty-second session, in 1980, the texts of articles 1 to 5 and X provisionally adopted by the Commission at the same session, and the texts of articles 1 to 9 as proposed by the Special Rapporteur in his first report".[42] The present Special Rapporteur will proceed on the assumption that the Drafting Committee will continue to have these materials available to assist it in its deliberations.

56. It is evident that the articles referred to the Drafting Committee in 1984 deal with concepts and principles that form the foundation for the entire draft. In some respects, these articles parallel those adopted in 1980; in other respects, they depart significantly from, and even go beyond, the earlier articles. Both sets of articles, however, were based upon lessons learned from discussions in the Commission and the Sixth Committee which began in 1974. Some of the discrepancies between the two sets of articles mirror the differences of views within the Commission and the Sixth Committee con-

[42] *Yearbook . . . 1984*, vol. II (Part Two), pp. 87-88, para. 280 and footnote 285.

cerning core principles and ideas. Other discrepancies may simply reflect preferences of the previous Special Rapporteur concerning drafting and style. In any event, the present Special Rapporteur is acutely aware that, in elaborating articles on this topic, neither he nor the Commission is writing on a *tabula rasa*. He will accordingly endeavour to offer guidance which, so far as possible, builds on the Commission's experience with the topic and avoids pitfalls that have manifested themselves in the past.

### A. General observations

57. There are several general aspects of the Special Rapporteur's tentative approach to the topic that apply to the draft as a whole, but which have special force with regard to the initial articles due to their foundational nature. Since these points pertain to the entire set of nine articles at present under consideration, it will perhaps be most convenient to state them at the outset to avoid repetition.

58. First, the Special Rapporteur wishes to emphasize the importance of bearing constantly in mind the unique nature of the topic: the Commission's task is the progressive development and codification of legal rules which apply to physical phenomena;[43] it obviously cannot ignore those phenomena, any more than it could ignore State practice relating thereto, in formulating articles designed to serve as a framework for the regulation, in the absence of an agreement, of relations among States in respect of international watercourses. As the Commission observed in its report on its thirty-first session: "The international consequences of the physical characteristics of water could be said to be that water was not confined within political boundaries and that its nature was to transmit to one region changes, or effects of changes, occurring in another."[44]

59. The second general theme of the Special Rapporteur's approach is that the Commission should strive for simplicity in drafting articles on the present topic. It must be borne in mind that the approach on which the Commission has embarked, and which the Sixth Committee has endorsed, is that of the preparation of a framework agreement containing general principles and rules of a residual nature and providing guidelines for the negotiation of future agreements. The Special Rapporteur would suggest that an effort to provide a great deal of detail or guidance might, in view of the objective just mentioned, prove to be counter-productive and unnecessarily time-consuming. Furthermore, the very concept of a framework agreement implies that the instrument in question should be composed of the fundamental legal rules that govern the relations of States with respect to the non-navigational uses of international watercourses. Accordingly, the Special Rapporteur would venture to suggest that, at least initially, the Commission should concentrate on the elaboration of the basic legal principles operative in this area. Once that task has been accomplished, the Commission may wish to consider whether it would be advisable to go on to make recommendations concerning various forms of non-binding provisions, for example the establishment of institutional mechanisms for implementing the obligations provided for in the articles.

### B. Observations concerning salient aspects of the articles referred to the Drafting Committee in 1984

#### 1. Definition of an "international watercourse [system]"

60. The articles provisionally adopted by the Commission in 1980 did not include a definition of the term "international watercourse" or of the somewhat more specific term they utilized, namely "international watercourse system". Instead, the Commission that year decided to proceed on the basis of a provisional working hypothesis as to what was meant by the term "international watercourse system".[45] This decision was a reflection of the fact that the Commission, in 1980, "continued to be conscious of what in 1976 had been 'general agreement in the Commission that the question of determining the scope of the term "international watercourses" need not be pursued at the outset of the work' ".[46]

61. The previous Special Rapporteur, in both his first and second reports, included as article 1 of the draft articles which he submitted an "explanation (definition) of the term 'international watercourse [system]' as applied in the present Convention". The "explanation (definition)" incorporated some elements of the hypothesis developed by the Commission in 1980 and added certain other elements. At the Commission's thirty-fifth session, in 1983, opinions were divided as to the advisability of drafting a definitional article at the

[43] The importance of this point led the second Special Rapporteur, Mr. Schwebel, to devote a substantial portion of his first report to a review of the salient characteristics of water relevant to the present topic. In introducing that review, he stated:

"In view of the ineluctable impact that the nature of water must exert on any codification of the law of international watercourses, it may be desirable, by way of introduction, to summarize the fundamental distinguishing physical characteristics of water. Water flowing in rivers has for present purposes three salient aspects: (*a*) the hydrologic cycle, (*b*) self-purification, and (*c*) variations in quantity and flow. . . ." (*Yearbook . . . 1979*, vol. II (Part One), p. 146, document A/CN.4/320, para. 8.)

[44] *Yearbook . . . 1979*, vol. II (Part Two), p. 163, para. 118. Herbert A. Smith, in his monumental work, *The Economic Uses of International Rivers* (London, King, 1931), wrote:

"The first principle is that every river system is naturally an indivisible physical unit, and that as such it should be so developed as to render the greatest possible service to the whole human community which it serves, whether or not that community is divided into two or more political jurisdictions." (pp. 150-151.)

[45] In its report on its thirty-second session, the Commission explained that:

". . . The purpose of the Commission at that juncture was not to prepare a definition of the international watercourse or the international watercourse system that would be definitive and to which the Commission or States would be asked to commit themselves. Rather, it was to prepare a working hypothesis, subject to refinement and indeed change, which would give those who were called upon to compose and criticize the draft articles an indication of their scope." (*Yearbook . . . 1980*, vol. II (Part Two), p. 108, para. 89.)

[46] *Ibid.*, para. 88.

outset of the work on the elaboration of draft articles.[47] Indeed, all the members of the Commission who addressed that issue at that session (when a definitional article was under consideration for the first time) favoured leaving aside, for the time being, the question of a definition. Several of those members expressly supported the idea of proceeding on the basis of a working hypothesis, such as the "note" formulated in 1980. Others simply expressed opposition to a definitional article, without indicating whether or not they favoured a working hypothesis.

62. Opinions in the Commission were also divided, in both 1983 and 1984, with regard to the "system" concept. Of those who addressed the issue, some members believed it to be an essential component of the draft, reflecting or describing hydrologic reality, others viewed it as being substantially equivalent to the "basin" concept which had earlier been found inappropriate, and still others simply considered the concept to be too wide. Thus, in 1983, of the members who did not express opposition to the idea of a definitional article, some did voice varying degrees of doubt concerning the utility of the "system" concept; and, in 1984, a number of other members questioned the then Special Rapporteur's abandonment of the "system" concept.

63. The foregoing considerations suggest that arriving at an acceptable definition of an "international watercourse" or an "international watercourse system" could well consume all the time that will be available for work on the present topic at the thirty-eighth session. The question is whether such an expenditure of time and effort would yield corresponding benefits in terms of progress on the remainder of the draft. It is the judgment of the Special Rapporteur that it would probably not. As the Commission concluded in 1980, at least as long as there is a tentative understanding of the meaning of the term, a definition of "international watercourse" would not seem to be a prerequisite to further work on the draft articles; in fact, leaving this question aside for the time being might well expedite work on the topic. The Special Rapporteur would therefore recommend that the Commission proceed on the basis of the provisional working hypothesis which it developed and accepted in 1980. Accordingly, unless the Commission would prefer that the Drafting Committee take up the text of draft article 1 referred to it in 1984, the Special Rapporteur would propose the withdrawal of this draft article for the time being.

[47] Members of the Commission expressing opposition to a definitional article were: Mr. Calero Rodrigues (*Yearbook . . . 1983*, vol. I, pp. 190-191, 1787th meeting, para. 12), Mr. Díaz González (*ibid.*, p. 199, 1788th meeting, para. 27) and Mr. Barboza (*ibid.*, pp. 200-201, 1789th meeting, para. 4), who agreed with the view of Sir Francis Vallat, expressed in 1976, that "to try to formulate a definition [before dealing with the uses of international watercourses] would only hamper the Commission's work unnecessarily" (*Yearbook . . . 1976*, vol. I, p. 275, 1407th meeting, para. 19); Mr. Jagota, who supported the idea of converting article 1 into a note (*Yearbook . . . 1983*, vol. I, p. 207, 1790th meeting, para. 14); Mr. Razafindralambo, who agreed with Mr. Jagota that the Commission "should for the time being leave aside the controversial question of a definition" (*ibid.*, p. 209, para. 29); and Mr. Mahiou, who expressed the view that "the Commission should follow the cautious approach which it had adopted in the past and that, at the present stage, a definition of the term 'international watercourse system' was not needed" (*ibid.*, p. 225, 1793rd meeting, para. 8).

### 2. Agreements concerning international watercourses

64. Articles 3 and 4 provisionally adopted by the Commission in 1980 are entitled, respectively, "System agreements" and "Parties to the negotiation and conclusion of system agreements". They make specific provision for that which is implicit in the framework-agreement approach, namely the possibility of concluding agreements concerning particular international watercourses. The previous Special Rapporteur, in his first report, reproduced the texts of these articles verbatim as articles 4 and 5. In his second report, however, he proposed substantial changes to paragraph 1 of draft article 4, since a number of States had expressed concern that the text initially proposed could have seriously undermined existing agreements.[48] But these changes also gave rise to concern regarding the effect they would have on the continued validity of existing agreements.[49] The previous Special Rapporteur "agreed that paragraph 1 of the new version could be reformulated, taking into account the text of paragraph 1 of article 3 as provisionally adopted by the Commission in 1980".[50]

[48] *Yearbook . . . 1984*, vol. II (Part Two), pp. 91-92, para. 304.

[49] *Ibid.*, p. 92, para. 305.

[50] *Ibid.*, para. 307. It must be noted that even article 3 as provisionally adopted in 1980 was not entirely free from controversy. The Commission indicated in the commentary to that article that "a few members did not accept it" (*Yearbook . . . 1980*, vol. II (Part Two), p. 117, para. (36)). The two reasons indicated for this position were: first, that it was not sufficiently clear that the right of "the riparians of an international watercourse . . . to make such agreements as they choose . . . could in no way depend upon the draft articles" (*ibid.*); and secondly, that "the draft articles could not obligate the riparians of an international watercourse to 'negotiate in good faith for the purpose of concluding one or more system agreements' " (*ibid.*). As to the first reason, there does not appear to be disagreement concerning the principle that the draft should neither discourage States from entering into agreements (indeed, if anything, it should encourage them to do so), nor affect existing agreements. If this is in fact the case, it only remains to find an acceptable form of words. As to the second reason, it does not appear to be the "duty to negotiate" *per se* that was the source of difficulty, but rather the question of which States were entitled to participate in the negotiations. (It might be noted that the Commission's reports on its thirty-fifth (1983) and thirty-sixth (1984) sessions contain almost no record of any comment on the duty to negotiate laid down in paragraph 3.) The reservations expressed in 1980 seem to have stemmed principally from uncertainty as to whether the "system" approach, in itself, would entitle States to participate in negotiations when the lack of an effect on such States would otherwise give them no legitimate claim to such participation. The Special Rapporteur is of the view that this difficulty can be dealt with independently of the "system" approach through the use of wording and a commentary that clearly define the States having a legitimate interest in participating in negotiations.

While discussing the effect of the draft articles on existing treaties and the duty to negotiate, it is perhaps appropriate to recall that article X as provisionally adopted in 1980, while preserving specific watercourse treaties in force, was made subject to the duty to negotiate laid down in paragraph 3 of article 3 as provisionally adopted the same year. The Commission explained in the commentary to article X that:

". . . the existence of a treaty relating to a specific international watercourse may not of itself relieve system States of that watercourse of an obligation to negotiate in good faith for the purpose of concluding one or more system agreements. The applicability of the latter obligation . . . depends not on whether there is an existing international agreement relating to the watercourse in question, but on whether—having regard to the terms and effects of the existing agreement as well as other factors—the uses of an international watercourse system require such negotiations." (*Yearbook . . . 1980*, vol. II (Part Two), p. 136, para. (3).)

The present Special Rapporteur considers this a suitable basis on which to proceed with regard to this article.[51]

65. The other introductory provision relating to specific agreements concerning international watercourses is article 4 as provisionally adopted in 1980 and draft article 5 as submitted by the previous Special Rapporteur in 1984. Draft article 5 deals with the right to participate in the negotiation of an agreement rather than with the duty to negotiate, which is addressed in paragraph 3 of draft article 4 as submitted in 1984. Paragraph 1 relates to agreements applying to the entire watercourse, while paragraph 2 deals with agreements applying only to a part of the watercourse or to a particular project, programme or use. Whereas in the former case all "system" or "watercourse" States would be entitled not only to participate in negotiations, but also to become a party to the agreement, in the latter case only States whose use of the waters might be "affected to an appreciable extent" by the agreement would be entitled to participate in the negotiation of the agreement, and even those States would not have the right to become a party to the agreement.

66. The previous Special Rapporteur explained that the revised text of draft article 5, submitted in 1984, "had been modelled closely on that of article 4 as provisionally adopted by the Commission in 1980, except for the deletion of the 'system' concept".[52] Questions were raised in the Commission concerning the expression "to an appreciable extent" in paragraph 2 of the article, and the differences between the rights under paragraph 1 and those under paragraph 2. It was also suggested that the reference to article 4 be reinstated in paragraph 2. Finally, the view was expressed that, "with the abandonment of the 'system' concept, the article had lost its utility and meaning".[53]

67. In the view of the present Special Rapporteur, article 5, or a similar article, should have a place in the draft. Where an agreement applies to an entire watercourse (system), there would appear to be little basis for excluding a State in whose territory parts of the watercourse exist from participating in its negotiation or from becoming a party thereto.[54] Furthermore, both sound watercourse management and actual State practice support such an approach. In the commentary to article 3 as provisionally adopted in 1980, the Commission noted that

> . . . technical experts considered that the most efficient and beneficial way of dealing with a watercourse is to deal with it as a whole, and that this approach of including all the riparian States had been followed, *inter alia*, in the treaties relating to the Amazon, the Plate, the Niger and the Chad basins. . . .[55]

68. Similar considerations apply to the situation dealt with in paragraph 2 of draft article 5, namely where the agreement applies only to a part of the watercourse or to a particular project, programme or use. Let us suppose, for example, that a river basin drains portions of States A, B and C, and that States A and B contemplate entering into an agreement relating to a part of that basin whose implementation would have a prejudicial effect (i.e. an appreciable adverse effect) upon State C. While the agreement would be directed only to a part of the basin, its implementation would produce effects in other parts and, in this example, in a State not party to the agreement.[56] In such conditions, the considerations

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[51] The Special Rapporteur is not unmindful of the other points covered by draft article 4 as submitted in 1984 but, as they were the subject of less comment that year than the issue of the effect of paragraph 1 on existing agreements, he will not further burden this section of the present report with independent discussion of them. Suffice it for present purposes to say that he considers both paragraphs 2 and 3 to be important, although the proviso in the second sentence of paragraph 2 may be covered by the prohibition against causing appreciable harm embodied in draft article 9 as submitted by the previous Special Rapporteur. As to the duty to negotiate in good faith laid down in paragraph 3, reference is made to the discussion in the previous footnote.

[52] *Yearbook . . . 1984*, vol. II (Part Two), p. 92, para. 308.

[53] *Ibid.*, pp. 92-93, paras. 309, 310 and 312.

[54] As Mr. Schwebel noted in his second report:

". . . It is true that there are likely to be system agreements that are of little interest to one or more of the system States. But since the provisions of such an agreement are intended to be applicable throughout the system, the purpose of the agreement would be stultified if every system State were not given the opportunity to participate." (Document A/CN.4/332 and Add.1 (see footnote 11 above), para. 106.)

It might be added that it should be up to each State to determine for itself whether it would be affected by, and thus interested in, an agreement concerning a watercourse which runs through or is contiguous to its territory.

[55] *Yearbook . . . 1980*, vol. II (Part Two), p. 113, para. (7), referring to Mr. Schwebel's first report (document A/CN.4/320 (see footnote 10 above), paras. 98-100). See the Treaty for Amazonian Co-operation (1978) (*International Legal Materials* (Washington, D.C.), vol. XVII (1978), p. 1045); the Treaty of the River Plate Basin (1969) (United Nations, *Treaty Series*, vol. 875, p. 3); the Act regarding navigation and economic co-operation between the States of the Niger Basin (1963) (United Nations, *Treaty Series*, vol. 587, p. 9); and the Convention and Statute relating to the development of the Chad Basin (1964) (*Journal officiel de la République fédérale du Cameroun* (Yaoundé), vol. 4, No. 18 (15 September 1964), p. 1003 (English and French texts); see also B. Rüster and B. Simma, eds., *International Protection of the Environment* (Dobbs Ferry (N.Y.), Oceana Publications, 1977), vol. XI, p. 5633).

The advantages of dealing with a watercourse as a whole are set out, for example, in United Nations, *Integrated River Basin Development*, report of a panel of experts (Sales No. E.70.II.A.4), p. 1:

> "The need for integrated river basin development arises from the relationship between the availability of water and its possible uses in the various sectors of a drainage area. It is now widely recognized that individual water projects—whether single or multi-purpose —cannot as a rule be undertaken with optimum benefit for the people affected before there is at least the broad outline of a plan for the entire drainage area. . . ."

See also United Nations, *Management of International Water Resources: Institutional and Legal Aspects*, report of the Panel of Experts on the Legal and Institutional Aspects of International Water Resources Development, Natural Resources/Water Series No. 1 (Sales No. E.75.II.A.2), para. 28:

> "In spite of the fact that most States possess water resources in several basins, and all water resources available need to be considered as a whole for national programming purposes, the waters within the geographical area of a particular basin have been found to constitute a critical and, therefore, a most useful conceptual unit for establishing a legal régime and for organizing co-operation and collaboration with respect to water resources development, conservation and use. . . ."

For a more detailed discussion to the same effect, see United Nations, *Long-Term Planning of Water Management*, Proceedings of the Seminar on Long-Term Planning of Water Management, Zlatni Piasatzi (Bulgaria), 17-22 May 1976, vol. I (Sales No. E.76.II.E.27), part one, sect. B, paras. 59-61.

[56] A similar example was given by Mr. Schwebel in his second report and reproduced by the Commission in the commentary to article 4 as provisionally adopted in 1980:

". . . States A and B, whose common border is the river Styx, agree that each may divert 40 per cent of the river flow for domestic con-

supporting the participation of all "system" or "watercourse" States in agreements dealing with the entire watercourse apply with equal or greater force.[57] As the Commission observed in relation to a similar hypothesis, in the commentary to article 4 as provisionally adopted in 1980:

> The question is not whether States A and B are legally entitled to enter into such an agreement.[58] It is whether a treaty that is to provide general principles for the guidance of States in concluding agreements on the use of fresh water should contain a principle that will ensure that State C has the opportunity to join in negotiations, as a prospective party, with regard to proposed action by States A and B that will substantially reduce the amount of water that flows through State C's territory.[59]

69. In provisionally adopting article 4 in 1980, the Commission answered this question in the affirmative. The Special Rapporteur submits that this answer is sound, for two reasons: first, it is in conformity with generally accepted principles of watercourse management by including all potentially affected States in the planning process; and secondly, it tends to forestall disputes that might arise from injury to State C by allowing that State to make its concerns known at the planning stage.[60] The policy underlying the latter reason also finds expression in chapter III of the draft submitted by the previous Special Rapporteur,[61] certain aspects of which will be addressed in subsequent parts of the present report.

70. Moreover, these considerations would seem to support entitling State C not only to participate in the negotiation of the agreement, but also to become a party thereto. Article 4 as provisionally adopted in 1980 did not provide for such entitlement.[62] The commentary to that article, however, includes language which would support granting State C such a right:

> . . . if the use of water by a State can be affected appreciably by the implementation of treaty provisions dealing with part or aspects of a watercourse, the scope of the agreement necessarily extends to the territory of the State whose use is affected.[63]

The fact that the scope of the agreement would thus extend to the territory of State C would, in effect, bring the situation within the principle laid down in paragraph 1 of draft article 5. As noted above, State C, by virtue of the adverse effect upon its use of the water, could well have a greater interest in the agreement in that hypothetical example than one or more "watercourse" or "system" States would have in an agreement applying to the watercourse as a whole. The reasons for entitling those States to participate in the negotiation of, and to become parties to, such an agreement would therefore seem to apply with even greater force to State C in the case of the kind of agreement involved in that hypothesis.

### 3. General principles, rights and duties of watercourse States (chapter II of the draft)

#### (a) *The "shared natural resource" concept*

71. The articles provisionally adopted by the Commission in 1980 do not specifically and directly address the subject of rights and duties of watercourse States. The article which perhaps comes closest to doing so is article 5, entitled "Use of waters which constitute a shared natural resource". It provides in effect that, for

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sumption, manufacturing and irrigation purposes at a point 25 miles upstream from State C, through which the Styx flows upon leaving States A and B. The total amount of water available to State C from the river, including return flow in States A and B, will be reduced as a result of the diversion by 25 per cent from what would have been available without diversion." (Document A/CN.4/332 and Add.1 (see footnote 11 above), para. 109; and *Yearbook . . . 1980*, vol. II (Part Two), p. 118, para. (4).)

Another example involving a clear effect upon State C would be an agreement between States A and B to erect a facility or co-operate in an activity whose wastes would either be discharged into the watercourse or find their way into it through natural drainage, where those wastes made the water unsuitable for one or more of State C's pre-existing uses.

[57] Such considerations may apply with greater force since, as already noted (footnote 54 above), there may be agreements intended to be applicable throughout the entire river basin or system which are none the less of little interest to one or more of the States in which part of the basin or system is located. In the present hypothesis, however, the agreement in question, although applicable only to a part of the basin, would doubtless affect State C's interests, and therefore be of interest to it.

[58] The present Special Rapporteur would recall, in this connection, that the proviso in paragraph 2 of article 3 as provisionally adopted in 1980, and in paragraph 2 of draft article 4 as submitted by the previous Special Rapporteur, would not allow States A and B to enter into an agreement with respect to a part of an "international watercourse system" if the agreement would appreciably affect the use by another "system State" of the waters of the international watercourse. Futhermore, implementation of such an agreement to the detriment of State C would appear to be barred by draft article 9 as submitted by the previous Special Rapporteur, which prohibits the causing of appreciable harm. As the Commission noted in the commentary to article 3, such implementation

> ". . . would run counter to fundamental principles which . . . govern the non-navigational uses of international watercourses, such as the right of all system States to share equitably in the use of the waters and the obligation of all system States not to use what is their own so as to inflict injury upon others" (*Yearbook . . . 1980*, vol. II (Part Two), p. 114, para. (14)).

[59] *Yearbook . . . 1980*, vol. II (Part Two), p. 118, para. (5) (reproduced from the second report of Mr. Schwebel, document A/CN.4/332 and Add.1 (see footnote 11 above), para. 110).

[60] The Commission will, of course, have occasion to revert to planning considerations when it takes up the part of the topic which deals with notification of projects or programmes that may cause appreciable harm. This subject is covered in draft articles 11 to 14 submitted by the previous Special Rapporteur. See also paragraphs 3 to 9 of draft article 8 submitted in Mr. Schwebel's third report (document A/CN.4/348 (see footnote 14 above), para. 156). The thrust of these provisions would seem to be to require States A and B, in the above hypothesis, to notify State C of any action by way of implementation of their agreement that might cause appreciable harm to the interests of State C. State C would then have an opportunity to determine whether the proposed action would appreciably harm its interests and, if so, States A and B would have a duty to consult with State C with a view to making such modifications as were necessary to avoid causing State C appreciable harm (unless they provided compensation acceptable to State C). It would seem likely that, in many instances, allowing State C to participate in the negotiation of the agreement in the first instance would forestall the need for recourse to these procedures and thus save all the States concerned time and expense.

[61] See the references and discussion in the previous footnote.

[62] This right had, however, been stipulated in the original text of the article (art. 5) submitted by Mr. Schwebel in his second report. Paragraph 2 of that article read:

> "2. Each system State whose use or enjoyment of the water of an international watercourse system may be affected to an appreciable extent by the provisions of a system agreement that applies only to a part of the system is entitled to participate in the negotiation and conclusion of that agreement." (Document A/CN.4/332 and Add.1 (see footnote 11 above), para. 105.)

[63] *Yearbook . . . 1980*, vol. II (Part Two), p. 118, para. (3), *in fine*.

the purposes of the articles, the waters of an international watercourse will be considered a "shared natural resource" to the extent that their use in one State affects their use in another State. The article goes on to provide that waters which constitute a shared natural resource are to be used in accordance with the provisions of the articles.

72. Article 5 does not specify the legal consequences of identifying the waters of an international watercourse as a "shared natural resource". However, the Commission indicated in the commentary to that article that the concept of shared natural resources might, in fact, entail certain legal obligations:

> While the concept of shared natural resources may in some respects be as old as that of international co-operation, its articulation is relatively new and incomplete. It has not been accepted as such, and in terms, as a principle of international law, although the fact of shared natural resources has long been treated in State practice as giving rise to obligations to co-operate in the treatment of such resources. . . .[64]

It went on to point out that article 5

> . . . simply requires States to use the waters of an international watercourse system as a shared natural resource, with what that implies pursuant to principles such as the equitable use of those waters and the axiom *sic utere tuo ut alienum non laedas*.[65]

73. The previous Special Rapporteur initially retained the shared natural resource concept in draft article 6 as submitted in his first report, in 1983. That draft article consisted largely of a verbatim reproduction of article 5 as provisionally adopted in 1980, but also provided that "each system State is entitled to a reasonable and equitable participation (within its territory) in this shared resource".[66] In his second report, however, submitted in 1984, the previous Special Rapporteur presented a completely revised text of article 6,[67] which omitted any reference to the shared natural resource concept.[68] He explained the change as follows:

> . . . In view of the opposition to the concept of an international watercourse as a "shared natural resource" expressed by a number of representatives during the discussions on the first report, it seems doubtful whether it will prove conducive to the attainment of a generally acceptable convention to retain that concept in the form in which it was expressed in article 6. . . .

He went on, however, to state that he had

> deemed it useful to lay down expressly the obvious starting-point that a State within its territory has the right to a fair and equitable share of the uses of the waters of an international watercourse.[69]

74. By thus, in effect, replacing the "shared natural resource" concept with an entitlement to "a reasonable and equitable share of the uses of the waters of an international watercourse", the previous Special Rapporteur gave a more definite legal content to the article. As indicated above, the Commission had recognized in 1980 that the articulation of the "shared natural resource" concept was "relatively new and incomplete". While the use of the concept had received a certain measure of support,[70] its elimination from the draft may have been a source of some comfort to those who were disquieted by the relative uncertainty as to its precise legal effect.[71] At the same time, one of the chief principles the Commission had identified as being implicit in the concept—that of equitable use of the waters of an international watercourse[72]—had been not only retained in article 6, but made explicit. Another attribute of the shared natural resource concept which had been identified by the Commission was the duty to co-operate.[73] While this duty is not mentioned in the revised text of draft article 6, the subject of co-operation is dealt with in draft article 10 submitted by the previous Special

[64] *Ibid.*, p. 120, para. (2).

[65] *Ibid.*, pp. 135-136, para. (79), *in fine*.

[66] Document A/CN.4/367 (see footnote 15 above), para. 80.

[67] See footnote 26 above.

[68] The term "share" does appear twice in the revised text of article 6, once (in paragraph 1) as a noun, where it replaces the term "participation", and once (in paragraph 2) as a verb, in the phrase "the watercourse States concerned shall share in the use of the waters . . . in a reasonable and equitable manner". In neither case, however, is the term used in the same sense as "shared" in the expression "shared natural resource".

[69] Document A/CN.4/381 (see footnote 16 above), para. 48.

[70] Of course, the Commission itself had indicated its support for the "shared natural resource" concept by incorporating it in article 5 as provisionally adopted in 1980. In addition, in their comments in the Sixth Committee of the General Assembly in 1980, a number of representatives had welcomed the Commission's adoption of article 5; see, for example, the statements by the representatives of the Netherlands (*Official Records of the General Assembly, Thirty-fifth Session, Sixth Committee*, 44th meeting, para. 38); Algeria (*ibid.*, 55th meeting, para. 36); the United States of America (*ibid.*, 56th meeting, para. 21); Thailand (*ibid.*, para. 51); Egypt (*ibid.*, para. 72); and Argentina (*ibid.*, 57th meeting, paras. 18-20). Some members of the Commission again endorsed the retention of the concept during the consideration of the original text of draft article 6 submitted by the previous Special Rapporteur in 1983; see, for example, the statements by Mr. Stavropoulos (*Yearbook . . . 1983*, vol. I, pp. 181-182, 1785th meeting, para. 38); Mr. Pirzada (*ibid.*, p. 188, 1786th meeting, para. 30); Mr. Sucharitkul (*ibid.*, p. 189, 1787th meeting, para. 3); Mr. Díaz González (*ibid.*, p. 199, 1788th meeting, para. 28); Mr. Barboza (*ibid.*, pp. 201-202, 1789th meeting, paras. 9-11); Mr. Balanda (*ibid.*, pp. 203-204, paras. 20 and 24); and Mr. Mahiou (*ibid.*, p. 225, 1793rd meeting, para. 9).

[71] In the commentary to article 5, the Commission had indicated that:

> "One member of the Commission was unable to take a position on draft article 5, essentially on the ground of the undetermined meaning of the concept of a shared natural resource. . . . Another member stressed the relevance for the topic of the principles of permanent sovereignty over natural resources." (*Yearbook . . . 1980*, vol. II (Part Two), p. 136, para. (80).)

See also the record of the Commission's discussion on draft article 5 as proposed by the Drafting Committee (*Yearbook . . . 1980*, vol. I, pp. 280-281, 1636th meeting, paras. 63-69). Statements of concern had also been made in the Sixth Committee of the General Assembly; see, for example, the comments by the representatives of France (*Official Records of the General Assembly, Thirty-fifth Session, Sixth Committee*, 50th meeting, para. 49); Brazil (*ibid.*, 51st meeting, para. 34); Ethiopia (*ibid.*, para. 51); Jamaica (*ibid.*, 54th meeting, para. 4); India (*ibid.*, para. 46); and Turkey (*ibid.*, para. 58). During the Commission's consideration of the original text of draft article 6 submitted by the previous Special Rapporteur, some members expressed sentiments ranging from doubt about, to opposition to, the concept; see, for example, the statements by Mr. Calero Rodrigues (*Yearbook . . . 1983*, vol. I, p. 191, 1787th meeting, para. 16); Mr. Njenga (*ibid.*, p. 196, 1788th meeting, paras. 6-7); Mr. Ushakov (*ibid.*, p. 198, para. 19); Mr. Jagota (*ibid.*, pp. 207-208, 1790th meeting, paras. 16-17); Mr. Razafindralambo (*ibid.*, p. 209, para. 32); Mr. Flitan (*ibid.*, p. 213, 1791st meeting, para. 9); and Mr. Yankov (*ibid.*, p. 231, 1794th meeting, paras. 13 and 15).

[72] See the passage cited in paragraph 72 above from the commentary to article 5 as provisionally adopted in 1980.

[73] See also the discussion of the duty to co-operate in the context of the treatment of the waters of an international watercourse as a shared natural resource in Mr. Schwebel's second report (document A/CN.4/332 and Add.1 (see footnote 11 above), chap. III).

Rapporteur.[74] It therefore appears that, while the reformulation of article 6 has resulted in the loss of a new and developing concept, it has produced greater legal certainty and, when viewed in connection with other draft articles, has not resulted in the elimination of any fundamental principles from the draft as a whole.

### (b) *Equitable utilization and participation*

75. The core of the revised text of article 6 is the *right* to "a reasonable and equitable share of the uses of the waters of an international watercourse". Article 7, entitled "Equitable sharing in the uses of the waters of an international watercourse", deals with what may be termed the other side of the coin, namely the *duty* to develop, use and share the waters of an international watercourse "in a reasonable and equitable manner on the basis of good faith and good-neighbourly relations". Thus the common theme of the two articles is the principle of equitable utilization, apportionment and participation. As the legal authorities supporting these articles and the principle of equitable utilization have already been presented to and discussed by the Commission,[75] it is hoped that it will suffice for present purposes to recall that there is extensive support for the principle,[76] and to review some representative illustrations of that support.

#### (i) *Treaties*

76. The basic principles underlying the doctrine of equitable utilization have been recognized, explicitly or implicitly, in numerous international agreements[77] between States located in all parts of the world. While the language and approaches of these agreements vary considerably,[78] their unifying theme is the recognition of

[74] Revised draft article 7, entitled "Equitable sharing in the uses of the waters of an international watercourse", submitted in 1984 by the previous Special Rapporteur, does not refer to co-operation. However, in his first report, the previous Special Rapporteur, commenting on the original text of this article, had stressed the importance of co-operation among "system" or "watercourse" States in order to attain the goals of "optimum utilization and the necessary control and protection of the watercourse system and its components" (document A/CN.4/367 (see footnote 15 above), para. 88). In his second report, he stated that "by and large, the commentary to the article contained in the first report is applicable to the amended text" (document A/CN.4/381 (see footnote 16 above), para. 53).

[75] See Mr. Schwebel's third report, document A/CN.4/348 (see footnote 14 above), paras. 41-91; the previous Special Rapporteur's first report, document A/CN.4/367 (see footnote 15 above), paras. 80-93; and his second report, document A/CN.4/381 (see footnote 16 above), paras. 45-53.

[76] See the exhaustive survey by Mr. Schwebel in his third report, document A/CN.4/348 (see footnote 14 above), paras. 41-84. See generally, for example, J. Andrassy, "L'utilisation des eaux des bassins fluviaux internationaux", *Revue égyptienne de droit international* (Cairo), vol. 16 (1960), pp. 23 *et seq.*; J. Barberis, *Los recursos naturales compartidos entre Estados y el derecho internacional* (Madrid, Técnos, 1979), pp. 35-45, and the authorities cited therein; J. Brierly, *The Law of Nations*, 6th ed., Sir Humphrey Waldock, ed. (Oxford, Clarendon Press, 1963), p. 231; W. L. Griffin, "The use of waters of international drainage basins under customary international law", *The American Journal of International Law* (Washington, D.C.), vol. 53 (1959), pp. 50 *et seq.*; E. Hartig, *Internationale Wasserwirtschaft und internationales Recht* (Vienna, Springer, 1955); J. Lipper, "Equitable utilization", *The Law of International Drainage Basins*, A. H. Garretson, R. D. Hayton and C. J. Olmstead, eds. (Dobbs Ferry (N.Y.), Oceana Publications, 1967), especially pp. 41 *et seq.*; F. Villagrán Kramer, "El aprovechamiento de las aguas del lago de Güija", *Revista de la Asociación Guatemalteca de Derecho Internacional* (Guatemala), No. 3 (January 1959), pp. 95 *et seq.*; and Smith, *op. cit.* (footnote 44 above), *passim* and especially p. 150. See also the work of non-governmental international organizations cited in footnote 79 below.

[77] See, for example, the agreements surveyed by Mr. Schwebel in his third report, document A/CN.4/348 (see footnote 14 above), paras. 49-72; and the agreements listed in annexes I and II to the present chapter. See also Lipper, *loc. cit.* (footnote 76 above), pp. 33-35; United States of America, Memorandum of the State Department of 21 April 1958, *Legal aspects of the use of systems of international waters with reference to Columbia-Kootenay river system under customary international law and the Treaty of 1909*, 85th Congress, 2nd session, Senate document No. 118 (Washington (D.C.), 1958), pp. 62-72 (referring to "well over 100 treaties which have governed or today govern systems of international waters [and which] have been entered into all over the world"). See also the collections of agreements which, in effect, place limitations upon the parties' freedom of action in respect of portions of international rivers within their borders, cited in: Smith, *op. cit.* (footnote 44 above), pp. 159-216 (abstracting 51 treaties concluded between 1785 and 1930); the Economic Commission for Europe (ECE) study by Pierre Sevette of January 1952, "Legal aspects of the hydro-electric development of rivers and lakes of common interest" (E/ECE/136-E/ECE/EP/98/Rev.1 and Corr.1), annex 1 (citing some 40 additional agreements); A. M. Hirsch, "Utilization of international rivers in the Middle East: A study of conventional international law", *The American Journal of International Law* (Washington, D.C.), vol. 50 (1956), pp. 81 *et seq.*; F. J. Berber, *Die Rechtsquellen des internationalen Wassernutzungsrechts* (Munich, Oldenberg, 1955) (English trans.: *Rivers in International Law* (London, Stevens, 1959)). See also the table of international agreements containing substantive provisions concerning pollution of international watercourses, in J. G. Lammers, *Pollution of International Watercourses* (The Hague, Nijhoff, 1984), pp. 124 *et seq.*

An observation by Jerome Lipper concerning the significance of a number of similar treaty provisions is pertinent here:

> ". . . treaties must be evaluated with caution; their significance rests not in the specific provisions of a particular treaty, but in underlying factors found in common among such treaties. It is of great importance that all of the numerous treaties dealing with successive rivers have one common element—the recognition of the shared rights of the signatory States to utilize the waters of an international river. Nor are these treaties limited to any particular area of the world, for the Americas, Europe, Asia and Africa are represented." (*Loc. cit.* (footnote 76 above), p. 33.)

In his study, Lipper provides a representative selection of 16 treaties dealing with successive rivers (*ibid.*, pp. 74-75, footnote 79). To the same effect, see the State Department Memorandum of 21 April 1958, *op. cit.* (above), p. 63.

[78] A few examples will illustrate the point:

(*a*) The Treaty of 11 January 1909 between Great Britain and the United States of America relating to boundary waters and questions concerning the boundary between Canada and the United States (hereinafter referred to as "1909 Boundary Waters Treaty") (*British and Foreign State Papers, 1908-1909* (London), vol. 102 (1913), p. 137; United States of America, *Treaty Series*, No. 548 (Washington (D.C.), 1924); reproduced in the United Nations Legislative Series, *Legislative Texts and Treaty Provisions concerning the Utilization of International Rivers for Other Purposes than Navigation* (Sales No. 63.V.4) (hereinafter referred to as "Legislative Texts . . ."), p. 260, No. 79) provides in article VI:

> ". . . the waters [of the St. Mary and Milk Rivers and their tributaries] shall be apportioned equally between the two countries, but in making such equal apportionment more than half may be taken from one river and less than half from the other, by either country, so as to afford a more beneficial use to each. . . ."

notwithstanding the fact that, as observed by the Legal Adviser of the United States Department of State, G. H. Hackworth, in a memorandum of 26 May 1942,

> "most of the supply comes from sources within the United States and the combined flow of the two rivers is insufficient to meet all of the irrigation needs of the regions through which they pass" (cited in M. M. Whiteman, ed., *Digest of International Law* (Washington, D.C.), vol. 3 (1964), p. 950).

(*b*) The Convention of 15 July 1930 between Romania and Czechoslovakia concerning the settlement of questions arising out of

the equal and correlative rights[79] of the parties to the use[80] and benefits[81] of the international watercourse or watercourses in question.[82] This is true of treaty provisions relating to both contiguous[83] and successive[84] rivers. Indeed, leading studies of the law of international watercourses have concluded that the rights and obligations of States in respect of the use of international watercourses are the same whether the watercourse is contiguous or successive.[85] Herbert A. Smith,

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the delimitation of the frontier between the two countries (Frontier Statute) (League of Nations, *Treaty Series*, vol. CLXIV, p. 157) provides, in article 24, only that "the Contracting Parties shall have regard as far as possible to the fair claims of the inhabitants of the other State".

(*c*) The Convention of 11 May 1929 between Norway and Sweden on certain questions relating to the law on watercourses (*ibid.*, vol. CXX, p. 263) relates (article 1) "to installations or works or other operations on watercourses in one country which are of such a nature as to cause an appreciable change in watercourses in the other country". Article 12, paragraph 1, of the Convention provides:

> "1. One country may not authorize an undertaking unless the other country has given its approval, if the undertaking is likely to involve any considerable inconvenience in the latter country in the use of a watercourse . . ."

(*d*) The Agreement of 8 November 1959 between the United Arab Republic and Sudan for the full utilization of the Nile waters (hereinafter referred to as "1959 Nile Waters Agreement") (United Nations, *Treaty Series*, vol. 453, p. 51) confirms in article 1 certain "present acquired rights", and contains in article 2 highly detailed provisions on "Nile control projects and the division of their benefits between the two Republics". Article 3, entitled "Projects for the utilization of lost waters in the Nile Basin", provides in paragraph 1, second subparagraph, that the water benefits of such projects and the total costs of construction shall be shared equally by the two Republics. Article 5, paragraph 2, provides that, if a joint consideration by the two parties of claims of other riparian States to a share of Nile waters

> "results in the acceptance of allotting an amount of the Nile water to one or the other of the said States, the accepted amount shall be deducted from the shares of the two Republics in equal parts, as calculated at Aswan".

Commenting on the régime established by this Agreement, Sayed Hosni observes that it "confirms the idea that the parties drifted further towards the concept of equitable shares" ("The Nile régime", *Revue égyptienne de droit international* (Cairo), vol. 17 (1961), p. 97). On the 1959 Nile Waters Agreement generally, see, for example, G. M. Badr, "The Nile waters question. Background and recent development", *ibid.*, vol. 15 (1959), pp. 94 *et seq.*; Abd El-Fattah Ibrahim El-Sayed Baddour, *Sudanese-Egyptian Relations. A Chronological and Analytical Study* (The Hague, Nijhoff, 1960), pp. 201-241; and J. Andrassy, "Rapport définitif sur l'utilisation des eaux internationales non maritimes (en dehors de la navigation)", *Annuaire de l'Institut de droit international, 1959* (Basel), vol. 48, tome I, pp. 319 *et seq.*

[79] However, as stated in the commentary to article IV of the Helsinki Rules on the Uses of the Waters of International Rivers, "equal and correlative rights of use among the co-basin States does not mean that each such State will receive an identical share in the uses of the waters" (for the texts of the Rules and the commentaries thereto adopted by the International Law Association at its Fifty-second Conference, held at Helsinki in 1966, see ILA, *Report of the Fifty-second Conference, 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).

The correlative nature of the rights in question is also reflected in article 2 of the resolution adopted by the Institute of International Law at its Salzburg session in September 1961:

> "*Article 2.* Every State has the right to utilize waters which traverse or border its territory, subject to the limits imposed by international law and, in particular, those resulting from the provisions which follow.
>
> "This right is limited by the right of utilization of other States interested in the same watercourse or hydrographic basin."

See *Annuaire de l'Institut de droit international, 1961* (Basel), vol. 49, tome II, pp. 381-384; and *Yearbook . . . 1974*, vol. II (Part Two), p. 202, document A/5409, para. 1076.

[80] As in the report by the Secretary-General on legal problems relating to the utilization and use of international rivers (*Yearbook . . . 1974*, vol. II (Part Two), p. 33, document A/5409), the term "use" is employed here in its broad sense, comprehending such terms as "utilization", and

> "should be understood as denoting every possible utilization or use of an international river [lake, etc.], excluding navigation, but including fishing, the floating of timber, flood control and the prevention of water pollution" (*ibid.*, p. 50, para. 8).

In his study on the principle of equitable utilization, Lipper states that these terms

> "are used in the general sense of the employment of the waters of an international river and include, but are not limited to, consumptive uses. . . . The quantity of water in the river is not diminished by a non-consumptive use, but its quality may be depreciated to such an extent that the water is no longer suitable for another use." (*Loc. cit.* (footnote 76 above), p. 17.)

[81] The term "benefits" covers many of the uses referred to in the previous footnote and, additionally, under appropriate circumstances, such watercourse "products" as hydroelectric energy.

[82] As Mr. Schwebel stated in his third report, with reference to article IV of the Helsinki Rules:

> "There may be, aside from the rule that no State may cause appreciable harm to another State, no more widely accepted principle in the law of the non-navigational uses of international watercourses than that each system State 'is entitled, within its territory, to a reasonable and equitable share of the beneficial uses of the waters'." (Document A/CN.4/348 (see footnote 14 above), para. 42.)

Cecil Olmstead, referring to the 1959 Nile Waters Agreement between the United Arab Republic and Sudan (see footnote 78 (*d*) above), the Indus Waters Treaty of 19 September 1960 between India, Pakistan and IBRD (United Nations, *Treaty Series*, vol. 419, p. 125) and the Treaty of 17 January 1961 between Canada and the United States of America relating to co-operative development of the water resources of the Columbia River Basin (*ibid.*, vol. 542, p. 244), reached a similar conclusion:

> ". . . The common theme running through these three recent treaties is that the great benefits derived from co-operative development of the river basins are to be shared . . ." ("Introduction", *The Law of International Drainage Basins, op. cit.* (footnote 76 above), p. 3.)

[83] The term "contiguous watercourse" is used here to mean a river, lake or other watercourse that flows between or is located upon, and is thus "contiguous" to, the territories of two or more States. Such watercourses are sometimes referred to as "frontier" or "boundary" waters. Annex I to the present chapter contains an illustrative list of treaty provisions relating to contiguous watercourses, arranged by region, which recognize the equality of the rights of the riparian States in the use of the waters in question.

[84] The term "successive watercourse" is used here to mean a watercourse that flows ("successively") from one State into another State or States. Lipper states that "all of the numerous treaties dealing with successive rivers have one common element—the recognition of the shared rights of the signatory States to utilize the waters of an international river" (*loc. cit.* (footnote 76 above), p. 33). Annex II to the present chapter contains an illustrative list of treaty provisions relating to successive watercourses which apportion the waters, limit the freedom of action of the upstream State, provide for sharing of the benefits of the waters or in some other way equitably apportion the benefits, or recognize the correlative rights of the States concerned.

[85] According to Lipper:

> ". . . international law does not draw legal distinctions between contiguous rivers and successive rivers. Such authority as has been found supports the view that the same rules of international law apply to both types of rivers.
>
> "It could be argued that this common treatment ignores the physical differences between the two categories of rivers, i.e. in the case of a successive river one State is in complete physical control of the river as it passes through its territory, while in the case of a contiguous river, there is dual physical control of the waters. Although superficially persuasive, the pertinence of this argument apparently

writing in 1931, summarized the position at that time as follows:

The treaty provisions, now somewhat numerous, are all directed towards the practical object of securing the most beneficial use of the rivers with which they are concerned . . .[86]

77. The subject of treaty arrangements providing for the equitable utilization of international watercourses should not be left without recalling the very important modern development referred to in Mr. Schwebel's third report, namely that of agreements providing for integrated management of entire river basins. Mr. Schwebel stated:

There also exists a series of quite recent agreements among developing countries in which the system States have felt it not only unnecessary to iterate their respective rights or shares, but have instead taken practical steps to bring about integrated management of their international watercourse systems. The Agreement for the establishment of the Organization for the Management and Development of the Kagera River Basin, entered into in 1977 by Burundi, Rwanda and the United Republic of Tanzania,[87] is the most recent and far-reaching example. Similarly comprehensive approaches, designed to achieve not just "equitable" but optimum utilization by fully international, system-wide organizations have been taken by some of or all the system States of several other international watercourses. These include the Senegal Basin, the Niger Basin, the Gambia Basin and the Lake Chad Basin. In such arrangements for the integrated development, use and protection of shared water resources, the residual duty to utilize waters equitably has been taken for granted and surpassed by recognition of the need to achieve the optimum use of waters rationally, by installing machinery for system-wide planning and implementation of the system States' projects and programmes as co-ordinated or joint ventures.[88]

(ii) *Positions taken by States in diplomatic exchanges*[89]

78. Government statements concerning the law of international watercourses generally confirm the above conclusions as to the effect of treaty practice. Statements of Governments must be evaluated with some caution, of course, in the light of the fact that they are often made in the context of negotiations and may thus represent advocacy more than a Government's view of the law. None the less, such statements cannot be ignored, and indeed can provide enlightening evidence of what States believe to be their rights and obligations under international law. This is particularly true when statements can be viewed in the light of actual government conduct. A representative selection of positions taken by Governments in international watercourse disputes will therefore now be reviewed for the purposes of illustration.

a. *The "Harmon Doctrine" or absolute sovereignty*

i. Treaty practice of the United States of America

79. It is perhaps appropriate to begin this survey by taking a brief look at the dispute between Mexico and the United States which produced the "Harmon Doctrine" of absolute sovereignty and which was ultimately resolved by the 1906 Convention concerning the Equitable Distribution of the Waters of the Rio Grande for Irrigation Purposes.[90]

80. The Rio Grande rises in the State of Colorado in the United States, flows through the State of New Mexico, then forms the border between the State of Texas and Mexico before flowing into the Gulf of Mexico. A controversy arose in the latter part of the nineteenth century over diversions of water from the Rio Grande by farmers and ranchers in Colorado and New Mexico. These diversions were said to have reduced the water supply available to Mexican communities in the vicinity of Ciudad Juarez.[91] In October 1895, the Mexican Minister to the United States sent a letter of protest to the United States Secretary of State claiming that the American diversions violated two treaties and that "the principles of international law would form a sufficient basis for the rights of the Mexican inhabitants of the bank of the Rio Grande", whose "claim to the use of

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rests solely upon the fact of physical control. While physical control is not wholly irrelevant, sheer power does not serve as the foundation upon which international law has been developed. And, in the field of international river law, its application would in many cases prevent optimum utilization of the waters.

". . . Even the geographic distinction between the two kinds of rivers can, in some cases, be more apparent than real, for a river may be both successive and contiguous. For example, it may flow through the territories of two States and also, at any point, between their territories." (*Loc. cit.* (footnote 76 above), p. 17.)

See also Smith, *op. cit.* (footnote 44 above), pp. 155-156; and C. C. Hyde, *International Law Chiefly as Interpreted and Applied by the United States*, 2nd rev. ed. (Boston (Mass.), Little, Brown and Co, 1945), vol. I, p. 567. Cf. F. L. Kirgis, Jr., *Prior Consultation in International Law. A Study of State Practice* (Charlottesville (Va.), University Press of Virginia, 1983), p. 86. It may also be recalled that, in its judgment of 10 September 1929 concerning *Territorial Jurisdiction of the International Commission of the River Oder*, on the question of the applicability of the Treaty of Versailles to certain navigable tributaries of the River Oder, the PCIJ drew no distinction between successive and contiguous rivers in stating "principles governing international fluvial law in general", referring only to the manner in which

"States have regarded the concrete situations arising out of the fact that a single waterway traverses or separates the territory of more than one State, and the possibility of fulfilling the requirements of justice and the considerations of utility which this fact places in relief . . ." (*P.C.I.J., Series A, No. 23*, pp. 26-27.)

Lipper notes, however, that:

". . . the application of the law to boundary waterways appears to have preceded in time and exceeded in frequency its application to successive streams, probably in recognition of the necessity of establishing boundaries between States and in part, perhaps, due to an awareness of the geographic facts of life which deprive either State of a natural advantage over the other as regards these waters" (*loc. cit.* (footnote 76 above), p. 23).

[86] *Op. cit.* (footnote 44 above), p. 148. Smith goes on to state that the treaties concluded up to that time "lend no support to the theory of an absolute right of veto", but that they

"protect each State from the danger of material injury by the unilateral action of its neighbours. This is highly important, in so far as it goes to show that the conventional law of nations is steadily cutting away any foundations that there may ever have been for the doctrine of the absolute rights of the territorial sovereign." (*Ibid.*)

[87] Agreement concluded on 24 August 1977 and subsequently acceded to by Uganda (United Nations, *Treaty Series*, vol. 1089, p. 165).

[88] A/CN.4/348 (see footnote 14 above), para. 70.

[89] For a general survey of the question, see Lipper, *loc. cit.* (footnote 76 above), pp. 25-28.

[90] Signed at Washington on 21 May 1906 (hereinafter referred to as "1906 Convention"). For the text, see C. Parry, ed., *The Consolidated Treaty Series*, vol. 201 (1906) (Dobbs Ferry (N.Y.), Oceana Publications, 1980), p. 225; reproduced in United Nations, *Legislative Texts . . .*, p. 232, No. 75.

[91] Concerning the disputes that arose during this period between the United States and Mexico relating to international rivers, see J. Simsarian, "The diversion of waters affecting the United States and Mexico", *Texas Law Review* (Austin), vol. 17 (1938-1939), p. 27. See also J. Austin, "Canadian-United States practice and theory respecting the international law of international rivers: A study of the history and influence of the Harmon Doctrine", *Canadian Bar Review* (Toronto), vol. XXXVII, No. 3 (1959), pp. 405 *et seq.*

the water of that river is incontestable, being prior to that of the inhabitants of Colorado by hundreds of years".[92] The Secretary of State thereupon requested that Attorney-General Judson Harmon prepare a legal opinion on the question whether, under principles of international law, Mexico was entitled to indemnity for harm suffered from the diversions. The Attorney-General's opinion, which has since become known as the "Harmon Doctrine", was based not upon the law of international watercourses, but upon principles of sovereignty under general international law. In fact, it relied principally upon the landmark sovereign immunity decision of the United States Supreme Court in *The Schooner "Exchange"* v. *McFaddon and others* (1812).[93] The following passages of the opinion are of present interest:

> . . . it is evident that what is really contended for is a servitude which makes the lower country dominant and subjects the upper country to the burden of arresting its development and denying to its inhabitants the use of a provision which nature has supplied entirely within its own territory.
>
> . . .
>
> The fundamental principle of international law is the absolute sovereignty of every nation, as against all others, within its own territory. Of the nature and scope of sovereignty with respect to judicial jurisdiction, which is one of its elements, Chief Justice Marshall said (*Schooner Exchange* v. *McFaddon* . . .):
>
> "The jurisdiction of the nation within its own territory is necessarily exclusive and absolute. It is susceptible of no limitation not imposed by itself. Any restriction upon it, deriving validity from an external source, would imply a diminution of its sovereignty to the extent of the restriction, and an investment of that sovereignty to the same extent in that power which could impose such restriction.
>
> "All exceptions, therefore, to the full and complete power of a nation within its own territories must be traced up to the consent of the nation itself. They can flow from no other legitimate source."[94]

Attorney-General Harmon went on to emphasize, however, that his opinion did not take foreign policy considerations into account:

> The case presented is a novel one. Whether the circumstances make it possible or proper to take any action from considerations of *comity** is a question which does not pertain to this Department [of Justice]; but that question should be decided as one of *policy** only, because, in my opinion, the rules, principles and precedents of international law impose no liability or obligation upon the United States.[95]

81. With respect to the legal value of the Harmon opinion, Anthony D'Amato has written that "it is an extremely dubious proposition to rely upon the *arguments* of Governments, expressed either through their attorneys or foreign offices, rather than their *acts*".[96] It might be added that statements of Governments should be viewed in the context in which they were made. For example, in a later dispute with Canada over diversion in Canada of the waters of the Columbia River, the United States, this time a lower riparian, took a position similar to that espoused by Mexico in 1895. It argued, *inter alia,* that:

> . . . the United States, as an injured sovereign, would not be limited to the redress provided for individuals in article II [of the 1909 Boundary Waters Treaty]; . . . [that] under the doctrine of "prior appropriation", since the United States has been first in use of the waters, it has a right to their permanent use; [and that] the application of the doctrine of "equitable apportionment" requires an equitable sharing of waters in the Columbia Basin between the two countries; . . .[97]

82. Returning to the Rio Grande dispute between Mexico and the United States, the Secretary of State informed the Government of Mexico, on the basis of Attorney-General Harmon's opinion, that the United States was under no duty to halt the diversions in Colorado and New Mexico.[98] At the same time, however, the two Governments instructed the United States and Mexican Commissioners on the International Boundary Commission[99] to investigate and report on the Rio

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[92] Letter of 21 October 1895 from the Mexican Minister, Matías Romero, to the United States Secretary of State, Richard Olney (*American and British Claims Arbitration. The Rio Grande Claim—Answer of the United States* (Washington (D.C.), 1923), pp. 200-203; cited by Simsarian, *loc. cit.* (footnote 91 above), p. 32).

[93] W. Cranch, *Reports of Cases Argued and Adjudged in the Supreme Court of the United States,* vol. VII, 3rd ed. (New York, 1911), p. 116.

[94] United States of America, *Official Opinions of the Attorneys-General of the United States* (Washington, D.C.), vol. XXI (1898), pp. 281-282. As will be seen below, the passages cited technically do not deny that a State has a duty to avoid causing injury to other States by means of actions wholly within its territory.

[95] *Ibid.*, p. 283.

[96] D'Amato adds: "So far as diversion of rivers is concerned, many bilateral treaties have appeared since 1895 that regulate water uses in international drainage basins, and over a hundred such treaties are operative today." (*The Concept of Custom in International Law* (Ithaca (N.Y.), Cornell University Press, 1970), p. 134.) G. Schwarzenberger states that "cases of special pleading are to be found in the practice of most States [and], according to convenience, *ad hoc* legal principles have been invented" (*International Law,* vol. 1, 3rd ed. (London, Stevens, 1957), p. 34). To similar effect, see the passage from the State Department Memorandum of 21 April 1958 cited in paragraph 82 below.

[97] United States position as summarized by L. M. Bloomfield and G. F. Fitzgerald, *Boundary Waters Problems of Canada and the United States (The International Joint Commission 1912-1958)* (Toronto, Carswell, 1958), p. 46. The authors point out that the United States additionally made the rather remarkable arguments that "the reservation of sovereign rights in article II is based on the Harmon Doctrine, which is not part of international law" and that "the Treaty could be abrogated under the principle of *rebus sic stantibus,* since there has been an essential change in the circumstances under which it was concluded" (*ibid.*). To these arguments, Canada is reported to have replied that "it is not the Harmon Doctrine of absolute sovereignty, but a solemn treaty which has been adhered to for nearly fifty years, that determines the rule applicable in the Columbia case; . . . [that] the diversion contemplated is neither unreasonable nor inequitable; [and that] any increased use of Columbia waters by the United States through storage of water in Canada would involve a fair allocation of the so-called 'downstream benefits' between the two countries" (*ibid.*, p. 47).

Compare, in this context, the United States request of Great Britain in April 1895, some eight months before Attorney-General Harmon's opinion was issued, that "suitable measures . . . be taken to avert the threatened injury" from a dam, or "dyke", which a corporation of the Canadian Province of British Columbia planned to construct on Boundary Creek "where it crosses the boundary line, the result of which would be the overflow and washing away of the lands and improvement of settlers in the [United States] State of Idaho" (J. B. Moore, *A Digest of International Law* (Washington (D.C.), 1906), vol. II, pp. 451-452). In the event, work on the dam proceeded, resulting in the apprehended injuries, whereupon the United States requested prompt "removal of the obstruction in the creek, and the payment of proper indemnity to those who had been injured" (*ibid.*, p. 451).

[98] Moore, *op. cit.* (footnote 97 above), vol. I, p. 654.

[99] This Commission had been established by the Boundary Convention between the United States and Mexico of 1 March 1889 (Parry, *The Consolidated Treaty Series, op. cit.* (footnote 90 above), vol. 172 (1889-1890) (1978), p. 21; reproduced in United Nations, *Legislative Texts . . .*, p. 229, No. 74). The name of the Commission was later changed to International Boundary and Water Commission, United

Grande situation. The Commissioners submitted a joint report in 1896 in which they declared that

the only feasible method of regulating the use of the waters so as to secure to each country and its inhabitants their legal and equitable rights was to build a dam across the Rio Grande at El Paso. The Commissioners' report stated that Mexico had been wrongfully deprived for many years of its equitable rights and they recommended the matter be settled by a treaty dividing the use of the waters equally, Mexico to waive all claims for indemnity for the past unlawful use of water.[100]

The dispute[101] was finally settled by the 1906 Convention,[102] the first paragraph of the preamble to which reads as follows:

The United States of America and the United States of Mexico being desirous to provide for the equitable distribution of the waters of the Rio Grande for irrigation purposes, and to remove all causes of controversy between them in respect thereto, and being moved by considerations of international comity, have resolved to conclude a Convention for these purposes . . .

83. The Convention provides that, after completion of a storage dam in New Mexico, the United States is to deliver a specified volume of water to Mexico annually, "in the bed of the Rio Grande", without cost to Mexico. It also provides that Mexico waives all claims arising out of past diversions in the United States and states in article V:

The United States, in entering into this treaty, does not thereby concede, expressly or by implication, any legal basis for any claims heretofore asserted or which may be hereafter asserted by reason of any losses incurred by the owners of land in Mexico due or alleged to be due to the diversion of the waters of the Rio Grande within the United States; nor does the United States in any way concede the establishment of any general principle or precedent by the concluding of this treaty. . . .

The State Department Memorandum of 21 April 1958 contains the following comments on the legal position taken by the United States in this dispute:

. . . it is necessary to distinguish between what States say and what they do. It should be noted that the Harmon opinion contains two elements: (1) Territorial sovereignty, and (2) therefore no obligation. . . . in the case of Mexico the United States uttered both elements (1) and (2) but entered into a treaty which in fact apportioned the water.[103]

Elsewhere in the memorandum, in a discussion of the negotiating history of the future treaty concerning the boundary waters between the United States and Canada,[104] it is noted that the United States negotiator, Chandler P. Anderson, made the following statements concerning boundary waters in a communication to the then Secretary of State, Elihu Root:

". . . absolute sovereignty carries with it the right of inviolability as to such territorial waters, and inviolability on each side imposes a coextensive restraint upon the other, so that neither country is at liberty to so use its own waters as to injuriously affect the other.

". . . the conclusion is justified that international law would recognize the right of either side to make any use of the waters on its side which did not interfere with the coextensive rights of the other, and was not injurious to it . . ."

As Mr. Anderson pointed out in the foregoing paragraphs, the truism that a State is sovereign in its territory does not lead to the conclusion that a State may legally make unlimited use of waters within its territory.[105]

84. The circumstances leading up to a subsequent treaty between the United States and Mexico shed further light on the United States position. In a memorandum of 26 May 1942 relating to the negotiations between the United States and Mexico concerning the Colorado River, the Legal Adviser of the United States Department of State, G. H. Hackworth, reviewed existing treaties regarding international rivers and lakes. He stated that the review

is by no means comprehensive but is believed to be sufficient to indicate the trend of thought concerning the adjustment of questions relating to the equitable distribution of the beneficial uses of such waters. No one of these agreements adopts the early theory advanced by Attorney-General Harmon . . . On the contrary, the rights of the subjacent State are specifically recognized and protected by these agreements.[106]

In a second memorandum, written in November of the same year, the Legal Adviser addressed the rights of Mexico to water impounded by Boulder Dam in the United States:

The question with which we are confronted is what is Mexico entitled to, under all the circumstances, as her fair and equitable portion of the impounded waters of a stream which if left in the state of nature would afford a certain amount of water to both countries—insufficient for the needs of either at the lowest stage and more than can be utilized by either or both at flood stage.

. . .

The rights of the United States and Mexico in this situation cannot be determined by fixed rules of law, nor can they be determined by the simple criterion that the water has its source in the United States and may be utilized in this country. Such a rule, if sound or if applied, would deprive all subjacent States of the normal and natural benefits of streams the world over. Our purpose should be to find a reasonable equation by which rights to the water may be equitably distributed.[107]

85. In 1944, the United States and Mexico signed a treaty concerning the lower Rio Grande and Colorado Rivers.[108] The process leading to the conclusion of this treaty had been initiated on the United States side by the appointment of three Commissioners, pursuant to Congressional authorization, "to co-operate with representatives of the Government of Mexico in a study regarding the equitable use of the waters of the lower Rio

States and Mexico, and new powers and duties were vested in it, under the Treaty of 3 February 1944 between the United States and Mexico relating to the utilization of the waters of the Colorado and Tijuana Rivers, and of the Rio Grande (Rio Bravo) from Fort Quitman, Texas, to the Gulf of Mexico (United Nations, *Treaty Series*, vol. 3, p. 313).

[100] See the State Department Memorandum of 21 April 1958, *op. cit.* (footnote 77 above), p. 64.

[101] For an account of events between the publication of the International Boundary Commission's report and the conclusion of the 1906 Convention, including the various United States attempts to satisfy Mexico, see Simsarian, *loc. cit.* (footnote 91 above) and the State Department Memorandum of 21 April 1958, *op. cit.* (footnote 77 above), pp. 64-65.

[102] See para. 79 and footnote 90 above.

[103] *Op. cit.* (footnote 77 above), pp. 9-10.

[104] 1909 Boundary Waters Treaty (see footnote 78 (*a*) above).

[105] *Op. cit.* (footnote 77 above), pp. 60-61. This point was also recognized in the ECE study (see footnote 77 above), which states:

". . . Each riparian State has a right of ownership over the section of the waterway which traverses it, and this right restricts the freedom of action of the others. Nevertheless, the fact that each State is obliged to respect the right of ownership of the other States in no way impairs its sovereign power. . . ." (E/ECE/136-E/ECE/EP/98/Rev.1 and Corr.1, para. 189.)

[106] Cited in Whiteman, *op. cit.* (footnote 78 (*a*) above), p. 950.

[107] *Ibid.*, pp. 953-954.

[108] Treaty of 3 February 1944 between the United States and Mexico (see footnote 99 above).

Grande and of the lower Colorado Rivers".[109] The Treaty provides for the allocation of the waters of the two rivers and the construction of works. When the Treaty was being considered by the United States Senate Committee on Foreign Relations as part of the United States ratification process, an opponent testified that Attorney-General Harmon's opinion was a correct statement of the law as practised by the United States. Three executive branch officials challenged this assertion. First, an Assistant Legal Adviser of the Department of State, Ben M. English, after pointing out that the Harmon opinion was based primarily on language from the *Schooner "Exchange"* case, which did not involve the question of the allocation of waters of international rivers, stated:

. . . the contention that . . . the United States can properly refuse to arbitrate a demand by Mexico for additonal waters of the Colorado is, to say the least, extremely doubtful, particularly when the Harmon opinion is viewed in the light of the following:

(*a*) The practice of States as evidenced by treaties between various countries, including the United States, providing for the equitable apportionment of waters of international rivers.[110]

Secondly, Assistant Secretary of State Dean Acheson made the following statement on the point under consideration:

. . . The logical conclusion of the legal argument of the opponents of the treaty appears to be that an upstream nation by unilateral act in its own territory can impinge upon the rights of a downstream nation; this is hardly the kind of legal doctrine that can be seriously urged in these times.[111]

Finally, Frank Clayton, counsel for the United States section of the International Boundary Commission, stated that "Attorney-General Harmon's opinion has never been followed either by the United States or by any other country of which I am aware".[112]

86. A fitting postscript to the conclusion of the 1944 Treaty was provided by Secretary of State Edward R. Stettinius, Jr., who observed, upon the Treaty's approval by the United States Senate, that it would allow Mexico and the United States to "co-operate as good neighbors in developing the vital water resources of the rivers in which each has an equitable interest".[113]

87. The conclusion can be drawn from the foregoing survey of positions taken by officials of the United States Government, viewed in the context of United States diplomatic and treaty practice, that the "Harmon Doctrine" is not, and probably never has been, actually followed by the State that formulated it.[114] Indeed, as

[109] Public Resolution No. 62 of 3 March 1927, sixty-ninth Congress, 2nd session (*The Statutes at Large of the United States of America*, vol. XLIV, part. 2, p. 1403, chap. 381).

[110] In addition to State practice, Mr. English referred, in support of this conclusion concerning the Harmon Doctrine, to:

"(*b*) The decisions of domestic courts giving effect to the doctrine of equitable apportionment, and rejecting, as between the States, the Harmon doctrine.

"(*c*) The writing of authorities on international law in opposition to the Harmon doctrine.

"(*d*) The Trail smelter arbitration . . . ."

(United States of America, Senate, *Hearings before the Committee on Foreign Relations on Treaty with Mexico relating to the Utilization of the Waters of Certain Rivers*, seventy-ninth Congress, 1st session (Washington (D.C.), 1945), part 5, p. 1751.)

[111] *Ibid.*, p. 1762.

[112] Mr. Clayton continued:

". . . I have made an attempt to digest the international treaties on this subject . . . [In] all those I have been able to find, the starting-point seemed to be the protection of the existing uses in both the upper riparian country and the lower riparian country, without regard to asserting the doctrine of exclusive territorial sovereignty. Most of them endeavour to go further than that and to make provision for expansion in both countries, both upper and lower, within the limits of the available supply." (*Ibid.*, part 1, pp. 97-98.)

[113] United States of America, *Department of State Bulletin* (Washington, D.C.), vol. XII, No. 304 (22 April 1945), p. 742. The President of the United States made the following statement concerning the Senate's approval of the 1944 Treaty:

"In voting its approval of the water treaty with Mexico, the Senate today gave unmistakable evidence that it stands firmly in support of the established policy of our Government to deal with our good neighbors on the basis of simple justice, equity, friendly understanding, and practical co-operation. By this action of the Senate, the United States and Mexico join hands in a constructive, businesslike program to apportion between them and develop to their mutual advantage the waters of the rivers that are in part common to them." (*Ibid.*)

[114] It has been said that article II of the 1909 Treaty concerning the boundary waters between Canada and the United States (see footnote 78 (*a*) above) embodies the Harmon Doctrine (see, for example, the United States argument referred to in footnote 97 above, which, however, also denied that this doctrine was part of international law). Article II provides in this regard:

"Each of the High Contracting Parties reserves to itself . . ., subject to any treaty provisions now existing with respect thereto, the exclusive jurisdiction and control over the use and diversion, whether temporary or permanent, of all waters on its own side of the line which in their natural channels would flow across the boundary or into boundary waters . . ."

The article must, however, be read in the context of the Treaty as a whole, which not only established the International Joint Commission and vested it with jurisdiction to investigate and report on "questions or matters of difference arising between [the parties] involving the rights, obligations, or interests of either in relation to the other" (art. IX), but also actually resolved the existing dispute over the waters of the St. Mary and Milk Rivers by apportioning the waters of those rivers and their tributaries equally (art. VI) (see footnote 78 (*a*) above). Furthermore, it has been seen that a State's assertion of "exclusive jurisdiction and control" or "absolute territorial sovereignty" is not incompatible with a recognition by that State of a duty not to use its waters in such a manner as to affect another State injuriously (see para. 83, *in fine* above). Finally, the State Department Memorandum of 21 April 1958, after an exhaustive study of the negotiating history of the 1909 Treaty, concludes that there is no evidence in the record that article II was intended to incorporate the Harmon Doctrine (*op. cit.* (footnote 77 above), pp. 59-61). The Memorandum (pp. 5-62) gives particular attention to article II in its review of the negotiating history of the 1909 Treaty.

See generally R. D. Scott, "The Canadian-American Boundary Waters Treaty: Why article II?", *Canadian Bar Review* (Toronto), vol. XXXVI, No. 4 (1958), p. 511; and Austin, *loc. cit.* (footnote 91 above), p. 393.

A somewhat different view was expressed by C. B. Bourne in his article "The right to utilize the waters of international rivers", *The Canadian Yearbook of International Law, 1965* (Vancouver), vol. III:

". . . even today it is doubtful whether the doctrine has been abandoned by the United States; the statements of its governmental officers in the Senate hearings on the 1944 United States-Mexico Treaty are equivocal, and in proceedings before the International Joint Commission as late as 1950 and 1951 counsel for the United States was still invoking it by relying on article II of the Boundary Waters Treaty of 1909" (p. 204).

The only statements to which Bourne refers are those of Assistant Secretary of State Acheson and Secretary of State Stettinius, referred to above (paras. 85-86). While neither statement expressly repudiates the Harmon Doctrine, as, for example, Mr. Clayton did (see footnote 112 above), both recognize in forceful terms that it has no place in the relations of the United States with its neighbours in respect of international rivers. As to the fact that United States counsel relied on article II of the 1909 Treaty in 1950 and 1951, it has been seen above that

has been seen, the 1906 Rio Grande Convention, which resolved the very dispute that gave rise to Attorney-General Harmon's opinion, provides, in its preamble, for the "equitable distribution of the waters of the Rio Grande" (see para. 82, *in fine* above).[115]

ii. Practice of other States

88. A few States, in diplomatic exchanges, have occasionally asserted absolute sovereignty over portions of international watercourses situated entirely within their territories.[116] As was true of the United States in respect of the situations discussed above, however, these States have generally resolved the controversies in the context of which absolute sovereignty was asserted by entering into treaties that actually apportioned the water or recognized rights in the other State or States. For example, the Indus Waters Treaty of 1960 between India and Pakistan,[117] concluded with the participation of the World Bank,[118] represented the culmination of a long period of negotiations in which India, at one point,

reserved its full freedom to extend or alter the system of irrigation within India—in other words, to draw off such quantities of water as it needed, subject to such agreement as could be reached with Pakistan. But it continued to supply water as in the past.[119]

Pakistan characterized India's position as striking at "the very root of Pakistan's right to [a] historic, legal and equitable share in the common rivers" and "accordingly proposed a conference for the purpose of making 'an equitable apportionment' of the flow of all the waters shared by the two countries and, failing a settlement arrived at through negotiation, submission of the dispute to the International Court of Justice".[120] While the parties reserved their legal positions,[121] the 1960 Treaty actually effected what observers have characterized as an equitable apportionment of the waters of the Indus System.[122]

89. Utilization of waters flowing from India into East Pakistan (Bangladesh since 1971) has been the subject of a series of negotiations between those two countries over a period of years. In one instance, in 1950, the Government of India, in response to reports of plans to construct a dam on the Karnafuli River in East Pakistan which would result in the flooding of areas in the Indian State of Assam, stated that "the Government of India cannot obviously permit this and trusts that the Government of Pakistan will not embark on any works likely to submerge land situated in India". Pakistan replied that construction of a dam which would flood land in India was not contemplated.[123] The principal source of controversy between the two countries, however, has been the dam constructed by India (between 1961 and 1975) on the Ganges River at Farakka, some 11 miles upstream from the Bangladesh border.[124] When the matter

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the reservation by each party in article II of "exclusive jurisdiction and control" over successive rivers within its territory is far from being tantamount to an assertion of a right to use waters within its territory with no regard whatsoever for resulting damage to the other country.

[115] The ECE study (see footnote 77 above) in fact concludes that the United States abandoned the Harmon Doctrine *de facto* by ratifying the 1906 Convention (E/ECE/136-E/ECE/EP/98/Rev.1 and Corr.1, para. 99).

[116] Research has revealed no assertions of the doctrine of absolute sovereignty in respect of purely contiguous watercourses. By this is meant that the contiguous States, while asserting "equal rights" or claiming "half the water" (see, for example, the provisions of treaties cited in annex I to the present chapter), have not claimed the right to dispose of all of the waters of contiguous watercourses. Of course, this statement would not apply to situations in which the boundary between the contiguous States followed one of the banks of the watercourse and not the median line or thalweg. See also Lipper, *loc. cit.* (footnote 76 above), p. 23.

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

[118] The late Richard Baxter wrote that the World Bank "was not a disinterested third force but one of the parties to what were actually tripartite negotiations, for it was known that it would have to be a participant in any program of works and of financing which might be drawn up" ("The Indus Basin", in Garretson, Hayton and Olmstead, *op. cit.* (footnote 76 above), p. 477).

[119] Baxter, *loc. cit.*, p. 453.

[120] Note verbale of 16 June 1949 from the Ministry of Foreign Affairs and Commonwealth Relations of Pakistan to the High Commissioner for India in Pakistan (Government of Pakistan, *Canal Waters Dispute: Correspondence between the Government of Pakistan and the Government of India and Partition Documents* (May 1958), p. 163), cited by Baxter, *loc. cit.*, p. 454.

[121] Article XI, paragraph (1) (*b*), of the Indus Waters Treaty provides:

"(*b*) nothing contained in this Treaty . . . shall be construed as constituting a recognition or waiver . . . of any rights or claims whatsoever of either of the Parties other than those rights or claims which are expressly recognized or waived in this Treaty."

Paragraph (2) of the same article provides:

"(2) Nothing in this Treaty shall be construed by the Parties as in any way establishing any general principle of law or any precedent."

However, as Baxter wrote in reference to this article, "a provision of this nature cannot keep others from looking to the settlement as a precedent or from deriving what general principles they choose from the terms agreed upon" (*loc. cit.*, p. 476).

[122] That the Indus Waters Treaty actually effected an equitable apportionment, or, to put it another way, provided for equitable utilization, of the waters of the Indus System is a conclusion that has been reached by a number of commentators. See, for example, Mr. Schwebel's third report, document A/CN.4/348 (see footnote 14 above), para. 65; and Baxter, *loc. cit.*, p. 476.

[123] Exchange of Notes of 13 February and 15 April 1950, referred to by M. Qadir, "Note on the uses of the waters of international rivers", *Principles of Law Governing the Uses of International Rivers* (London, ILA, 1956), reports and commentaries submitted to the International Law Association at its Forty-seventh Conference (Dubrovnik (Yugoslavia), 26 August-1 September 1956), p. 12; cited by Lammers, *op. cit.* (footnote 77 above), p. 311.

[124] This project and the resulting controversy is described by Lammers as follows:

". . . The purpose of this project was to divert part of the Ganges waters through a feeder canal into the Bhagirathi-Hooghly River—in fact a branch of the Ganges in India—in order to put an end to the silting of that river and of the port of Calcutta which had been the result of inadequate headwater supply. According to India, this diversion of Ganges waters and flushing of the Bhagirathi-Hooghly River was the only feasible means to save the port of Calcutta and to safeguard the well-being of millions of people in the city and the hinterland. The flushing of the Bhagirathi-Hooghly River would according to India also diminish the intensity and frequency of the so-called 'bores', which are walls of water that surge upstream at great speed and seriously impede navigation.

"Pakistan, and since 1971, Bangladesh, has vigorously opposed the construction of the dam at Farakka. While the Ganges has an abundant flow in the monsoon period (June-October) causing floods in East Pakistan/Bangladesh, it has a very small flow in the remaining dry season (November-May) when there is no melting snow from the Himalayas and the rainfall in the basin is extremely scarce. It was the further reduction of the flow of the Ganges in the dry season brought about by the Farakka dam which constituted the

was brought before the General Assembly in 1968, India originally took the position that, by virtue of the fact that 90 per cent of its main channel, 99 per cent of its catchment area and 91.5 per cent of its entire irrigation potential lay within India, the Ganges was not an international river, but "overwhelmingly" an Indian river.[125] India nevertheless declared that it was "willing to discuss this matter with Pakistan to satisfy them that construction of the Farakka Barrage will not do any damage to Pakistan".[126] In subsequent debates in the Special Political Committee of the General Assembly, India not only ceased to deny the internationality of the Ganges, but stated its general position as follows:

> India's views regarding the utilization of waters of an international river were similar to those held by the majority of States. When a river crossed more than one country, each country was entitled to an equitable share of the waters of that river. . . .
>
> Those views did not conform to the Harmon Doctrine of absolute sovereignty of a riparian State over the waters within its territory, as had been implied in the statement by the representative of Bangladesh. India, for its part, had always subscribed to the view that each riparian State was entitled to a reasonable and equitable share of the waters of an international river.[127]

Pursuant to a joint statement adopted by consensus in 1976 by both the Special Political Committee and the General Assembly,[128] the parties met to work out a settlement and in fact reached agreement on an interim arrangement in the form of the 1977 Agreement on Sharing of the Ganges Waters.[129] According to Lammers:

> [it has] become apparent from the Ganges waters controversy . . . that India has eventually fully abandoned the Harmon doctrine, a doctrine which it still appeared to favour in its dealings with Pakistan in the Indus waters controversy and the early phase of the Ganges waters question.[130]

90. The Government of Austria took what might be described as an absolute sovereignty position when, in negotiations with Bavaria over the development of certain international watercourses, it stated that, "in accordance with the law of territorial sovereignty", a successive watercourse is wholly at the disposal of the State through which it flows.[131] As noted above, however, this position is not necessarily inconsistent with a recognition of one State's obligation not to use waters within its borders in such a manner as to cause harm to other States. Moreover, Austria did agree to give notice of and to consider objections concerning future development, and, 10 years later, was reportedly espousing the position that an international river is an indivisible unit.[132]

91. Lipper states his conclusions with regard to the "Harmon Doctrine" or notion of absolute sovereignty as follows:

> . . . the Harmon Doctrine was not an expression of international river law. Rather, it was an assertion that, there being no rules of international law which governed, States were free to do as they wished. No subsequent development of the principle supports its inclusion as a part of the law of international rivers.[133]

### b. *Equitable utilization or "limited sovereignty"*[134]

92. In numerous instances, upper riparian States have recognized rights in lower riparian States from the outset of negotiations. For example, in the negotiations between the United Kingdom and Egypt leading to the 1929 agreement concerning the Nile,[135] the United Kingdom Foreign Minister instructed his representative as follows:

> The principle is accepted that the waters of the Nile, that is to say, the combined flow of the White and Blue Niles and their tributaries, must be considered as a single unit, designed for the use of the peoples inhabiting their banks according to their needs and their capacity to benefit therefrom; and, in conformity with this principle, it is recognized that Egypt has a prior right to the maintenance of her present supplies of water for the areas now under cultivation, and to an equitable proportion of any additional supplies which engineering works may render available in the future.[136]

Herbert A. Smith has made the following observation in relation to these negotiations:

> The position taken by Great Britain in her discussions with Egypt over the apportionment of the Nile water is a significant example of the refusal of a powerful State to rely upon the doctrine of the ab-

core of the problem. Pakistan/Bangladesh feared that in that season the flow of the Ganges would become so small that, due to lack of water, hundreds of thousands of acres of cultivated land would turn into waste land. Other expected negative effects were that the channel of the Ganges in East Pakistan/Bangladesh would become silted, which would greatly increase the problem of flooding in the wet season, and that coastal areas of East Pakistan/Bangladesh would become uncultivable in consequence of the greater penetration of sea water into the delta owing to the lack of drainage of fresh water into the sea." (*Op. cit.* (footnote 77 above), pp. 312-313.)

[125] *Official Records of the General Assembly, Twenty-third Session, Plenary Meetings,* 1682nd meeting, para. 177; and *ibid., Thirty-first Session, Special Political Committee,* 21st meeting, para. 15. For further details on the negotiations between India and Pakistan, and later Bangladesh, see Lammers, *op. cit.*, pp. 313-319.

[126] *Official Records of the General Assembly, Twenty-fourth Session, Plenary Meetings,* 1776th meeting, para. 285.

[127] *Ibid., Thirty-first Session, Special Political Committee,* 21st meeting, paras. 8-9.

[128] *Ibid.,* 27th meeting, para. 3; and *ibid., Plenary Meetings,* 80th meeting, paras. 134-142.

[129] The Agreement entered into force for a period of five years on 5 November 1977. For the text, see *International Legal Materials* (Washington, D.C.), vol. XVII (1978), p. 103.

[130] *Op. cit.* (footnote 77 above), p. 319.

[131] Austrian statement of principles regarding successive rivers. Austria further recognized that:

> ". . . neither State enjoys exclusive rights over the total volume of the waters of contiguous waterways, but that, by virtue of general principles of law, each of them . . . may claim the right to exploit half the volume of the waters of the waterways in question." (Cited in the ECE study (see footnote 77 above), E/ECE/136-E/ECE/EP/98/Rev.1 and Corr.1, para. 38.)

[132] "Austria, an upper riparian . . . has gone even further than the United States in forsaking absolute sovereignty. The present Austrian position treats an international river as an indivisible unit, and the riparian States as tenants in common, with each owning an indivisible share of the whole. This position thus moves beyond the principle of limited territorial sovereignty and approaches adoption of the community in the waters theory." (Lipper, *loc. cit.* (footnote 76 above), p. 27, citing I. Seidl-Hohenveldern, "Austrian views on international rivers", *Annales Universitatis Saraviensis,* vol. IX (1962), p. 191.)

[133] *Loc. cit.*, pp. 22-23.

[134] According to Lipper's definition, the principle of "limited territorial sovereignty" "restricts the principle of absolute sovereignty to the extent necessary to insure each riparian a reasonable use of the waters" (*loc. cit.*, p. 18; see also pp. 23-28).

[135] Exchange of Notes of 7 May 1929 in regard to the use of the waters of the River Nile for irrigation purposes (League of Nations, *Treaty Series,* vol. XCIII, p. 43).

[136] United Kingdom, *Papers regarding Negotiations for a Treaty of Alliance with Egypt—Egypt No. 1 (1928),* Cmd. 3050 (London, 1928), p. 31.

solute rights of the territorial sovereign. The application of this principle would have permitted Great Britain to take as much water as she pleased for the irrigation of the Sudan, but the published correspondence shows that Lord Lloyd admitted freely and without argument the principle of Egypt's "ancient and historic rights" in the waters of the Nile with the consequence that the apportionment of the water must rest upon the agreement of the two Governments concerned.[137]

In more recent discussions between the United Arab Republic and Sudan in relation to the proposed Aswan high dam, the Sudanese Government stated:

> It is not disputed that Egypt has established a right to the volumes of water which she actually uses for irrigation. The Sudan has a similar right.[138]

The Government of Sudan agreed with that of the United Arab Republic that any supplies of water additional to those in which there were established rights must be apportioned equitably, although agreement upon a specific equitable allocation was not reached at that time. The 1959 Nile Waters Agreement, however, did confirm the rights of each party to certain quantities of water.[139]

93. The dispute between Argentina and Brazil over the use of the waters of the Paraná River,[140] while primarily involving questions of consultation, provision of information and co-operation, is instructive for the present study. The problem revolved around plans by Argentina and Brazil, respectively, to construct two separate dams across different points of the Paraná River. The Argentine dam would be located at Corpus, where the Paraná forms the frontier between Argentina and Paraguay; The Brazilian dam would be situated upstream at Itaipu, where the Paraná forms the frontier between Brazil and Paraguay. Because of apprehension that the Itaipu project, in conjunction with others in Brazil, would adversely affect the Corpus dam, Argentina claimed that Brazil was under an international legal duty to provide Argentina with information and to consult with it concerning its plans. Although Brazil refused to recognize such an obligation,[141] it later concluded a bilateral agreement with Argentina which provided that, in the field of the environment, States would co-operate by providing technical data regarding works to be undertaken within their jurisdiction in order to prevent any appreciable harm which might be caused in the human environment of the neighbouring area.[142] The agreement also provided that, "in the exploration, exploitation and development of their natural resources, States must not provoke [appreciable] harmful effects on zones located outside their national jurisdictions".[143] The text of this agreement was later adopted as General Assembly resolution 2995 (XXVII) of 15 December 1972.[144] Furthermore, in June 1971, Argentina and Brazil both signed the Act of Asunción, which contains the Declaration of Asunción on the Use of International Rivers.[145] Paragraph 2 of that Declaration provides:

> In successive international rivers, where there is no dual sovereignty, each State may use the waters in accordance with its needs provided that it causes no appreciable damage to any other State of the [La Plata] Basin.[146]

Finally, Argentina, Brazil and Paraguay concluded an agreement in 1979 providing for co-ordination of the two dam projects.[147]

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[137] *Op. cit.* (footnote 44 above), p. 147.

[138] Sudan, Ministry of Irrigation and Hydro-Electric Power, *Nile Waters Question* (Khartoum, 1955), p. 13.

[139] See the illustrative provisions of this Agreement in footnote 78 (*d*) above and annex II to the present chapter. In addition, article 3, paragraph 2, of the Agreement provides:

> ". . . when the Republic of Sudan is ready to utilize its share according to the agreed programme, it shall pay to the United Arab Republic a share of all the expenses in the same ratio as the Sudan's share in benefit is to the total benefit of the project; provided that the share of either Republic shall not exceed one half of the total benefit of the project."

See also article 5, paragraph 2.

In his study of the régime of the Nile Basin, Albert H. Garretson notes:

> ". . . as soon as the Sudan was given a degree of control over her foreign affairs she indicated that she did not consider herself as bound by the 1929 [Nile Waters] Agreement. Moreover, the Sudan immediately upon independence in January 1956, formally stated that she did not consider herself bound by a treaty entered into on her behalf by the British.
>
> "The legal question as to the succeeding effect of the 1929 Agreement may be considered to be overtaken by the recital in the preamble of the 1959 Agreement that 'whereas the Nile Waters Agreement concluded in 1929 has only regulated a partial use of the natural river and did not cover the future conditions of the fully controlled river supply, the two riparians have agreed to the following . . .'
>
> "It would seem quite clear that the Sudan thereby renounces any claim to the invalidity of the 1929 Agreement. Moreover, the full scheme of the 1959 Agreement is clearly an adaptation and extension of the 1929 Agreement." ("The Nile Basin", *The Law of International Drainage Basins, op. cit.* (footnote 76 above), p. 287.)

For further detailed examination of the legal situation with respect to the Nile, see, for example, the studies mentioned in footnote 78 (*d*) above, and Whiteman, *op. cit.* (footnote 78 (*a*) above), pp. 1002-1013.

[140] Concerning this dispute, see generally G. J. Cano, "Argentina, Brazil and the De la Plata River Basin: A summary review of their legal relationship", *Natural Resources Journal* (Albuquerque, N.M.), vol. 16 (1976), p. 863; P. M. Dupuy, "La gestion concertée des ressources naturelles: à propos du différend entre le Brésil et l'Argentine relatif au barrage d'Itaipu", *Annuaire français de droit international, 1978* (Paris), vol. XXIV, p. 866; and Lammers, *op. cit.* (footnote 77 above), pp. 294-296.

[141] Lammers writes:

> ". . . the dispute between Argentina and Brazil on this question even made it impossible during the 1972 United Nations Conference on the Human Environment to reach consensus on Principle 20 of the Draft Declaration on the Human Environment, which referred to the obligation of States to supply information on activities within their territory which could have significant adverse effects on the environment of other States" (*op. cit.*, p. 295).

[142] The agreement between Argentina and Brazil was concluded in New York on 29 September 1972 (*ibid.*).

[143] Cited by Cano, *loc. cit.* (footnote 140 above), p. 873, who also points out that Argentina denounced this agreement on 10 June 1973 because of disagreements with Brazil over methods of notification and which country would be the judge of whether planned works might cause appreciable extraterritorial harm.

[144] See also General Assembly resolution 3129 (XXVIII), adopted on 13 December 1973 on the initiative of Argentina and 52 other countries after the breakdown of the 1972 agreement between Argentina and Brazil mentioned in the previous footnote.

[145] *Yearbook . . . 1974*, vol. II (Part Two), pp. 322-324, document A/CN.4/274, para. 326.

[146] *Ibid.*, p. 324. The Paraná is situated within the La Plata River Basin.

[147] Agreement signed on 19 October 1979, reproduced in *International Legal Materials* (Washington, D.C.), vol. XIX, No. 3 (1980), p. 615.

94. In a dispute between Chile and Bolivia over the use of the Lauca River,[148] Chile, the upstream State, recognized that Bolivia had "rights" in the waters and went on to state that the Montevideo Declaration of 1933 "may be considered as a codification of the generally accepted legal principles on this matter".[149] That Declaration provides, *inter alia*, that States have the "exclusive right" to exploit the portion of a contiguous or successive river that is within their jurisdiction, but makes the exercise of this right conditional on "the necessity of not injuring the equal right due to the neighbouring State" in the portion under its jurisdiction.[150]

95. Similarly, the Government of France, in the *Lake Lanoux* arbitration in 1957, pointed to "the sovereignty in its own territory of a State desirous of carrying out hydroelectric developments", but at the same time recognized "the correlative duty not to injure the interests of a neighbouring State".[151] France did not assert a "Harmon Doctrine" position, but argued that Spain's consent to the project in question was not required because restitution of the diverted water would result in there being no alteration of the water régime in Spain.

96. At one stage of the long-standing dispute between Israel and neighbouring Arab countries over the use of the Jordan River and its tributaries,[152] the United States Department of State declared in 1954 that, according to the United States mediator, Eric Johnston:[153]

> Syria, Lebanon, Jordan and Israel have accepted the principle of international sharing of the contested waters of the Jordan River and are prepared to co-operate with the United States Government in working out details of a mutually acceptable program for developing the irrigation and power potentials of the river system.
>
> . . . Mr. Johnston stated that the plan involved acceptance by the Arab countries and Israel of the following principles:
>
> 1. The limited waters of the Jordan River system should be shared equitably by the four States in which they rise and flow. This principle was implicit in the valley plans put forward respectively by the Arab States and Israel, both of which clearly recognized the right of the other States to a share of the available waters. It was affirmed by both sides during the recent conversations with Mr. Johnston.[154]

Technical experts of the States involved agreed upon a unified Jordan Valley plan proposed by Johnston, which was based upon the above principles. Israel's Prime Minister Lévi Eshkol later stated that "Mr. Johnston produced a unified regional plan which was based upon accepted rules and principles of international law and procedure".[155] The Johnston plan was, however, "rejected for political reasons by the Arab League Council in October 1955".[156] Israel then decided to proceed with its own project for the diversion of Jordan River waters,[157] but "undertook not to exceed the quantities allotted to it" under the Johnston plan.[158] The Arab States responded with plans to divert headwaters of the Jordan located in Arab territory, but this project was not implemented, reportedly for technical reasons.[159]

97. The 1958 State Department Memorandum indicated that, in the view of the United States, which is both an upper and a lower riparian in relation to Canada, and an upper riparian in relation to Mexico:

> . . . an international tribunal would deduce the applicable principles of international law to be along the following lines:

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[148] Lipper points out that "the situation arose after Chile announced its intention to divert for agricultural purposes the waters of the Lauca which flow from Chile into Bolivia. In the ensuing disagreement, rioting and a severance of diplomatic relations by Bolivia resulted." He further notes that, "despite the heat of the quarrel and the interests at stake, Chile did not assert the Harmon Doctrine" (*loc. cit.* (footnote 76 above), p. 27). See also the discussion of this controversy in Lammers, *op. cit.* (footnote 77 above), pp. 289-290, and the sources cited on p. 290, footnote 1.

[149] Statement by Chile's Minister of Foreign Affairs, Martínez Sotomayor, to the OAS Council, 19 April 1962 (OEA/Ser.G/VI, p. 1), cited by Lipper, *loc. cit.*, pp. 27-28. Lammers observes that Bolivia also invoked the Montevideo Declaration, but that it interpreted it differently. Bolivia claimed that the Declaration

> "embodied international law and obliged Chile not to carry out the project before it had obtained the consent of Bolivia. Chile, however, contended, *inter alia*, that the Declaration required such consent only if the project would cause damage to Bolivia and stated that Bolivia had not furnished any proof that it would suffer damage as a result of the diversion." (*Op. cit.*, p. 289.)

Lammers also notes (pp. 289-290) that Chile eventually went ahead with the project, which was put into operation in 1962.

[150] See paras. 2 and 4 of the Declaration of Montevideo concerning the industrial and agricultural use of international rivers, resolution LXXII adopted by the Seventh International Conference of American States at its fifth plenary session, 24 December 1933 (*The International Conferences of American States, First Supplement, 1933-1940* (Washington (D.C.), Carnegie Endowment for International Peace, 1940), p. 88; reproduced in *Yearbook . . . 1974*, vol. II (Part Two), p. 212, document A/5409, annex I.A).

[151] United Nations, *Reports of International Arbitral Awards*, vol. XII (Sales No. 63.V.3), pp. 296-297; *International Law Reports, 1957* (London), vol. 24 (1961), pp. 111-112; see also *Yearbook . . . 1974*, vol. II (Part Two), pp. 194 *et seq.*, document A/5409, paras. 1055-1068.

[152] For discussion of this situation, see, for example, S. N. Saliba, *The Jordan River Dispute* (The Hague, Nijhoff, 1968); K. B. Doherty, "Jordan waters conflict", *International Conciliation* (New York), No. 553 (May 1965); O. Z. Ghobashy, *The Development of the Jordan River* (New York, Arab Information Center, 1961), Information Paper No. 18; J.-V. Louis, "Les eaux du Jourdain", *Annuaire français de droit international, 1965* (Paris), vol. XI, pp. 823 *et seq.*; G. G. Stevens, *Jordan River Partition* (Stanford University (Cal.), 1965), Hoover Institution Studies No. 6; Whiteman, *op. cit.* (footnote 78 (*a*) above), pp. 1013 *et seq.*; Lammers, *op. cit.* (footnote 77 above), pp. 304-307; and M. Wolfrom, *L'utilisation à des fins autres que la navigation des eaux des fleuves, lacs et canaux internationaux* (Paris, Pedone, 1964), pp. 211-227.

[153] The mission of the United States mediator has been described as follows:

> "In October 1953 President Eisenhower appointed Eric Johnston his personal representative . . . stating:
>
> "One of the major purposes of Mr. Johnston's mission will be to undertake discussions with certain of the Arab States and Israel, looking to the mutual development of the water resources of the Jordan River Valley on a regional basis for the benefit of all the people of the area.' " (Whiteman, *op. cit.* (footnote 78 (*a*) above), p. 1017, citing *The Department of State Bulletin* (Washington, D.C.), vol. XXIX, No. 748 (26 October 1953), p. 553.)

[154] "Eric Johnston reports agreement on sharing of Jordan waters", press release No. 369, 6 July 1954, *The Department of State Bulletin*, vol. XXXI, No. 787 (26 July 1954), p. 132; cited in Whiteman, *op. cit.*, pp. 1017-1018.

[155] Speech to the Knesset, 20 January 1964, *Jerusalem Post*, 21 January 1964, p. 2; cited by Lammers, *op. cit.* (footnote 77 above), p. 306.

[156] Lammers, *op. cit.*, p. 306.

[157] *Ibid.*, p. 304.

[158] *Ibid.*, p. 306.

[159] Stevens, *op. cit.* (footnote 152 above), pp. 68, 75-76 and 80; and Lammers, *op. cit.*, p. 307.

1. A riparian has the sovereign right to make maximum use of the part of a system of international waters within its jurisdiction, consistent with the corresponding right to each co-riparian.

*Comment.*—The doctrine of sovereignty is a fundamental tenet of the world community of States as it presently exists. Sovereignty exists and it is absolute in the sense that each State has exclusive jurisdiction and control over its territory. Each State possesses equal rights on either side of a boundary line. Thus riparians each possess the right of exclusive jurisdiction and control over the part of a system of international waters in their territory, and these rights reciprocally restrict the freedom of action of the others.

2. (*a*) Riparians are entitled to share in the use and benefits of a system of international waters on a just and reasonable basis.

...[160]

98. In the negotiations leading to the 1909 Boundary Waters Treaty between Great Britain and the United States,[161] the position of the Canadian negotiators was that all existing and future disputes should be resolved by an international tribunal in accordance with principles to be incorporated into the treaty.

. . . These principles, apparently believed in general to be existing law, were:

1. Navigation was not to be impaired by other uses.

2. Neither country could make diversions or obstructions which might cause injury in the other without the latter's consent.

3. Each country would be entitled to the use of half the waters along the boundary for the generation of power.

4. Each country would be entitled to an "equitable" share of water for irrigation.[162]

99. Finally, an early example of a lower riparian State's espousal of the principle of equitable allocation is to be found in the letter of 30 May 1862 from the Government of the Netherlands to its Ministers in Paris and London concerning the use of the River Meuse by Belgium and the Netherlands. The letter states:

The Meuse being a river common both to Holland and to Belgium, it goes without saying that both parties are entitled to make the natural use of the stream, but at the same time, following general principles of law, each is bound to abstain from any action which might cause damage to the other. In other words, they cannot be allowed to make themselves masters of the water by diverting it to serve their own needs, whether for purposes of navigation or of irrigation.[163]

### (iii) *Decisions of international courts and tribunals*

100. It is well known that Article 38, para. 1 (*d*), of the Statute of the ICJ directs the Court to apply "judicial decisions . . . as [a] subsidiary means for the determination of rules of law" in deciding in accordance with international law disputes brought before it.[164] While such decisions have no binding force *per se* "except between the parties [to the case in question] and in respect of that particular case",[165] they are often cited and relied upon to a certain extent in subsequent cases, both by the parties to a given dispute and by the body called upon to settle it, if any. This phenomenon is probably due largely to the fact that, in deciding concrete cases, courts must usually have recourse to generally applicable rules of law, which are then applied to the specific case at hand. The very identification of such general rules is often found to be of great assistance in later cases, in view of the fact that the international legal system is still not fully developed. It should be added, however, that, in the words of the ICJ itself, the Court's "duty is to apply the law as it finds it, not to make it".[166]

101. While a thorough discussion of all decisions bearing upon the doctrine of equitable utilization and participation is beyond the scope of the present review of authorities, a brief summary of the principal decisions of courts and arbitral tribunals relating to the subject at hand is offered below in the hope that it will be of some assistance in ascertaining the present state of the law. The organization of the cases—i.e. according to whether a judicial decision or arbitral award was involved—follows that of the 1963 report by the Secretary-General on "Legal problems relating to the utilization and use of international rivers".[167]

#### a. *Judicial decisions*

##### i. The River Oder case[168]

102. In the case concerning *Territorial Jurisdiction of the International Commission of the River Oder,* the PCIJ was asked to determine whether, under the Treaty of Versailles of 1919, the jurisdiction of the International Commission of the Oder extended to certain tributaries of that river. The Oder rises in Czechoslovakia, flows into Poland, forms the border between Poland and eastern Germany, and empties into the Baltic. Article 331 of the Treaty of Versailles provided that all navigable parts of these river systems [including the Oder] which naturally provided more than one State with access to the sea possessed international status. Article 341 of the Treaty placed the Oder under the administration of an International Commission,[169] whose task it was to define the sections of the river or its tributaries to which the international régime would be applied.

103. The question before the PCIJ was whether the jurisdiction of the Commission should extend to two tributaries of the Oder situated in Poland, the Netze (Notéc) and the Warthe (Warta): Poland maintained that the Commission's jurisdiction should end where the Oder crossed the Polish border, whereas the six other

[160] *Op. cit.* (footnote 77 above), pp. 89-90.

[161] See footnote 78 (*a*) above.

[162] 1958 State Department Memorandum, *op. cit.* (footnote 77 above), p. 58.

[163] Cited and translated in Smith, *op. cit.* (footnote 44 above), p. 217, where the main parts of the letter are reproduced (pp. 217-221) in the original Dutch (original text in the State Archives at The Hague).

[164] This directive is, of course, expressly made subject to the qualification contained in Article 59 of the Statute that decisions of the Court have "no binding force except between the parties and in respect of [the] particular case [in question]".

[165] See the previous footnote. See also Article 94 of the Charter of the United Nations.

[166] *South West Africa* cases, *Second Phase,* Judgment of 18 July 1966, *I.C.J. Reports 1966,* p. 48, para. 89. See also *Fisheries Jurisdiction (United Kingdom* v. *Iceland), Merits,* Judgment of 25 July 1974, *I.C.J. Reports 1974,* pp. 23-24, para. 53.

[167] Document A/5409, reproduced in *Yearbook . . . 1974,* vol. II (Part Two), pp. 33 *et seq.* Part III of the report contains a "Summary of decisions by international tribunals, including arbitral awards" (pp. 187 *et seq.*).

[168] Judgment of 10 September 1929, *P.C.I.J., Series A, No. 23.* For discussion of this case, see, for example, Lipper, *loc. cit.* (footnote 76 above), pp. 28-29, and Lammers, *op. cit.* (footnote 77 above), pp. 505-507.

[169] The members of the Commission were Czechoslovakia, Denmark, France, Germany, Great Britain, Poland and Sweden; the dispute was between Poland and the other members.

members of the Commission contended that it should extend to the point at which each of the tributaries ceased to be navigable, even if that point were situated within Polish territory. The navigability of the Warthe and the Netze was not disputed, but Poland claimed that the sections of those rivers situated in Polish territory provided only Poland with "access to the sea" under article 331.

104. The issue in the case thus concerned the competence of the Oder Commission in particular and navigation rights in general. However, because the PCIJ found that it was unable to answer the question before it solely on the basis of the provisions of the Treaty of Versailles, it resorted to "the principles underlying the matter to which the text refers", namely those "governing international fluvial law in general".[170] The Court acknowledged that providing upstream States with access to the sea played an important role "in the formation of the principle of freedom of navigation on so-called international rivers". But, it continued:

. . . when consideration is given to the manner in which States have regarded the concrete situations arising out of the fact that a single waterway traverses or separates the territory of more than one State, and the possibility of fulfilling the requirements of justice and the considerations of utility which this fact places in relief, it is at once seen that a solution of the problem has been sought not in the idea of a right of passage in favour of upstream States, but in that of a community of interest of riparian States. This community of interest in a navigable river becomes the basis of a common legal right, the essential features of which are the perfect equality of all riparian States in the use of the whole course of the river and the exclusion of any preferential privilege of any one riparian State in relation to the others.[171]

The Court went on to hold that, under the Treaty of Versailles, the jurisdiction of the Commission extended to the sections of the Oder tributaries that were situated in Polish territory.

105. While the dispute before the PCIJ concerned questions of navigation, the Court's pronouncements regarding "international fluvial law in general"[172] may be applicable to a certain extent to non-navigational uses as well. Commentators have so concluded. Lipper, for example, in his study on equitable utilization, states that "both [the Court's] language and its reasoning make [the above-quoted passage] equally applicable to non-navigational uses" and that

the "requirements of justice and the considerations of utility" referred to by the Court apply with equal force to both navigational and non-navigational uses. . . . Finally, if navigation on an international river—which involves the physical entry of foreign vessels into the territory of another State—does not violate State sovereignty, it would seem that, *a fortiori*, States would have the right to use the waters of such river within their own territory subject to "the perfect equality of all riparian States" so to do.[173]

A somewhat different line of analysis is followed by Lammers, who points out that the PCIJ based its finding of "a community of interest of riparian States" upon considerations which do not relate solely to navigation. Thus he notes:

. . . The Court derived [the existence of the community of interest of riparian States] from 1. "the manner in which States have regarded the concrete situations arising out of the fact that a single waterway traverses or separates the territory of more than one State" and 2. "the possibility of fulfilling the requirements of justice and the considerations of utility which this fact places in relief". Both these elements were mentioned by the Court without further qualification.

He observes:

Accordingly it is not improbable that in the Court's view the legal concept of "a community of interest of riparian States" should not merely lie at the basis of legal solutions for problems of navigation to which the international character of an international watercourse would give rise but also for problems connected with other forms of use of the waters of an international watercourse.

He acknowledges that:

. . . For forms of use other than navigation, the legal notion of the community of interest could not, of course, find exactly the same application. As appears from the practice of States, each riparian State may make such other use of the water only within the limits of its own territory.

But he points out that:

. . . the other elements mentioned such as "the perfect equality of all riparian States" and "the exclusion of any preferential privilege of any one riparian State in relation to the others" would, in the line of the Court's thinking, probably apply similarly to water uses other than navigation.[174]

### ii. The *Diversion of Water from the Meuse* case[175]

106. In the words of the PCIJ:

The Meuse is an international river. It rises in France . . . leaves French territory near Givert, crosses Belgium, forms the frontier between the Netherlands and Belgium . . . and enters Netherlands territory a few kilometres above Maastricht. Between Borgharen (a few kilometres below Maastricht) and Wessem-Maasbracht, the Meuse again forms the frontier between Belgium and the Netherlands, then below Wessem-Maasbracht both banks of the river are in Netherlands territory.[176]

Belgium and the Netherlands had concluded a treaty in 1863 in order "to settle permanently and definitively the régime governing diversions of water from the Meuse for the feeding of navigation canals and irrigation channels".[177] Article 1 of the Treaty provided for construction in Netherlands territory below Maastricht of an intake from the Meuse which would feed all the canals then situated below Maastricht. Belgium had in 1930 begun the construction of a canal (the Albert Canal) which was to be fed by water drawn from the Meuse in Belgian territory above Maastricht. In 1936, the Netherlands instituted a case against Belgium before the PCIJ, claiming that certain works constructed or planned by Belgium in connection with the 1930 canal project violated or would violate the 1863 Treaty. For its part, the Belgian Government contended in its countermemorial that the Netherlands had violated the Treaty by constructing a barrage, and also claimed that the flow of water to the Juliana Canal constructed by the Netherlands would be subject to the Treaty.

[170] *P.C.I.J., Series A, No. 23*, p. 26.

[171] *Ibid.*, pp. 26-27.

[172] *Ibid.*, p. 26.

[173] Lipper, *loc. cit.* (footnote 76 above), p. 29.

[174] Lammers, *op. cit.* (footnote 77 above), p. 507.

[175] Judgment of 28 June 1937, *P.C.I.J., Series A/B, No. 70*, p. 4; summarized in *Yearbook . . . 1974*, vol. II (Part Two), pp. 187-188, document A/5409, paras. 1022 *et seq.*

[176] *P.C.I.J., Series A/B, No. 70*, pp. 9-10.

[177] The text of the 1863 Treaty is reproduced (in French) in *P.C.I.J., Series A/B, No. 70*, p. 81, annex I; and in United Nations, *Legislative Texts . . .*, p. 550, No. 157. See also *Yearbook . . . 1974*, vol. II (Part Two), pp. 146-147, document A/5409, paras. 736-740.

107. The value of the PCIJ's opinion for the present study is limited significantly by the fact that the Court, while noting that the parties had made reference in their written and oral pleadings to "the application of the general rules of international law as regards rivers", declared that "the points at issue must all be determined solely by the interpretation and application of [the 1863] Treaty".[178] The Court nevertheless made several noteworthy statements in addressing the Netherlands' claims that (*a*) Belgium's plans to divert water from the Meuse above Maastricht violated the Netherlands' right of supervision over diversions of water from the Meuse by means of the Maastricht intake,[179] and (*b*) the feeding of canals located below Maastricht with water taken from the Meuse in excess of the quantities allotted to Belgium by the 1863 Treaty violated Treaty regulations governing allocation of Meuse water. With regard to the first point, the Court stated:

> . . . There can be no doubt that, so far as the right of supervision is derived from the position of the intake on Netherlands territory, the Netherlands, as territorial sovereign, enjoys a right of supervision which Belgium cannot possess.[180]

With regard to the second point, the Court stated:

> . . . If, therefore, it is claimed on behalf of the Netherlands Government that, over and above the rights which necessarily result from the fact that the new intake is situated on Netherlands territory, the Netherlands possess certain privileges in the sense that the Treaty imposes on Belgium, and not on [the Netherlands], an obligation to abstain from certain acts connected with the supply to canals below Maastricht of water taken from the Meuse elsewhere than at the Treaty feeder, the argument goes belong what the text of the Treaty will support.[181]

The Court went on to make the following observation in relation to diversion of Meuse waters from points other than the Treaty feeder into canals not expressly covered by the Treaty and situated wholly in the territory of Belgium or the Netherlands:

> . . . As regards such canals, each of the two States is at liberty, in its own territory, to modify them, to enlarge them, to transform them, to fill them in and even to increase the volume of water in them from new sources, provided that the diversion of water at the Treaty feeder and the volume of water to be discharged therefrom to maintain the normal level and flow in the Zuid-Willemsvaart [a canal situated partly in the Netherlands] is not affected.[182]

Thus the Court would seem to have recognized that the Treaty régime for the supply of water to canals below Maastricht could not legally be impaired by upstream diversions of Meuse waters at points and for purposes not covered by the 1863 Treaty.

### iii. The *Corfu Channel* case[183]

108. This case was brought before the ICJ by special agreement between Albania and the United Kingdom in order to determine whether the United Kingdom had rights of innocent passage through the Corfu Channel, and whether Albania was internationally responsible for loss of life and damage to two United Kingdom destroyers sustained when the ships struck mines in the Channel.[184] The case thus does not deal at all with international watercourses, nor, strictly speaking, with environment-related injuries such as those suffered through air pollution. None the less, certain aspects of the Court's opinion have been cited repeatedly in connection with legal analyses of international environmental problems.[185] Those aspects are reviewed briefly below.

109. While the ICJ did not find sufficient evidence to support a finding that the mines had been laid by or at the instance of Albania, it did conclude that they could not have been laid without Albania's knowledge. It went on to hold that this knowledge gave rise to an obligation to notify ships operating in the area of the ex-

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[178] *P.C.I.J., Series A/B, No. 70,* p. 16. Commentators are in general agreement that "except as an example of the potentiality of the judicial process in this area, the decision does not yield any important general principles of international law" (A. P. Lester, "Pollution", in Garretson, Hayton and Olmstead, *op. cit.* (footnote 76 above), p. 100). See also Lammers, *op. cit.* (footnote 77 above), p. 504. Often cited, however, is the portion of the concurring opinion of Judge Hudson concerning the derivation of the Court's equitable powers from "general principles of law recognized by civilized nations" (*P.C.I.J., Series A/B, No. 70,* p. 76).

[179] The gravamen of the Netherlands' complaint in this regard related to the fact that a portion of the new canal being constructed by Belgium (the Albert Canal) utilized the bed of the old Hasselt Canal, which was situated in Belgian territory below Maastricht and thus, under the Treaty, was to be fed by water drawn from the Mastricht intake. The Netherlands claimed, in essence, that Belgium could not, consistently with the Treaty, feed that portion of the Albert Canal which would be comprised of the old Hasselt Canal with water drawn from points other than the Maastricht intake. The reason for the Netherlands' concern seems to have been that it would not be able to supervise diversions in Belgian territory in the manner that would be possible at the Maastricht feeder. This element of having some degree of control over diversions through a supervisory power was presumably an aspect of the overall agreement that was important to the Netherlands.

[180] *P.C.I.J., Series A/B, No. 70,* p. 18.

[181] *Ibid.*, p. 20.

[182] *Ibid.*, p. 26.

[183] Judgment of 9 April 1949, *I.C.J. Reports 1949,* p. 4. See generally Q. Wright, "The Corfu Channel case", *The American Journal of International Law* (Washington, D. C.), vol. 43 (1949), p. 491; A. C. Kiss, "Problèmes juridiques de la pollution de l'air", in Hague Academy of International Law, *Colloquium 1973—The Protection of the Environment and International Law,* A. C. Kiss, ed. (Leyden, Sijthoff, 1975), p. 168; Lammers, *op. cit.* (footnote 77 above), pp. 525-527; A. P. Lester, "River pollution in international law", *The American Journal of International Law,* vol. 57 (1963), pp. 839-840; and S. A. Bleicher, "An overview of international environmental regulation", *Ecology Law Quarterly* (Berkeley, Cal.), vol. II (1972), pp. 16-19.

[184] These ships were part of a squadron of British naval vessels which were proceeding through the Corfu Channel on 22 October 1946 without the permission of the Albanian Government. Briefly, the background of this incident is that British warships had been fired on by an Albanian battery on 5 May 1946 while passing through the Channel. The United Kingdom Government protested, claiming rights of innocent passage through the strait. Albania replied that no foreign vessels, naval or merchant, had rights of innocent passage through Albanian territorial waters without giving prior notification to, and receiving permission from, Albanian authorities. Thus when, on 22 October 1946, the British squadron sailed into the Channel without notification or permission, Albania claimed that the United Kingdom had violated Albanian sovereignty. (The United Kingdom subsequently, on 12 and 13 November 1946, swept a number of mines from the Channel, and Albania also contended in the case that this action violated her sovereignty.)

[185] See Bleicher and Lammers, cited in footnote 183 above; I. Brownlie, "A survey of international customary rules of environmental protection", *Natural Resources Journal* (Albuquerque, N.M.), vol. 13 (1973), p. 180; M. H. Arsanjani, *International Regulation of Internal Resources* (Charlottesville, University Press of Virginia, 1981), pp. 397-399; Lester, *loc. cit.* (footnote 178 above), pp. 101-102; and Helsinki Rules on the Uses of the Waters of International Rivers, adopted by the International Law Association, commentary (*a*) to article X, ILA, *op. cit.* (footnote 79 above), p. 497.

istence of the mines and to warn the British naval vessels of the imminent danger they posed.[186] The Court declared:

> . . . Such obligations are based . . . on certain general and well-recognized principles, namely: elementary considerations of humanity, even more exacting in peace than in war; the principle of the freedom of maritime communication; and *every State's obligation not to allow knowingly its territory to be used for acts contrary to the rights of other States.*"[187]

110. The obligation last referred to by the Court may be considered to be an expression of the maxim *sic utere tuo ut alienum non laedas,*[188] and to this extent it is helpful in the context of the present inquiry. On the other hand, the facts of the case are obviously far removed from the types of situation under consideration,[189] and furthermore, the Court's formulation provides no indication of what the "rights of other States" might be in the context of the non-navigational utilization of international watercourses. None the less, the Court did characterize the obligation in question as one which was "general and well-recognized", and gave no indication that the applicability of either that obligation or the other two principles it identified was limited to factual situations closely akin to those involved in the case. It may therefore be concluded that the general obligation identified by the Court would make it internationally wrongful for one State "to allow knowingly its territory", including portions of international watercourses situated thereon, "to be used for acts contrary to the rights of other States".[190] What remain to be identified and established, of course, are "the rights of other States" along or through whose territory the watercourse in question flows. Such rights could include the right to an equitable share of the uses and benefits of the waters, and the right to be free from adverse effects, or "appreciable harm", occasioned through the medium of the watercourse. Once these rights have been established, the obligation recognized in the Corfu Channel case would offer protection against their infringement.[191]

b. *Arbitral awards*

i. The Lake Lanoux arbitration[192]

111. This case involved a hydroelectric project, proposed in 1950 by Electricité de France and adopted by the French Government, which would entail the diversion of waters of Lake Lanoux, situated in the eastern Pyrenees entirely within France, down a steep incline and into the Ariège River. The natural drop in elevation between the lake and the Ariège would make possible the generation of electricity. The difficulty was that, while Lake Lanoux naturally drained into Spain via the Font-Vive and Carol Rivers, and thence into the Mediterranean, the Ariège is a tributary of the Garonne, which flows through France and empties into the Atlantic. "The initial project involved no return of water to the Carol River despite important irrigation interests in Spain that were served by it. Instead, France offered monetary compensation which was refused by Spain."[193] The project was then modified so that the "withdrawal of part of the water which feeds the Carol" would be offset by "an underground return tunnel [which] would carry a part of the water of the Ariège to the Carol", and thence into Spain.[194] While France offered to return to the Carol an amount of water equivalent to that which had been diverted, Spain opposed any diversion of Lake Lanoux waters, since the French project

> would alter the natural conditions of the hydrographic basin of Lake Lanoux by diverting its waters to the Ariège and by thus making restitution of the waters to the Carol physically dependent upon human will, which would result in the *de facto* preponderance of one party only, rather than in the preservation of the equality of the two parties as provided for by the Treaty of Bayonne of 26 May 1866 and by the Additional Act of the same date; . . .[195]

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[186] With regard to innocent passage, the Court

> "arrived at the conclusion that the North Corfu Channel should be considered as belonging to the class of international highways through which passage cannot be prohibited by a coastal State in time of peace.
>
> ". . .
>
> "For these reasons the Court is unable to accept the Albanian contention that the Government of the United Kingdom has violated Albanian sovereignty by sending the warships through the Strait without having obtained the previous authorization of the Albanian Government." (*I.C.J. Reports 1949,* pp. 29-30.)

[187] *Ibid.*, p. 22.

[188] In this connection, see, for example, Helsinki Rules, commentary (*a*) to article X (see footnote 79 above); and Lester, *loc. cit* (footnote 178 above), p. 101. Cf. the 1949 Memorandum by the Secretary-General, *Survey of International Law in Relation to the Work of Codification of the International Law Commission* (United Nations publication, Sales No. 1948.V.1(1)):

> ". . . There has been general recognition of the rule that a State must not permit the use of its territory for purposes injurious to the interests of other States in a manner contrary to international law. . . ." (P. 34, para. 57.)

[189] Moreover, as Bleicher points out:

> ". . . The court was primarily concerned with other matters, such as the problems of proof and presumptions, the scope of the right of innocent passage of warships, and the jurisdiction of the court to fix the amount of compensation under the language of the *compromis.*" (*Loc. cit.* (footnote 183 above), p. 17.)

[190] *I.C.J. Reports 1949,* p. 22.

[191] Cf. Lammers's statement that, once the "rights of other States" have been established, the obligation recognized by the Court "may be resorted to to establish that States are not only obliged to prevent violations of those rights committed by their organs but are also obliged to prevent inroads on the interests protected by those rights through the conduct of individuals or private entities from within their territory" (*op. cit.* (footnote 77 above), p. 527).

[192] Original French text of the arbitral award in: *Revue générale de droit international public* (Paris), vol. 62 (1958), pp. 79 *et seq.*; and United Nations, *Reports of International Arbitral Awards,* vol. XII (Sales No. 63.V.3), pp. 281 *et seq.*; partial translations in *Yearbook . . . 1974,* vol. II (Part Two), pp. 194 *et seq.*, document A/5409, paras. 1055-1068; *The American Journal of International Law* (Washington, D.C.), vol. 53 (1959), pp. 156 *et seq.*; and *International Law Reports, 1957* (London), vol. 24 (1961), pp. 101 *et seq.* For commentary, see, for example, J. G. Laylin and R. L. Bianchi, "The role of adjudication in international river disputes. The Lake Lanoux case", *The American Journal of International Law,* vol. 53 (1959), pp. 30 *et seq.*; F. Duléry, "L'affaire du lac Lanoux", *Revue générale de droit international public,* vol. 62 (1958), pp. 469 *et seq.*; A. Gervais, "L'affaire du lac Lanoux—étude critique de la sentence du tribunal arbitral", *Annuaire français de droit international, 1960* (Paris), vol. 6, pp. 372 *et seq.*; Lammers, *op. cit.* (footnote 77 above), pp. 508-517; Whiteman, *op. cit.* (footnote 78 (*a*) above), pp. 1066-1073; and Bleicher, *loc. cit.* (footnote 183 above), pp. 25-28.

[193] Whiteman, *op. cit.*, p. 1066.

[194] United Nations, *Reports of International Arbitral Awards,* vol. XII . . ., p. 294.

[195] *Ibid.*, p. 285, third preambular paragraph of the arbitration *compromis.*

The Additional Act accompanying the 1866 Treaty of Bayonne, which fixed the border between France and Spain from Andorra to the Mediterranean, recognized existing rights on watercourses flowing from one country into the other or forming a boundary and required agreement between the two States before new construction that might change the régime or the volume of the watercourse.[196]

112. Negotiations between France and Spain yielded no solution, and the parties entered into a *compromis* providing for the submission of the dispute to arbitration and referring the following question to the arbitral tribunal:[197]

Is the French Government justified in its contention that, in carrying out, without a preliminary agreement between the two Governments, works for the use of the waters of Lake Lanoux on the terms laid down in the project and in the French proposals mentioned in the preamble to this *compromis*, it would not commit a violation of the provisions of the Treaty of Bayonne of 26 May 1866 and of the Additional Act of the same date?[198]

While this formulation of the question suggests that the *compromis* limited the competence of the tribunal to the application and interpretation of the 1866 Treaty, the tribunal found that:

. . . when there is a matter for interpretation, this should be done according to international law; international law does not establish any absolute and rigid system of interpretation; it is, therefore, permissible to take into consideration the spirit which governed the Pyrenees treaties and the generally accepted rules of international law; . . .[199]

113. The tribunal concluded that the French project violated neither the 1866 Treaty nor the Additional Act. In the course of its opinion, the tribunal made a number of important statements concerning the rights and duties of States riparian to an international watercourse under general international law. Those that are most relevant to the present inquiry will be mentioned at this juncture; the others will be referred to subsequently in connection with other aspects of the topic.

114. Article 8 of the Additional Act provided that:

All still and running water, whether in the public or the private domain, shall be subject to the sovereignty of the country in which it is situated and, consequently, to that country's laws, except for such amendments as are agreed to by both Governments. . . .

In addressing the contention that "these amendments should be interpreted restrictively, because they derogated from sovereignty", the tribunal declared that it

could not accept so absolute a statement. Territorial sovereignty acts as a presumption. It must yield to all international obligations, whatever their origin, but only to them.

The question is, therefore, to determine what the obligations of the French Government are in this matter. . . .[200]

115. The tribunal considered that the issue posed in the *compromis* could be reduced to two basic questions: first, whether the French project would in itself constitute a violation of Spain's rights under the 1866 Treaty and Additional Act; and secondly, if the answer to the first question were in the negative, whether the execution of the project without a prior agreement between the two countries would consitute a violation of the Treaty and Additional Act.

116. With respect to the first question, Spain had argued, as noted above (para. 111), that the project was unlawful because by altering natural conditions it would make "restitution of the waters to the Carol physically dependent upon human will". Spain based this argument on article 12 of the Additional Act. The tribunal observed:

According to the Spanish Government, this provision confirms the notion that neither of the Parties may, without the consent of the other, alter the natural order of the water's flow. . . . [But] the Spanish Government does not attribute an absolute meaning to respect for natural order; according to the counter-case . . . : "A State has the right to use unilaterally the part of a river which traverses it to the extent that this use is likely to cause on the territory of another State a limited harm only, a minimal inconvenience, which comes within the bounds of those that derive from good-neighbourliness."[201]

117. The tribunal then characterized Spain's argument concerning the first question as consisting of two parts: first, the transfers of water by one riparian State to another basin without the consent of the other riparian State were prohibited, even if an equivalent amount were returned to the basin of origin; and secondly, that "all actions that may create along with a *de facto* inequality, the physical possibility of a violation of law" were prohibited without the consent of the other party.[202]

118. With regard to the first part of Spain's argument, the tribunal concluded that "withdrawal with return, as provided in the French project and proposals, is not in conflict with the Treaty and the Additional Act of 1866".[203] In reaching this conclusion, it reasoned as follows:

. . . The Tribunal, from the viewpoint of physical geography, cannot disregard the reality of each river basin, which constitutes, as the Spanish case . . . contends, "a whole". But this fact does not justify the absolute consequences which the Spanish thesis seeks to draw from it. The unity of a basin is supported at the legal level only to the extent that it conforms to the realities of life. Water, which is by nature a fungible thing, may be restored without alteration of its qualities from the viewpoint of human needs. A withdrawal with return, as contemplated in the French project, does not alter a state of affairs established in response to the demands of life in society.[204]

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[196] Whiteman, *op. cit.*, p. 1066.

[197] "In accordance with the provisions of article 2 of the *compromis*, the arbitral tribunal comprised four members: Mr. Plinio Bolla and Mr. Paul Reuter (appointed by the French Government), Mr. Fernand de Visscher and Mr. Antonio de Luna (appointed by the Spanish Government), and a President, Mr. Sture Petrén (designated by the King of Sweden). It sat at Geneva and gave its award on 16 November 1957." (*Yearbook . . . 1974*, vol. II (Part Two), p. 195, document A/5409, para. 1061.)

[198] Art. 1 of the *compromis* (*ibid.*, para. 1060).

[199] Para. 2 (penultimate subparagraph) of the arbitral award (*ibid.*, para. 1063).

[200] Para. 1 (second and third subparagraphs) of the award (*ibid.*).

[201] Para 7 (third subparagraph) of the award (*ibid.*, p. 196, para. 1064).

[202] Para. 7 (fourth subparagraph) of the award (*ibid.*).

[203] Para. 8 (third subparagraph) of the award (*ibid.*).

[204] Para. 8 (first subparagraph) of the award (*ibid.*). The tribunal went on to note that, "in federations", court decisions had recognized the validity of the practice of inter-basin diversions for the purpose of generating electric power, referring to the decision by the Supreme Court of the United States of America in *Wyoming* v. *Colorado* (1922) (*United States Reports*, vol. 259 (1923), p. 419), and to the cases cited by Berber, *Die Rechtsquellen . . ., op. cit.* (footnote 77 above), p. 180, and by G. Sauser-Hall, "L'utilisation industrielle des fleuves internationaux", *Recueil des cours de l'Académie de droit international de La Haye, 1953-II* (Leyden, Sijthoff, 1955), vol. 83, p. 544.

119. The tribunal disposed of the second part of Spain's argument with the observation that, since France had given assurances that it would not interfere with the régime established under its proposals,

It could not be alleged that despite this commitment Spain would not have a sufficient guarantee, for it is a well-established general principle of law that bad faith is not presumed. . . .[205]

The tribunal concluded that:

. . . there is not, in the Treaty and Additional Act of 26 May 1866 or in the generally accepted principles of international law, a rule which forbids a State, acting to protect its legitimate interests, from placing itself in a situation which enables it in fact, in violation of its international obligations, to do even serious injury to a neighbouring State.[206]

120. The tribunal then turned to the second basic question involved in the case, namely Spain's contention that the execution of the French project required "the preliminary agreement of the two Governments, and that in the absence of such agreement the country which proposed the project could not have freedom of action to undertake the works". Since Spain based its position not only on the Treaty and the Additional Act, but also on generally accepted rules of international law, the tribunal found that it was possible "to demonstrate the existence of an unwritten general rule of international law" established by, *inter alia*, "precedents . . . in the international practice of States concerning the industrial use of international waterways".[207]

121. The tribunal first made some general observations:

. . . To admit that in a given matter competence may no longer be exercised except on the condition of or by means of an agreement between two States is to place an essencial restriction on the sovereignty of a State, and it may be allowed only if there is conclusive proof. Undoubtedly international practice discloses some specific cases in which this assumption is proved; . . . But these cases are exceptional and international case-law does not readily recognize their existence, especially when they infringe upon the territorial sovereignty of a State, which would be true in the present case.

In fact, to evaluate in its essence the need for a preliminary agreement, it is necessary to adopt the hypothesis that the States concerned cannot arrive at an agreement. In that case, it would have to be admitted that a State which ordinarily is competent has lost the right to act alone as a consequence of the unconditional and discretionary opposition of another State. This is to admit a "right of consent", a "right of veto", which at the discretion of one State paralyses another State's exercise of its territorial competence.

For this reason, international practice prefers to resort to less extreme solutions, limiting itself to requiring States to seek the terms of an agreement by preliminary negotiations without making the exercise of their competence conditional on the conclusion of this agreement. . . .[208]

The tribunal thus concluded that international practice did not permit it to decide anything more than the following:

. . . the rule that States may use the hydraulic power of international waterways only if a *preliminary* agreement between the States concerned has been concluded cannot be established as a customary rule or, still less, as a general principle of law. . . .[209]

With regard to the foregoing point, the tribunal had stated:

. . . while admittedly there is a rule prohibiting the upper riparian State from altering the waters of a river in circumstances calculated to do serious injury to the lower riparian State, such a principle has no application to the present case, since it was agreed by the Tribunal . . . that the French project did not alter the waters of the Carol. . . .[210]

122. Finally, the tribunal addressed the question whether France had complied with the obligations laid down in article 11 of the Additional Act, which required a State initiating works to give prior notice, and to develop a system of complaints and safeguards for "all the interests involved on one side and the other". The tribunal decided that France had complied with those obligations, but in so deciding it made further statements of a general nature which do not appear to be derived solely from the agreement of the parties (in this case, article 11). First of all, the tribunal noted that France's compliance with the obligation to give notice had not been contested. The tribunal next proceeded to consider the question "how 'all the interests involved on one side and the other' should be safeguarded".[211] It was of the view that more was involved than the "interests corresponding to a right of the riparian population", and declared:

. . . Consideration must be given to all interests, whatever their nature, which may be affected by the works undertaken, even if they do not amount to a right. Only this solution is in accord with the terms of article 16 [of the Additional Act], the spirit of the Pyrenees Treaties, and *the trends apparent in current international practice as regards hydro-electric development.*[212]

The tribunal went on to explain how, according to principles which are apparently of general applicability, these interests could be safeguarded. It stated that the procedure "cannot be reduced to purely formal requirements, such as taking note of complaints". Rather, according to the tribunal:

. . . the upper riparian State, under the rules of good faith, has an obligation to take into consideration the various interests concerned, to seek to give them every satisfaction compatible with the pursuit of its own interests and to show that it has, in this matter, a real desire to reconcile the interests of the other riparian with its own.[213]

123. But the tribunal did not stop there. In addressing the question whether France had taken Spanish interests sufficiently into consideration, the tribunal observed that "note must be taken of the intimate connection between the obligation to take adverse interests into account in the course of negotiations and the obligation to give a reasonable place to such interests in the solution adopted".[214] It found that France had given sufficient

[205] Para. 9 (second subparagraph) of the award (*Yearbook . . . 1974*, vol. II (Part Two), p. 196, document A/5409, para. 1064).

[206] *Ibid.*

[207] Para. 10 (third subparagraph) of the award (*ibid.*, pp. 196-197, para. 1065).

[208] Para. 11 (first, second and third subparagraphs) of the award (*ibid.*, p. 197, para. 1065).

[209] Para. 13 (second subparagraph) of the award (*ibid.*, para. 1066). In reaching this conclusion, the tribunal relied upon the Geneva Convention of 9 December 1923 relating to the development of hydraulic power affecting more than one State (League of Nations, *Treaty Series*, vol. XXXVI, p. 77; see also *Yearbook . . . 1974*, vol. II (Part Two), pp. 57 *et seq.*, document A/5409, paras. 68-78).

[210] Para. 13 (first subparagraph) of the award (*Yearbook . . . 1974*, vol. II (Part Two), p. 197, document A/5409, para. 1066).

[211] Para. 22 (first subparagraph) of the award (*ibid.*, p. 198, para. 1068).

[212] Para. 22 (second subparagraph) of the award (*ibid.*).

[213] Para. 22 (third subparagraph) of the award (*ibid.*).

[214] Para. 24 (penultimate subparagraph) of the award (*ibid.*).

consideration to Spanish interests and therefore that "the French project satisfies the obligations of article 11 of the Additional Act".

124. It has been seen that, in deciding the Lake Lanoux case, the arbitral tribunal had recourse to a number of principles of general international law, including some that pertain specifically to international watercourses. Among these principles are the following:

(1) territorial sovereignty "must yield to all international obligations, whatever their origin";

(2) "the unity of a basin is supported at the legal level only to the extent that it conforms to the realities of life", and therefore a transfer of water out of a basin, accompanied by the return of water into it, with no significant alteration of quality or quantity, "does not alter a state of affairs established in response to the demands of life in society";

(3) "it is a well-established general principle of law that bad faith is not presumed";

(4) there is not to be found "in the generally accepted principles of international law, a rule which forbids a State, acting to protect its legitimate interests, from placing itself in a situation which enables it in fact, in violation of its international obligations, to do even serious injury to a neighbouring State";

(5) in the factual context of the case, at least, international practice does not require prior agreement between the riparians, but "prefers to resort to less extreme solutions, limiting itself to requiring States to seek the terms of an agreement by preliminary negotiations without making the exercise of their competence conditional on the conclusion of this agreement";

(6) while it has no application to the facts of the case, "there is a rule prohibiting the upper riparian State from altering the waters of a river in circumstances calculated to do serious injury to the lower riparian State";

(7) under "the trends apparent in current international practice as regards hydro-electric development", "consideration must be given to all interests, whatever their nature, which may be affected by the works undertaken, even if they do not amount to a right";

(8) "the upper riparian State, under the rules of good faith, has an obligation to take into consideration the various interests concerned, to seek to give them every satisfaction compatible with the pursuit of its own interests and to show that it has, in this matter, a real desire to reconcile the interests of the other riparian with its own"; and

(9) there is an "intimate connection between the obligation to take adverse interests into account in the course of negotiations and the obligation to give a reasonable place to such interests in the solution adopted".

ii. The Trail Smelter arbitration[215]

125. In this case, sulphur dioxide fumes emitted by a privately-owned zinc and lead smelter located at Trail (British Columbia) in Canada, seven miles from the border with the United States of America, were carried by the prevailing winds across the border into the State of Washington in the United States, where they caused damage to crops and timber, also privately owned. The case thus does not involve international watercourses, but because the damage was inflicted through the medium of an airshed[216] common to the areas of Canada and the United States involved—much like a boundary lake—it is believed to be analogous to the kinds of situation under consideration.

126. As John E. Read has observed:

> . . . The subject-matter of the dispute did not directly concern the two Governments; nor did it involve claims by United States citizens against the Canadian Government. It did not seem to come within any of the ordinary categories of arbitrable international disputes. It consisted rather of claims based on nuisance, alleged to have been committed by a Canadian corporation and to have caused damage to United States citizens and property in the State of Washington.[217]

Private remedies at the level of municipal law being unavailable,[218] however, the two Governments ultimately[219] entered into an agreement for the "final settlement" of the dispute.[220] The Convention provided, *inter alia*: (*a*) that Canada would pay the United States $US 350,000 for "all damage which occurred in the United States, prior to the first day of January, 1932, as

[215] For the texts of the awards of 16 April 1938 and 11 March 1941 in this case, see United Nations, *Reports of International Arbitral Awards*, vol. III (Sales No. 1949.V.2), pp. 1905 *et seq.* The awards are summarized and excerpted in *Yearbook . . . 1974*, vol. II (Part Two), pp. 192 *et seq.*, document A/5409, paras. 1049-1054. The 1941 award, which will be focused upon here, is reproduced in *The American Journal of International Law* (Washington, D.C.), vol. 35 (1941), p. 684. See the commentary by John E. Read, Legal Adviser to Canada's Secretary of State for External Affairs during the dispute, "The Trail Smelter dispute", *The Canadian Yearbook of International Law, 1963* (Vancouver), vol. I, p. 213. See also J. Andrassy, "Les relations internationales de voisinage", *Recueil des cours . . ., 1951-II* (Paris, Sirey, 1952), vol. 79, pp. 92 *et seq.*

[216] *Webster's New Twentieth Century Dictionary of the English Language, Unabridged*, 2nd ed. (New York, Simon and Schuster, 1983), p. 41, defines "airshed" as "an area of varying size that is dependent on a single air mass and that is uniformly affected by the same sources of air pollution".

[217] *Loc. cit.* (footnote 215 above), pp. 213-214.

[218] The Constitution of the State of Washington did not permit the acquisition of a smoke easement by an alien and, under the precedent established by the House of Lords in *British South Africa Company, v. Companhia de Moçambique* (1893) (United Kingdom, *The Law Reports, 1893*, p. 602), the courts of British Columbia would have lacked jurisdiction over an action to recover for damage to foreign land. Read states:

> "It was the general opinion of the lawyers concerned at the time that the British Columbia courts would be compelled to refuse to accept jurisdiction in suits based on damage to land situated outside of the province." (*Loc. cit.* (footnote 215 above), p. 222.)

See also S. C. McCaffrey, "Transboundary pollution injuries: Jurisdictional considerations in private litigation between Canada and the United States", *California Western International Law Journal* (San Diego, Cal.), vol. 3 (1973), pp. 224-229.

[219] The negotiations and steps taken by the two States leading up to the submission of the dispute to arbitration began in 1927 and included referral of the problem to the International Joint Commission established by the 1909 Boundary Waters Treaty (see footnote 78 (*a*) above). See, in this connection, Read, *loc. cit.*, pp. 213-214.

[220] Convention of 15 April 1935 for the final settlement of the difficulties arising through complaints of damage done in the State of Washington by fumes discharged from the smelter of the Consolidated Mining and Smelting Company, Trail, British Columbia (League of Nations, *Treaty Series*, vol. CLII, p. 73; and United Nations, *Reports of International Arbitral Awards*, vol. III . . ., p. 1907).

a result of the operation of the Trail Smelter" (art. I);[221] (*b*) that the two Governments would constitute a tribunal (art. II),[222] which would decide the following questions:

(1) Whether damage caused by the Trail Smelter in the State of Washington has occurred since the first day of January, 1932, and, if so, what indemnity should be paid therefor?

(2) In the event of the answer to the first part of the preceding question being in the affirmative, whether the Trail Smelter should be required to refrain from causing damage in the State of Washington in the future and, if so, to what extent?

(3) In the light of the answer to the preceding question, what measures or régime, if any, should be adopted or maintained by the Trail Smelter?

(4) What indemnity or compensation, if any, should be paid on account of any decision or decisions rendered by the Tribunal pursuant to the next two preceding questions? (Art. III.)

and (*c*) that, in deciding those questions, the tribunal

shall apply the law and practice followed in dealing with cognate questions in the United States of America as well as international law and practice, and shall give consideration to the desire of the High Contracting Parties to reach a solution just to all parties concerned. (Art. IV.)

The tribunal delivered its decision on the first of the above questions in its interim award of 16 April 1938,[223] and on the other questions in its final award of 11 March 1941.[224] In its first award, the tribunal answered question No. 1 by finding that damage had indeed occurred since 1 January 1932, and determining that $78,000 should be paid as indemnity therefor.[225] It also found that it was "unnecessary to decide whether the facts proven did or did not constitute an infringement or violation of sovereignty of the United States under international law independently of the Convention",[226] because its terms of reference included only the questions of the existence of damage and the amount of indemnity due therefor, which Canada had promised to pay. In its second award, the tribunal addressed the remaining three questions.[227] It first observed that a balance had to be struck between the interests of industry and those of the agricultural community. In this regard, it took note of the parties' desire to reach a "just solution", which it interpreted to mean one

which would allow the continuance of the operation of the Trail Smelter but under such restrictions and limitations as would, as far as foreseeable, prevent damage in the United States, and as would enable indemnity to be obtained if, in spite of such restrictions and limitations, damage should occur in the future in the United States.[228]

The tribunal found that it was not necessary to decide whether to apply United States or international law, "as the law followed in the United States in dealing with the quasi-sovereign rights of the States of the Union, in the matter of air pollution, whilst more definite, is in conformity with the general rules of international law".[229]

127. The tribunal referred to Eagleton's statement that "a State owes at all times a duty to protect other States against injurious acts by individuals from within its jurisdiction",[230] and observed that "a great number of such general pronouncements by leading authorities" had been presented to it.[231] It stated:

. . . International decisions, in various matters, from the Alabama case onward, and also earlier ones, are based on the same general principle, [which] has not been questioned by Canada.[232]

Noting the lack of international cases involving air pollution, the tribunal stated that "the nearest analogy is that of water pollution", but found no international decisions in that area either. The tribunal therefore turned to decisions of the United States Supreme Court dealing with air and water pollution, finding that they

may legitimately be taken as a guide in this field of international law, for it is reasonable to follow by analogy, in international cases, precedents established by that court in dealing with controversies between States of the Union or with other controversies concerning the quasi-sovereign rights of such States, where no contrary rule prevails in international law and no reason for rejecting such precedents can be adduced from the limitations of sovereignty inherent in the constitution of the United States.[233]

After discussing a number of decisions of the United States Supreme Court in cases involving inter-State air and water pollution, as well as a case decided by the Federal Court of Switzerland involving complaints by one canton concerning dangers posed by a shooting-range in a neighbouring canton,[234] the tribunal stated the principle for which the arbitration is most often cited:

The Tribunal . . . finds that the above [United States Supreme Court] decisions, taken as a whole, constitute an adequate basis for its conclusions, namely that, under the principles of international law, as well as of the law of the United States, no State has the right to use or permit the use of its territory in such a manner as to cause injury by fumes in or to the territory of another or the properties or persons therein, when the case is of serious consequence and the injury is established by clear and convincing evidence.[235]

The tribunal accordingly went on to hold that:

. . . the Dominion of Canada is responsible in international law for the conduct of the Trail Smelter. Apart from the undertakings in the Convention, it is, therefore, the duty of the Government of the Dominion of Canada to see to it that this conduct should be in conformity with the obligation of the Dominion under international law as herein determined.[236]

The tribunal therefore answered question No. 2 in the affirmative, finding specifically that the smelter should

[221] This had been the sum recommended by the International Joint Commission, to which the Trail Smelter problem had been referred by the two Governments in 1928 pursuant to article IX of the 1909 Boundary Waters Treaty.

[222] The tribunal constituted pursuant to article II was composed of: Charles Warren (appointed by the United States); Robert A. E. Greenshields (appointed by Canada); and Jan Frans Hostie, Chairman (appointed by the two Governments jointly).

[223] United Nations, *Reports of International Arbitral Awards*, vol. III . . . , p. 1911.

[224] *Ibid.*, p. 1938.

[225] *Ibid.*, p. 1931.

[226] *Ibid.*, p. 1932.

[227] It also completed the answer to question No. 1 by finding, contrary to the claim of the United States, that no damage had occurred since 1 October 1937 (the end of the period covered by the sum of $78,000 under the first award) (*ibid.*, p. 1962).

[228] *Ibid.*, p. 1939.

[229] *Ibid.*, p. 1963.

[230] C. Eagleton, *The Responsibility of States in International Law* (New York, University Press, 1928), p. 80.

[231] United Nations, *Reports of International Arbitral Awards*, vol. III . . . , p. 1963.

[232] *Ibid.*

[233] *Ibid.*, p. 1964.

[234] *Solothurn* v. *Aargau*, judgment of 1 November 1900, *Recueil officiel des arrêts du Tribunal fédéral suisse, 1900*, vol. XXVI, part I, p. 444.

[235] United Nations, *Reports of International Arbitral Awards*, vol. III . . . , p. 1965.

[236] *Ibid.*, pp. 1965-1966.

refrain from causing such damage in the State of Washington as would be "recoverable" in suits between private individuals in United States courts.[237] With regard to question No. 3, the tribunal prescribed a régime which regulated the operation of the smelter and which the tribunal believed would "probably result in preventing any damage of a material nature".[238] But the tribunal went on to rule, in its answer to question No. 4, that:

> . . . if any damage . . . shall occur in the future, whether through failure on the part of the smelter to comply with the regulations herein prescribed or notwithstanding the maintenance of the régime, an indemnity shall be paid for such damage . . .[239]

128. The implications of the awards in the *Trail Smelter* case have been thoroughly analysed elsewhere, most notably in a lucid report by the late Robert Q. Quentin-Baxter.[240] Suffice it for present purposes to say that the tribunal endeavoured to achieve a "just solution" to the controversy by striking the following balance between the industrial and agricultural interests involved: it allowed the smelter to continue to operate under a strict regulatory régime and required the Washington landowners to tolerate any minor damage that might none the less ensue; if the landowners suffered material damage, however, they were to be compensated, even if such damage resulted from the smelter's operation in compliance with the tribunal's régime. The agricultural and industrial interests were thus accommodated by allowing the smelter to continue to operate on the condition that the landowners would be compensated for any material damage it caused. The solution arrived at by the tribunal is thus an apt illustration of a general observation of R. Q. Quentin-Baxter:

> It is . . . a feature of the modern world—of which there is ample evidence in the jurisprudence of the [ICJ]—that the resolution of disputes between States may turn as much upon the adjustment of competing interests as upon the ascertainment and application of prohibitory rules. . . .[241]

### iii. Other arbitral awards

129. There are several other arbitral awards which are perhaps not so prominent or apposite to the question of equitable utilization as the two just discussed, but which should be touched upon for the sake of completeness.

130. The first two awards are those rendered in the *Helmand River Delta* case between Afghanistan and Persia (Iran) on 19 August 1872 and 10 April 1905.[242] The Helmand (or Hirmand) rises in, and flows for most of its course through Afghanistan, but forms the boundary between that country and Iran for about 12 miles before dividing and flowing into lakes in Afghanistan and Iran. A dispute between Afghanistan and Persia concerning the delimitation of their boundary and the use of the waters of the Helmand River was submitted in 1872 to arbitration by a British Commissioner, Sir Frederick Goldsmid. In his award of 19 August 1872, the arbitrator stated, *inter alia:*

> . . . It is moreover to be well understood that no works are to be carried out on either side calculated to interfere with the requisite supply of water for irrigation on the banks of the Helmand.[243]

131. A change in the channel of the Helmand led in 1902 to a second arbitration concerning the boundary and the allocation of the waters of that river. The arbitrator, Sir Henry McMahon, rendered an award on 10 April 1905 which effected a slight change in the boundary and a new allocation of the waters.[244] While the portion of the award concerning the boundary was accepted by both States, the other part, which allocated to Persia one third of the Helmand waters measured at a point approximately 35 miles inside Afghanistan,[245] was accepted only in part by Afghanistan and rejected entirely by Persia, on the ground that it had been treated more favourably under the previous Goldsmid award.[246]

132. The Goldsmid award, which continued to govern the distribution of the waters of the Helmand, did attempt to achieve an equitable allocation by requiring that no works on either side of the river were to interfere with "the requisite supply of water for irrigation" on the other. The McMahon award recognized substantial rights in the downstream State. While that State, Persia, did not find the award acceptable, the upstream State did accept it in part.

133. Other arbitral awards concerning international rivers principally concern delimitation of boundaries and navigation.[247] A final award that is of some interest

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[237] *Ibid.*, p. 1966.

[238] *Ibid.*, p. 1980.

[239] *Ibid.*

[240] "Second report on international liability for injurious consequences arising out of acts not prohibited by international law", *Yearbook . . . 1981*, vol. II (Part One), pp. 108 *et seq.*, document A/CN.4/346 and Add.1 and 2, paras. 22-40.

[241] *Ibid.*, p. 115, para. 54, citing the decisions of the ICJ in the *Fisheries* case (United Kingdom *v.* Norway), Judgment of 18 December 1951, *I.C.J. Reports 1951*, p. 116, and in the *North Sea Continental Shelf* cases (Federal Republic of Germany/Denmark; Federal Republic of Germany/Netherlands), Judgment of 20 February 1969, *I.C.J. Reports 1969*, p. 3.

[242] Concerning this dispute, see C. U. Aitchison, *A Collection of Treaties, Engagements and Sanads Relating to India and Neighbouring Countries* (Calcutta, Government of India Central Publication Branch, 1933), vol. XIII, pp. 34-35 and 209 *et seq.* See also *Yearbook . . . 1974*, vol. II (Part Two), pp. 188 *et seq.*, document A/5409, paras. 1034-1037; Whiteman, *op. cit.* (footnote 78 (*a*) above), pp. 1031-1032; and Lammers, *op. cit.* (footnote 77 above), pp. 302-304 and 505.

[243] See *Yearbook . . . 1974*, vol. II (Part Two), p. 189, document A/5409, para. 1035 and footnote 840.

[244] The text of the McMahon award appears in Aitchison, *op. cit.* (footnote 242 above), pp. 285-286; and in *Yearbook . . . 1974*, vol. II (Part Two), pp. 189-190, document A/5409, para. 1036.

[245] Clause III of the McMahon award.

[246] See Aitchison, *op. cit.*, p. 35. See also Whiteman, *op. cit.*, p. 1031.

[247] See, for example, the award of 22 March 1888 by Grover Cleveland, President of the United States of America, as arbitrator in the case between Costa Rica and Nicaragua concerning San Juan River (text in J. B. Moore, *History and Digest of the International Arbitrations to which the United States Has Been a Party* (Washington (D.C.), 1898), vol. II, pp. 1964 *et seq.*; excerpted in *Yearbook . . . 1974*, vol. II (Part Two), pp. 190-191, document A/5409, paras. 1038-1041); and the award in the Faber case between Germany and Venezuela by the German-Venezuelan Mixed Claims Commission constituted under the Protocol of 13 February 1903 (text in United Nations, *Reports of International Arbitral Awards*, vol. X (Sales No. 60.V.4), pp. 438 *et seq.*, and J. H. Ralston, *Venezuelan Arbitrations of 1903* (Washington (D.C.), 1904), p. 600; excerpted in *Yearbook . . . 1974*, vol. II (Part Two), p. 192, document A/5409, paras. 1047-1048).

An award which did involve non-navigational uses is the one of 22 August (3 September) 1893 delivered in the Kushk River case by an

for present purposes is that rendered on 4 April 1928 in the *Island of Palmas* case between the United States of America and the Netherlands.[248] Those States submitted to arbitration by Max Huber, acting for the Permanent Court of Arbitration, the question "whether the Island of Palmas (or Miangas) in its entirety forms a part of territory belonging to the United States of America or of Netherlands territory". The case thus does not involve international watercourses or even use of natural resources, but resolution of conflicting territorial claims to an island. In the award, however, Huber stated the following general principle, which is of relevance for the present study:

> Territorial sovereignty . . . involves the exclusive right to display the activities of a State. This right has as corollary a duty: the obligation to protect within the territory the rights of other States, in particular their right to integrity and inviolability in peace and in war, together with the rights which each State may claim for its nationals in foreign territory. Without manifesting its territorial sovereignty in a manner corresponding to circumstances, the State cannot fulfil this duty. Territorial sovereignty cannot limit itself to its negative side, i.e. to excluding the activities of other States; for it serves to divide between nations the space upon which human activities are employed, in order to assure them at all points the minimum of protection of which international law is the guardian.[249]

While, as in the *Corfu Channel* case, this statement does not define the rights of other States that are to be protected by the territorial State, it does reinforce the principle underlying the other decisions that the sovereign rights of States are correlative.

### (iv) *Other international instruments*

134. A number of intergovernmental and non-governmental bodies have adopted statements of principles concerning the non-navigational uses of international watercourses. These instruments overwhelmingly support the principle of equitable utilization by States of international watercourses. Many of them are conveniently collected in the report by the Secretary-General on legal problems relating to the utilization and use of international rivers[250] and the supplement thereto.[251] In order to avoid unduly prolonging the present survey, not all of them will be mentioned here. It is hoped that a few representative examples will suffice to illustrate the positions typically taken. The instruments are organized according to their nature and the type of body that produced them.

#### a. *Declarations and resolutions adopted by intergovernmental organizations, conferences and meetings*

135. The Declaration of Montevideo concerning the industrial and agricultural use of international rivers, adopted by the Seventh International Conference of American States at its fifth plenary session on 24 December 1933,[252] includes the following provisions:

> . . .
>
> 2. The States have the exclusive right to exploit, for industrial or agricultural purposes, the margin which is under their jurisdiction of the waters of international rivers. This right, however, is conditioned in its exercise upon the necessity of not injuring the equal right due to the neighbouring State over the margin under its jurisdiction.
>
> . . .
>
> 4. The same principles shall be applied to successive rivers as those established in articles 2 and 3, with regard to contiguous rivers.[253]

136. The Act of Asunción on the use of international rivers, adopted by the Ministers of Foreign Affairs of the River Plate Basin States (Argentina, Bolivia, Brazil, Paraguay and Uruguay) at their Fourth Meeting, from 1 to 3 June 1971,[254] contains the Declaration of Asunción on the Use of International Rivers,[255] paragraphs 1 and 2 of which provide:

> 1. In contiguous international rivers, which are under dual sovereignty, there must be a prior bilateral agreement between the riparian States before any use is made of the waters.
>
> 2. In successive international rivers, where there is no dual sovereignty, each State may use the waters in accordance with its needs provided that it causes no appreciable damage to any other State of the Basin.

137. Argentina signed three other instruments in 1971 dealing with international watercourses: the Act of Santiago of 26 June 1971 concerning hydrologic basins (with Chile),[256] the Declaration of 9 July 1971 on water resources (with Uruguay)[257] and the Act of Buenos Aires of 12 July 1971 on hydrologic basins (with Bolivia).[258] The following provisions of the Act of Santiago are typical:

> 1. The waters of rivers and lakes shall always be utilized in a fair and reasonable manner.
>
> . . .
>
> 4. Each Party shall recognize the other's right to utilize the waters of their common lakes and successive international rivers within its territory in accordance with its needs, provided that the other Party does not suffer any appreciable damage.
>
> . . .

138. The United Nations Conference on the Human Environment of 1972 adopted the Declaration on the

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Anglo-Russian commission with a view to elucidating and completing clause III of Protocol No. 4 of 10 (22) July 1887 between Great Britain and Russia (text in Aitchison, *op. cit.* (footnote 242 above), p. 253; excerpted in *Yearbook . . . 1974*, vol. II (Part Two), pp. 191-192, document A/5409, paras. 1042-1046). That award, rendered by a commission composed of one national of each of the States involved, concerned the application of an earlier (1885) agreement between them. The award, set forth in a protocol, essentially allocated the waters on the basis of the point on the river from which the water was taken (or flowed, in the case of a canal).

[248] United Nations, *Reports of International Arbitral Awards*, vol. II (Sales No. 1949.V.1), pp. 829 *et seq.*

[249] *Ibid.*, p. 839.

[250] Document A/5409, reproduced in *Yearbook . . . 1974*, vol. II (Part Two), p. 33.

[251] Document A/CN.4/274, *ibid.*, p. 265.

[252] See footnote 150 above.

[253] See the reservations by Venezuela and Mexico and the declaration by the United States of America, in *The International Conferences of American States . . ., op. cit.* (footnote 150 above), pp. 105-106; and *Yearbook . . . 1974*, vol. II (Part Two), p. 212, document A/5409, annex I.A.

[254] Text reproduced in OAS, *Ríos y Lagos Internacionales (Utilización para fines agrícolas e industriales)*, 4th ed. rev. (OEA/Ser.I/VI, CIJ-75 Rev.2) (Washington (D.C.), 1971), pp. 183-186; extracts in *Yearbook . . . 1974*, vol. II (Part Two), pp. 322-324, document A/CN.4/274, para. 326.

[255] Resolution No. 25 annexed to the Act of Asunción.

[256] See *Yearbook . . . 1974*, vol. II (Part Two), p. 324, document A/CN.4/274, para. 327.

[257] *Ibid.*, pp. 324-325, para. 328.

[258] *Ibid.*, p. 325, para. 329.

Human Environment (Stockholm Declaration),[259] Principle 21 of which provides:

*Principle 21*

States have, in accordance with the Charter of the United Nations and the principles of international law, the sovereign right to exploit their own resources pursuant to their own environmental policies, and the responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other States or of areas beyond the limits of national jurisdiction.

The Conference also adopted an "Action Plan for the Human Environment",[260] Recommendation 51 of which provides:

*Recommendation 51*

*It is recommended* that Governments concerned consider the creation of river-basin commissions or other appropriate machinery for co-operation between interested States for water resources common to more than one jurisdiction.

. . .

(*b*) The following principles should be considered by the States concerned when appropriate:

. . .

(ii) The basic objective of all water resource use and development activities from the environmental point of view is to ensure the best use of water and to avoid its pollution in each country;

(iii) The net benefits of hydrologic regions common to more than one national jurisdiction are to be shared equitably by the nations affected;

. . .

139. The "Mar del Plata Action Plan", adopted by the United Nations Water Conference, held at Mar del Plata (Argentina) in 1977,[261] contains a number of recommendations and resolutions concerning the management and utilization of water resources. Recommendation 7 calls upon States to frame "effective legislation . . . to promote the efficient and equitable use and protection of water and water-related ecosystems".[262] With regard to international co-operation, the Action Plan provides, in Recommendations 90 and 91:

90. It is necessary for States to co-operate in the case of shared water resources in recognition of the growing economic, environmental and physical interdependencies across international frontiers. Such co-operation, in accordance with the Charter of the United Nations and principles of international law, must be exercised on the basis of the equality, sovereignty and territorial integrity of all States, and taking due account of the principle expressed, *inter alia*, in principle 21 of the Declaration of the United Nations Conference on the Human Environment.

91. In relation to the use, management and development of shared water resources, national policies should take into consideration the right of each State sharing the resources to equitably utilize such resources as the means to promote bonds of solidarity and co-operation.[263]

[259] *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 and corrigendum), chap. I.

[260] *Ibid.*, chap. II, sect. B.

[261] *Report of the United Nations Water Conference, Mar del Plata, 14-25 March 1977* (United Nations publication, Sales No. E.77.II.A.12), part one.

[262] *Ibid.*, p. 11.

[263] *Ibid.*, p. 53.

b. *Reports and studies prepared by intergovernmental organizations or by conferences of government experts*

140. The report of the Permanent Committee on Public International Law on the general principles which may facilitate regional agreements between adjacent States on the industrial and agricultural use of the waters of international rivers, adopted at Rio de Janeiro on 23 July 1932 and submitted to the Seventh International Conference of American States (Montevideo, 1933), defined "the right of a riparian State with respect to the use of fluvial waters for industrial purposes in general, and agricultural purposes in particular" as being "an exclusive right, but limited in its exercise by the necessity of not prejudicing the equal right of a neighbouring State".[264]

141. The report entitled *Integrated River Basin Development*, submitted in November 1957 by a panel of experts constituted by the Secretary-General of the United Nations pursuant to Economic and Social Council resolution 599 (XXI) of 3 May 1956,[265] states that, "pending establishment of an accepted international code, it is suggested that the Dubrovnik draft statement of principles affords a sound basic philosophy for planning and executing a project for integrated river development in an international river basin".[266] The principles adopted by the International Law Association at its Forty-seventh Conference, held at Dubrovnik in 1956,[267] included the following:

III. While each State has sovereign control over the international rivers within its own boundaries, the State must exercise this control with due consideration for its effects upon other riparian States.

IV. A State is responsible, under international law, for public or private acts producing change in the existing régime of a river to the injury of another State, which it could have prevented by reasonable diligence.

V. In accordance with the general principle stated in No. III above, the States upon an international river should in reaching agreements, and States or tribunals in settling disputes, weigh the benefit to one State against the injury done to another through a particular use of the water. . . .[268]

142. In a report submitted in 1971 to the Committee on Natural Resources of the Economic and Social Council, the Secretary-General recognized that: "Multiple, often conflicting uses and much greater total demand have made imperative an integrated approach to river basin development in recognition of the growing economic as well as physical interdependencies across national frontiers."[269] The report went on to note that international water resources, which were defined as water in a natural hydrological system shared by two or

[264] Para. 2 of the report, reproduced in *Yearbook ... 1974*, vol. II (Part Two), p. 213, document A/5409, annex II.A.

[265] The revised edition of the report appeared in 1970 (United Nations publication, Sales No. E.70.II.A.4); extracts of the text published in 1958 are reproduced *ibidem*, pp. 215 *et seq.*, annex II.B.

[266] Chap. IV of the report, under the heading "Inadequacy of relevant international law".

[267] ILA, *Report of the Forty-seventh Conference, Dubrovnik, 1956*, (London, 1957), pp. x-xii, resolution 3; text reproduced in *Yearbook . . . 1974*, vol. II (Part Two), p. 203, document A/5409, para. 1080.

[268] The last-quoted principle goes on to list a number of factors that should be taken into consideration in the weighing process referred to therein.

[269] E/C.7/2/Add.6, para. 1.

more countries, offer "a unique kind of opportunity for the promotion of international amity. The optimum beneficial use of such waters calls for practical measures of international association where all parties can benefit in a tangible and visible way through co-operative action."[270]

143. The Asian-African Legal Consultative Committee in 1969 created an inter-sessional Sub-Committee to prepare draft articles on the law of international rivers. In 1971, this body was succeeded by a new Sub-Committee, and in 1972 the Committee established a Standing Sub-Committee. In 1973, the Sub-Committee recommended to the plenum that it consider the Sub-Committee's report at an opportune time at a future session. The revised draft propositions submitted by the Sub-Committee's Rapporteur follow closely the Helsinki Rules adopted in 1966 by the International Law Association (see para. 154 below). Proposition III provides in part as follows:

1. Each basin State is entitled, within its territory, to a reasonable and equitable share in the beneficial uses of the waters of an international drainage basin.

2. What is a reasonable and equitable share is to be determined by the interested basin States by considering all the relevant factors in each particular case.[271]

144. The secretariat of the Economic Commission for Europe prepared a study on the legal aspects of the hydroelectric development of rivers and lakes of common interest, which was published in 1950.[272] The study contains the following statements:

A State has the right to develop unilaterally that section of the waterway which traverses or borders its territory, in so far as such development is liable to cause in the territory of another State only slight injury or minor inconvenience compatible with good-neighbourly relations.

On the other hand, when the injury liable to be caused is serious and lasting, development works may only be undertaken under a prior agreement.[273]

The study goes on to inquire whether it is possible to establish a criterion for distinguishing between slight and serious injury, and concludes that the determination must be made on a case-by-case basis in the light of the prevailing circumstances.

145. In Recommendation No. 4 adopted at its eleventh session in 1954, the Committee on Electric Power:

*Recommends* that a State proposing to embark within its own territory on projects likely to have serious repercussions on the territory of other States, whether upstream or downstream, should first communicate to the States concerned such information as would enlighten them as to the nature of those repercussions;

*Recommends* that, in the event of objections being raised by the States concerned following such prior notification, the State proposing to embark on the projects should endeavour, by negotiations with those States, to reach an agreement such as will ensure the most economic development of the river system.[274]

146. In 1968, the Secretary-General of the United Nations constituted a Panel of Experts on the Legal and Institutional Aspects of International Water Resources Development, whose report, entitled *Management of International Water Resources: Institutional and Legal Aspects,*[275] was published in 1975. In the section of the report dealing with "The need for international co-operation or collaboration", it is stated:

Each basin State should recognize the legitimacy of the interest that its co-basin States have in the use of the waters of their international drainage basin or water resources system and should be disposed to co-operate to optimize the uses of the resource and to seek management of the system on a system-wide, long-term basis. This includes minimizing, if not eliminating, deleterious consequences to other States of one State's uses, or water-related activities. Furthermore, non-co-operation and failure to provide affirmatively for the rational management of the system will in the long run prove to be detrimental to the national interest of each basin or system State, to the extent that water in the system bears a relationship to the human welfare and economic development of the States concerned, and also by having a disruptive influence on bilateral relations generally.[276]

147. The study entitled *The Control of Marine Pollution and the Protection of Living Resources of the Sea: A Comparative Study of International Controls and National Legislation and Administration*, presented in 1970 to the FAO Technical Conference on Marine Pollution and its Effects on Living Resources and Fishing,[277] contains the following passage dealing with the current state of customary international law:

. . . Briefly, the theory of absolute territorial sovereignty prevailing at the beginning of the century, which holds that each State has sovereign power to do what it likes in its own territory, regardless of the results outside that territory, is now treated with disfavour. So also is the contrary view that a State may do nothing within its territory which may produce harmful effects, however slight, within the territory of another State. So far as inland water pollution is concerned, most legal writers now adopt a compromise position between these two extremes, which requires that a State should act in such a way as to avoid causing appreciable and unreasonable harm on the territory of a neighbouring State.[278]

148. In 1972, the Legal Office (Legislative Branch) of FAO prepared a draft agreement on water utilization and conservation in the Lake Chad Basin as part of its technical assistance to the Lake Chad Basin Commission. Article V of that draft provides:

(1) Each Member State shall be entitled, within its territory, to a reasonable and equitable share in the beneficial utilization of the water resources of the Basin.

(2) At the request of any Member State, the Commission may determine what constitutes a reasonable and equitable share, taking into account all relevant hydrological, ecological, economic and social circumstances.[279]

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[270] *Ibid.*, para. 3.

[271] The next paragraph of proposition III contains a non-exhaustive list of 10 "relevant factors which are to be considered" in determining what constitutes a reasonable and equitable share. See Asian-African Legal Consultative Committee, *Report of the Fourteenth Session held at New Delhi* (10-18 January 1973) (New Delhi), pp. 7-14; text reproduced in *Yearbook . . . 1974*, vol. II (Part Two), pp. 339-340, document A/CN.4/274, para. 367.

[272] The revised text of the study appeared in 1952 as document E/ECE/136-E/ECE/EP/98/Rev.1 and Corr.1 (see footnote 77 above).

[273] *Ibid.*, para. 191. See also *Yearbook . . . 1974*, vol. II (Part Two), p. 330, document A/CN.4/274, para. 340.

[274] E/ECE/EP/147. See also *Yearbook . . . 1974*, vol. II (Part Two), p. 331, document A/CN.4/274, para. 343.

[275] Natural Resources/Water Series No. 1 (United Nations publication, Sales No. E.75.II.A.2).

[276] *Ibid.*, p. 18, para. 53.

[277] FAO, document FIR: MP/70/R-15.

[278] *Ibid.*, p. 6; cited in *Yearbook . . . 1974*, vol. II (Part Two), p. 335, document A/CN.4/274, para. 357.

[279] FAO/UNDP, *Survey of the Water Resources of the Chad Basin for Development Purposes—Surface Water Resources in the Lake Chad Basin*, Technical Report 1 (AGL: DP/RAF/66/579), appendix I, pp. 125 *et seq.*; the text of the draft is reproduced in *Yearbook . . . 1974*, vol. II (Part Two), pp. 335-337, document A/CN.4/274, para. 358.

149. On 12 May 1969, the Consultative Assembly of the Council of Europe adopted Recommendation 555 (1969),[280] in which it recommended "that the Committee of Ministers instruct a committee of governmental experts to prepare as rapidly as possible a European convention based on the following draft". The preamble of the draft convention provides that the member States of the Council of Europe consider that "it is a general principle of international law that no country is entitled to exploit its natural resources in a way that may cause substantial damage in a neighbouring country", and that these States are "desirous of implementing the principle of the equitable utilization of the waters of international drainage basins". Article 2, paragraph 1, of the draft provides in part:

1. Contracting States shall take measures to abate any existing pollution and to prevent any new form of water pollution or any increase in the degree of existing water pollution causing or likely to cause substantial injury or damage in the territory of any other contracting State. . . .[281]

150. In 1963, the Inter-American Juridical Committee of OAS[282] adopted a draft convention on the industrial and agricultural use of international rivers and lakes. After member States had commented on the draft, the Committee prepared a revised draft convention in 1965,[283] relevant provisions of which are as follows:

*Article 4*

The right of a State to industrial or agricultural utilization of the waters of an international river or lake that are under its sovereignty does not imply non-recognition of the eventual right of the other riparian States.

*Article 5*

The utilization of the waters of an international river or lake for industrial or agricultural purposes must not . . . cause substantial injury, according to international law, to the riparian States . . .

*Article 6*

In cases in which the utilization of an international river or lake results or may result in damage or injury to another interested State, the consent of that interested State shall be required, as well as the payment or indemnification for any damage or harm done, when such is claimed.[284]

[280] Council of Europe, Consultative Assembly, Committee on Regional Planning and Local Authorities, "Report on a Draft European Convention on the Protection of Fresh Water against Pollution" (document 2561). The draft convention is reproduced in *Yearbook . . . 1974*, vol. II (Part Two), pp. 343 *et seq.*, document A/CN.4/274, para. 374.

[281] The Committee of Ministers, after considering the draft convention, decided that it did not, "in its present form, provide a suitable basis for [concerted] action", principally because of the provisions of chapter III (arts. 7 *et seq.*) concerning State liability (Council of Europe, Committee of Ministers, document CM (70) 134; text reproduced in *Yearbook . . . 1974*, vol. II (Part Two), pp. 345-346, document A/CN.4/274, para. 375). It does not appear that the provisions quoted above, in particular those concerning equitable utilization, presented significant obstacles.

[282] Although OAS is an intergovernmental organization, and the Committee is an organ of OAS, it is recognized that the members of the Committee serve in their individual expert capacities and not as representatives of States.

[283] *Report of the Inter-American Juridical Committee on the work accomplished during its 1965 meeting* (OEA/Ser.1/VI.1, CIJ-83) (Washington (D.C.), 1966), pp. 7-10; the text of the draft convention is reproduced in *Yearbook . . . 1974*, vol. II (Part Two), pp. 349-351, document A/CN.4/274, para. 379.

[284] Article 8 provides in part: "A State that plans to build works for utilization of an international river or lake must first notify the other interested States."

### c. *Studies by international non-governmental organizations*

151. A number of studies of the law of the non-navigational uses of international watercourses have been conducted by groups of experts on international law, the most prominent of which are those of the Institute of International Law and the International Law Association. These studies all embody the principle of equitable utilization.

152. At its Madrid session, in 1911, the Institute of International Law adopted a resolution on "International regulations regarding the use of international watercourses",[285] which provided in part:

I. When a stream forms the frontier of two States, neither of these States may, without the consent of the other, and without special and valid legal title, make or allow individuals, corporations, etc. to make alterations therein detrimental to the bank of the other State. On the other hand, neither State may, on its own territory, utilize or allow the utilization of the water in such a way as seriously to interfere with its utilization by the other State or by individuals, corporations, etc. thereof.

The foregoing provisions are likewise applicable to a lake lying between the territories of more than two States.

II. When a stream traverses successively the territories of two or more States:

. . .

(2) All alterations injurious to the water, the emptying therein of injurious matter (from factories, etc.) is forbidden;

(3) No establishment (especially factories using hydraulic power) may take so much water that the constitution, otherwise called the utilizable or essential character, of the stream shall, when it reaches the territory downstream, be seriously modified;

. . .

(5) A State situated downstream may not erect or allow to be erected within its territory constructions or establishments which would subject the other State to the danger of inundation;

. . .[286]

153. At its Salzburg session, in 1961, the Institute adopted another resolution concerning the non-navigational uses of international watercourses.[287] This text, entitled "Utilization of non-maritime international waters (except for navigation)", provides in part:

*Article 1*

The present rules and recommendations are applicable to the utilization of waters which form part of a watercourse or hydrographic basin which extends over the territory of two or more States.

[285] *Annuaire de l'Institut de droit international, 1911* (Paris), vol. 24 (1911), pp. 365-367. The resolution was based on the second report of the Rapporteur, L. von Bar, *ibid.*, pp. 168-183.

[286] In the "Statement of reasons" accompanying the regulations, the Institute stated that it seemed expedient to remedy the fact that "the use of water for the purposes of industry, agriculture, etc." had not theretofore been "foreseen by international law", by "noting the rules of law resulting from the interdependence which undoubtedly exists between riparian States with a common stream and between States whose territories are crossed by a common stream" (*ibid.*, p. 365).

[287] The resolution, which was based on the final report of the Rapporteur, J. Andrassy, submitted at the Institute's Neuchâtel session in 1959 (*Annuaire de l'Institut de droit international, 1959* (Basel), vol. 48, tome I, pp. 319 *et seq.*), was adopted by 50 votes to none, with one abstention; for the text, see *Annuaire de l'Institut de droit international, 1961* (Basel), vol. 49, tome II, pp. 381-384; reproduced in *Yearbook . . . 1974*, vol. II (Part Two), p. 202, document A/5409, para. 1076.

*Article 2*

Every State has the right to utilize waters which traverse or border its territory, subject to the limits imposed by international law and, in particular, those resulting from the provisions which follow.

This right is limited by the right of utilization of other States interested in the same watercourse or hydrographic basin.

*Article 3*

If the States are in disagreement over the scope of their rights of utilization, settlement will take place on the basis of equity, taking particular account of their respective needs, as well as of other pertinent circumstances.

*Article 4*

No State can undertake works or utilizations of the waters of a watercourse or hydrographic basin which seriously affect the possibility of utilization of the same waters by other States except on condition of assuring them the enjoyment of the advantages to which they are entitled under article 3, as well as adequate compensation for any loss or damage.

*Article 5*

Works or utilizations referred to in the preceding article may not be undertaken except after previous notice to interested States.

154. The International Law Association (ILA) has studied the topic of the non-navigational uses of international watercourses since consideration of the subject was first proposed to the Association by Clyde Eagleton at its Forty-sixth Conference, held at Edinburgh in 1954.[288] The Association has produced a number of drafts relating to the topic,[289] the most notable of which is that entitled "Helsinki Rules on the Uses of the Waters of International Rivers", adopted at its Fifty-second Conference, held at Helsinki in 1966.[290] Chapter 2 of the Helsinki Rules, entitled "Equitable utilization of the waters of an international drainage basin", contains the following relevant provisions:

*Article IV*

Each basin State is entitled, within its territory, to a reasonable and equitable share in the beneficial uses of the waters of an international drainage basin.

*Article V*

1. What is a reasonable and equitable share within the meaning of article IV is to be determined in the light of all the relevant factors in each particular case.

Paragraph 2 of article V contains a non-exhaustive list of 11 factors to be considered in determining what is a reasonable and equitable share of the beneficial uses of the waters of an international drainage basin. The provisions of the Helsinki Rules concerning water pollution, contained in chapter 3, were elaborated in the Rules on Water Pollution in an International Drainage Basin, approved by the Association at its Sixtieth Conference, held at Montreal in 1982.[291] Article 1 of the Montreal Rules provides that States shall, in particular:

(*a*) prevent new or increased water pollution that would cause substantial injury in the territory of another State;

(*b*) take all reasonable measures to abate existing water pollution to such an extent that no substantial injury is caused in the territory of another State; and

(*c*) attempt to further reduce any such water pollution to the lowest level that is practicable and reasonable under the circumstances.

The Montreal Rules go on to provide, *inter alia*, that "States shall co-operate with the other States concerned" in order to give effect to the articles (art. 4); that basin States shall regularly inform other concerned States about pollution of waters in the basin, notify them "in due time of any activities envisaged in their own territories that may involve a significant threat of, or increase in, water pollution in the territories of those other States", and "promptly inform States that might be affected of any sudden change of circumstances that may cause or increase water pollution in the territories of those other States" (art. 5); that basin States "shall consult one another on actual or potential problems of water pollution in the drainage basin" in a way that will not "unreasonably delay the implementation of plans that are the subject of the consultation" (art. 6); and that:

When it is contended that the conduct of a State is not in accordance with its obligations under these articles, that State shall promptly enter into negotiations with the complaining State with a view of reaching a solution that is equitable under the circumstances. (Art. 10.)

155. A final study by an international non-governmental organization that is worthy of note in the present context is that conducted under the auspices of the Inter-American Bar Association, the results of which are embodied in a resolution adopted unanimously at the Association's Tenth Conference, held at Buenos Aires in 1957.[292] The resolution, which concerns the principles of law governing the use of international rivers, provides in part:

1. That the following general principles, which form part of existing international law, are applicable to every watercourse or system

[288] See ILA, *Report of the Forty-sixth Conference, Edinburgh, 1954* (London, 1955), pp. 324 *et seq.*

[289] The drafts adopted by the International Law Association concerning the uses of the waters of international rivers are the following:

The resolution adopted at the Forty-seventh Conference, held at Dubrovnik in 1956, containing a statement of principles on which to base rules of law concerning the use of international rivers, extracts from which are quoted in paragraph 141 (see footnote 267 above).

The statement of "Agreed principles of international law", principle 2 of which provides in part:

". . . each co-riparian State is entitled to a reasonable and equitable share in the beneficial uses of the waters of the drainage basin. What amounts to a reasonable and equitable share is a question to be determined in the light of all the relevant factors in each particular case."

(See the third report of the Committee on the Uses of the Waters of International Rivers, submitted to the Forty-eighth Conference, held in New York in 1958 (ILA, *Report of the Forty-eighth Conference, New York, 1958* (London, 1959), pp. 99 *et seq.*; reproduced in *Yearbook . . . 1974*, vol. II (Part Two), pp. 204-205, document A/5409, para. 1082).)

The "Hamburg Recommendations on Procedure concerning Non-Navigational Uses", recommending that, in the event of a difference between co-riparian States as to their legal rights or interests, the States concerned should enter into consultations, and that, if the consultations do not resolve the dispute, the States should agree to form an *ad hoc* commission, the composition and procedures of which are set out in the recommendations (ILA, *Report of the Forty-ninth Conference, Hamburg, 1960* (London, 1961), pp. xvi-xviii). See also the "Hamburg Recommendation on Pollution Control" (*ibid.*, p. xviii). Both texts are reproduced in *Yearbook . . . 1974*, vol. II (Part Two), pp. 205-206, document A/5409, para. 1084.

[290] See footnote 79 above.

[291] ILA, *Report of the Sixtieth Conference, Montreal, 1982* (London, 1983), pp. 535 *et seq.*

[292] Inter-American Bar Association, *Proceedings of the Tenth Conference, Buenos Aires, 1957* (Buenos Aires, 1958), pp. 82-83; see also *Yearbook . . . 1974*, vol. II (Part Two), p. 208, document A/5409, para. 1092.

of rivers or lakes (non-maritime waters) which may traverse or divide the territory of two or more States (such a system being referred to hereinafter as a "system of international waters"):

1. Every State having under its jurisdiction a part of a system of international waters has the right to make use of the waters thereof in so far as such use does not affect adversely the equal right of the States having under their jurisdiction other parts of the system;

2. States having under their jurisdiction a part of a system of international waters are under a duty, in the application of the principle of equality of rights, to recognize the right of the other States having jurisdiction over a part of the system to share the benefits of the system, taking as the basis the right of each State to the maintenance of the status of its existing beneficial uses and to enjoy, according to the relative needs of the respective States, the benefits of future developments. In cases where agreement cannot be reached, the States should submit their differences to an international court or an arbitral commission;

3. States having under their jurisdiction a part of a system of international waters are under a duty to refrain from making changes in the existing régime that might affect adversely the advantageous use by one or more other States having a part of the system under their jurisdiction, except in accordance with (i) an agreement with the State or States affected or (ii) a decision of an international court or arbitral commission;

At its Fifteenth Conference, held at San José (Costa Rica) in 1967, the Association adopted another resolution, which provides in part:

3. International waters have for America unique importance to the extent that it is difficult to imagine a social and economic development and integration of the continent without an equitable and adequate usage of such waters, in achieving which the law has a substantial function;[293]

### (v) *The views of publicists*

156. Writings relating to the law of the non-navigational uses of international watercourses in general, and to equitable utilization in particular, are too numerous even to summarize in this review of authorities. Several works of particular note will be mentioned, however, in an effort to provide a representative sample of the views of publicists on the subject of the rights of States under international law in respect of the utilization of international watercourses.

157. Commentators who have studied the subject overwhelmingly support the doctrine of equitable utilization as a rule of general international law.[294] In 1962, the eminent jurist and then member of the Commission, Sir Humphrey Waldock, concluded that "some broad principles of international river law have now come into existence, though their precise formulation may still remain to be settled".[295] He stated six principles, the third of which was formulated as follows:

(3) where one State's exercise of its rights conflicts with the water interests of another, the principle to be applied is that each is entitled to the equitable apportionment of the benefits of the river system in proportion to their needs and in the light of all the circumstances of the particular river system;[296]

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[293] Inter-American Bar Association, *Resolutions, Recommendations and Declarations approved by the XVth Conference, San José (Costa Rica), 1967*, pp. 1-2; see also *Yearbook . . . 1974*, vol. II (Part Two), p. 356, document A/CN.4/274, para. 401.

[294] Writers of treaties on the law of international watercourses support the proposition that the doctrine of equitable utilization is part of the corpus of general international law. See, for example, E. Caratheodory, *Du droit international concernant les grands cours d'eau* (Leipzig, Brockhaus, 1861), p. 32; H. P. Farnham, *The Law of Waters and Water Rights; International, National, State, Municipal and Individual, including Irrigation, Drainage and Municipal Water Supply* (Rochester (N.Y.), The Lawyers Co-operative Publishing Co., 1904); A. Lederle, *Das Recht der internationalen Gewässer unter besonderer Berücksichtigung Europas* (Mannheim, Bensheimer, 1920), pp. 51 *et seq.* and 60 *et seq.*; G. R. Bjorksten, *Das Wassergebiet Finnlands in völkerrechtlicher Hinsicht* (Helsinki, Tilgmann, 1925), pp. 8 and 166 *et seq.*; Smith, *op. cit.* (footnote 44 above), especially p. 150; E. Hartig, *op. cit.* (footnote 76 above); J. Dräger, *Die Wasserentnahme aus internationalen Binnengewässern* (Bonn, Röhrscheid, 1970); and J. Barberis, *op. cit.* (footnote 76 above), pp. 35-45, and the works cited therein. See also C. Sosa-Rodriguez, *Le droit fluvial international et les fleuves de l'Amérique latine* (Paris, Pedone, 1935). However, Berber concludes that "outside certain areas of Europe and perhaps North America, there are no rules of customary law governing water relations between independent States" (*Rivers in International Law, op. cit.* (footnote 77 above), p. 265). Berber's conclusion, as Mr. Schwebel explained in his third report, was probably attributable to the fact that he "takes a restrictive view of [the sources of] customary international law as his point of departure" (document A/CN.4/348 (see footnote 14 above), footnote 146; see also the works cited in that footnote). Berber does recognize, however, that "underlying almost every [municipal law] system is a principle according to which the user must in some way take into consideration the use of water by other users" (*Rivers . . .*, p. 254). He further acknowledges the existence of "the principle of good neighbourship and the principle of mutual and general consideration for each other between riparian States", which he regards as "general principles of law recognized by civilized nations" (*ibid.*, p. 266). His conclusion that there are no rules of customary law governing relations between States in respect of international watercourses would thus appear to be significantly limited by the other norms and practices he does recognize.

The doctrine of equitable utilization finds support in the following learned works and articles, *inter alia*: L. von Bar, "L'exploitation industrielle des cours d'eau internationaux au point de vue du droit international", *Revue générale de droit international public* (Paris), vol. 17 (1910), p. 281; A. W. Quint, "Nouvelles tendances dans le droit fluvial international", *Revue de droit international et de législation comparée* (Brussels), 58th year (1931), p. 325; C.-A. Colliard, "Evolution et aspects actuels du régime juridique des fleuves internationaux", *Recueil des cours . . ., 1968-III* (Leyden, Sijthoff, 1970), vol. 125, pp. 343 *et seq.*; R. B. Bilder, "International law and natural resources policies", *Natural Resources Journal* (Albuquerque, N.M.), vol. 20 (1980), p. 451; Andrassy, Griffin, Lipper and Villagrán Kramer, cited in footnote 76 above; and Bourne, *loc. cit.* (footnote 114 above).

Finally, authors of general works on public international law lend further support to the doctrine of equitable utilization as a norm of general international law. See, for example, P. Fauchille, *Traité de droit international public*, 8th ed., rev. of *Manuel de droit international public* by H. Bonfils (Paris, Rousseau, 1925), tome I, part two, pp. 450 *et seq.*; L. Oppenheim, *International Law: A Treatise*, 8th ed., H. Lauterpacht, ed. (London, Longmans, Green, 1955), vol. I, pp. 345-347 and 475; Brierly-Waldock, *op. cit.* (footnote 76 above), pp. 231-232; and C. Rousseau, *Droit international public* (Paris, Sirey, 1980), vol. IV, pp. 499-500.

[295] Brierly-Waldock, *op. cit.* (footnote 76 above), p. 231.

[296] The five other principles formulated by Sir Humphrey are worth noting:

"(1) where a river system drains the territories of two or more States, each State has the right to have that river system considered as a whole and to have its own interests taken into account together with those of other States; (2) each State has in principle an equal right to make the maximum use of the water within its territory, but in exercising this right must respect the corresponding rights of other States; (3) . . .; (4) a State is in principle precluded from making any change in the river system which would cause substantial damage to another State's right of enjoyment without that other State's consent; (5) it is relieved from obtaining that consent, however, if it offers the other State a proportionate share of the benefits to be derived from the change or other adequate compensation for the damage to the other State's enjoyment of the water; (6) a State whose own enjoyment of the water is not substantially damaged by a development in the use of a river beneficial to another State is not entitled to oppose that development." (*Ibid.*, pp. 231-232.)

158. Similarly, Sir Hersch Lauterpacht has written:

> . . . a State is not only forbidden to stop or divert the flow of a river which runs from its own to a neighbouring State, but likewise to make such use of the water of the river as either causes danger to the neighbouring State or prevents it from making proper use of the flow of the river on its part.[297]

Speaking in more general terms, he wrote:

> The responsibility of a State may become involved as the result of an abuse of a right enjoyed by virtue of international law. This occurs when a State avails itself of its right in an arbitrary manner in such a way as to inflict upon another State an injury which cannot be justified by a legitimate consideration of its own advantage. . . . The duty of the State not to interfere with the flow of a river to the detriment of other riparian States has its source in the same principle. The maxim *sic utere tuo ut alienum non laedas* is applicable to relations of States no less than to those of individuals; it underlies a substantial part of the law of tort in English law and the corresponding branches of other systems of law; it is one of those general principles of law recognized by civilized States which the Permanent Court is bound to apply by virtue of Article 38 of its Statute.[298]

159. Under the heading "General principle: joint utilization of the watercourse by co-riparians", Charles Rousseau states the currently applicable international law as follows:

> Contemporary international law considers all the riparians of the watercourse as a regional entity that is subject to the principle of joint utilization of the river and its tributaries. The direct consequence of this principle is a *prohibition on any exclusive utilization* by one of the riparian States by virtue of its territorial sovereignty and particularly a prohibition on any unilateral action by the upstream State that would, as a result of diversions effected at its discretion, deprive the downstream State or States of water.[299]

In a section entitled "Technical procedure: sharing of the water", Rousseau makes the following introductory statement:

> There are a number of methods of apportioning the waters among the user States of the same river basin. All of them tend towards equitable apportionment, in accordance with the formula used by Professor Smith . . .[300]

160. After reviewing the municipal law of France, Italy, Switzerland, Germany and the United States, Georges Sauser-Hall concluded in 1953 that it is a generally recognized principle of law that:

> . . . no diversion of a stream [is permitted] which is likely to cause serious injury to other riparians or communities whose territories are bordered or traversed by the same stream.[301]

On the relations between Austria and Bavaria in respect of both contiguous and successive watercourses, Sauser-Hall concluded:

> . . . in seeking to achieve the industrial development of a whole river area, the contracting States have been guided above all by good-neighbourly considerations, agreeing in some cases to the diversion of watercourses from their natural beds, and in others abandoning the intention to divert them and taking the requisite steps to maintain the volume of water estimated necessary for industry in the States downstream, and to make tolerable the backing-up of water in the territory of the State upstream from any dams established.[302]

161. Herbert W. Briggs, on the other hand, took the position in 1952 that "no general principle of international law prevents a riparian State from excluding foreign ships from the navigation of such a river [i.e. one not subjected to a special conventional régime] or from diverting or polluting its waters".[303] Charles C. Hyde would seem at first glance to go even further, declaring that "the upstream proprietor . . . may in fact claim the right to divert at will and without restraint such waters as [it] may require, and that regardless of the effect produced upon the proprietor downstream".[304] Juraj Andrassy has pointed out, however, that:

> . . . An argument against this opinion is the view expressed by the same author in connection with water pollution. Invoking the Trail Smelter arbitration, Mr. Hyde affirms that States are required to prevent any use of their territory that would cause water or air pollution in the neighbouring State. A combination of the two principles enunciated by the learned author would lead to the conclusion that it would be forbidden to cause a marked reduction in fishing downstream, but that it would be legitimate to remove the watercourse by diverting it and in that way deprive the downstream State of any benefits, even the most necessary.[305]

Hyde also admits that "the increasing tendency of interested States to acquiesce through appropriate agreements in schemes of regulated diversions through accepted agencies bears testimony to the character of the practice that is in process of development".[306] Commenting on this statement, Charles B. Bourne observes that while, for Hyde,

> the Harmon doctrine was still the law in 1945, developing practice already foreshadowed a new rule. Much has happened in the development of law and practice of international rivers since 1945, so that Hyde's opinions on this point of law, and indeed the similar opinions of earlier authors, do not carry great weight today.[307]

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The author adds:

> "The application of these general principles may well involve problems of considerable difficulty in individual cases, as is shown by the detailed provisions of some of the existing treaties." (*Ibid.*, p. 232.)

A similar observation is made by Lipper in his well-known study on equitable utilization:

> "Although the area of equitable utilization may not lend itself to the formulation of precise rules, it is nevertheless suitable for the formulation of general guiding principles.
>
> "Stated somewhat differently, there are no mechanical formulas capable of application to all rivers and which, in every case when applied to a specific situation, will provide the correct allocation of the waters between the co-riparian States and a judicious resolution of conflicts among various uses of the waters. It is apparent, for example, that the needs of an arid Middle Eastern country for irrigation will not necessarily be fulfilled by applying solutions that have been successful in resolving disputes over hydroelectric power in the northwestern United States or Canada, or in resolving a timber-floating dispute in Scandinavia." (*Loc. cit.* (footnote 76 above), p. 41-42.)

[297] Oppenheim-Lauterpacht, *op. cit.* (footnote 294 above), vol. I, p. 475.

[298] *Ibid.*, pp. 345-347. See also P. Guggenheim, *Traité de droit international public* (Geneva, Librairie de l'université, 1953), vol. I, p. 397.

[299] Rousseau, *op. cit.* (footnote 294, *in fine* above), pp. 499-500.

[300] *Ibid.*, p. 501, citing Smith, *op. cit.* (foonote 44 above), pp. 151-152.

[301] Sauser-Hall, *loc. cit.* (footnote 204 above), p. 517.

[302] *Ibid.*, p. 565; see also *Yearbook . . . 1974*, vol. II (Part Two), pp. 135-136, document A/5409, para. 627 and footnote 507.

[303] H. W. Briggs, *The Law of Nations*, 2nd ed. (New York, Appleton-Century-Crofts, 1952), p. 274.

[304] Hyde, *op. cit.* (footnote 85 above), p. 565.

[305] Andrassy, "Les relations internationales de voisinage", *loc. cit.* (footnote 215 above), p. 120.

[306] Hyde, *op. cit.*, p. 571.

[307] Bourne, *loc. cit.* (footnote 114 above), pp. 206-207, citing the following earlier authors as holding opinions similar to Hyde's: Klüber (1821), Heffter (1888), Bousek (1913), and others cited in Berber, *op. cit.* (footnote 77 above), pp. 14-19, and in the ECE study

162. Indeed, most commentators approach the subject of the utilization of a watercourse common to two or more States in terms of the concept of "qualified", or "limited territorial sovereignty". For example, Lipper states that this concept, while not extending "as far as the principle of a community in the waters, nevertheless restricts the principle of absolute sovereignty to the extent necessary to ensure each riparian a reasonable use of the waters".[308] After reviewing "governmental pronouncements", adjudications, treaties, conventions and declarations, and the writings of commentators and publicists, Lipper concludes:

> The concurrence among lawyers and legal scholars that international rivers cannot be the subject of exclusive appropriation by one State is persuasive, when considered with the overwhelming evidence discussed previously, that the limited sovereignty principle is a rule of international law.[309]

163. Andrassy has written that "the most acceptable rule is the rule of equitable sharing applied in certain decided cases".[310] He concludes, in effect, that international law requires a "limited sovereignty" approach to questions relating to the use of international watercourses, because of the requirement that harm not be caused to other States:

> A scrutiny of the rules of the law of neighbourly relations in connection with waters reveals, first of all, a well-established rule prohibiting any change in the natural conditions or in the existing régime if the change is harmful to the neighbour. A State cannot by means of works on its territory alter the direction of a watercourse, completely or partly divert it, or change its point of entry into neighbouring territory.[311]

This assertion follows from Andrassy's more general conclusion that "there is a general obligation not to perform or allow any act that will cause harm to the neighbouring State".[312]

(vi) *Decisions of municipal courts*

164. In his third report, Mr. Schwebel noted that "early formulations of the doctrine [of equitable utilization] can be found in national practice, particularly in connection with adjudications within federal States".[313] Courts of these States, in resolving competing claims of their quasi-sovereign political subdivisions concerning the use of waters forming or crossing their boundaries, often apply what they regard as principles of international law. Such decisions may thus be considered relevant to the present inquiry as constituting evidence of international law under either paragraph 1 (*c*) or paragraph 1 (*d*) of Article 38 of the Statute of the ICJ.[314] Several representative decisions of national courts will be noted briefly to illustrate the application by these courts of the doctrine of equitable utilization.

165. In 1907, the United States Supreme Court held, in *Kansas* v. *Colorado*, that the rights of the two States were to be accommodated "upon the basis of equality of rights as to secure as far as possible to Colorado the benefits of irrigation without depriving Kansas of the like beneficial effects of a flowing stream".[315] Illustrating the flexibility of the doctrine, the same Court decided in 1936 that, since the State of Washington was found to have no need for the waters of the Walla Walla River, it was not necessarily inconsistent with the principle of equality of rights for the State of Oregon to divert all of the flow of that river during times of water scarcity.[316]

166. In the well-known *Donauversinkung* case (1927)[317] in Germany, involving a dispute between, on the one hand, the States of Württemberg and Prussia, and on the other, the State of Baden, over diversions by the latter, the upper riparian, the Supreme Court of Germany stated the following general principles of law:

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(see footnote 77 above) (E/ECE/136-E/ECE/EP/98/Rev.1 and Corr.1), paras. 39 *et seq.*

Ian Brownlie, however (in *Principles of Public International Law*, 3rd ed. (Oxford, Clarendon Press, 1979)), takes an unusually cautious approach for a modern writer:

> "In this field the lawyer has to avoid the temptation to choose rough principles of equity governing relations between riparians, reflected in some treaty provisions and the work of jurists and learned bodies, as rules of customary law." (P. 271.)

He does admit, however, that:

> "On some sets of facts . . . unilateral action, creating conditions which may cause specific harm, and not just loss of amenity, to other riparian States, may create international responsibility on the principles laid down in the *Trail Smelter* arbitration and the decision in the *Corfu Channel* case (Merits)." (*Ibid.*)

Brownlie acknowledges that, in the *Lake Lanoux* case, the arbitral tribunal recognized the last-mentioned principle. He then notes that the International Law Association adopted the Helsinki Rules "as a statement of existing rules of international law" (*ibid.*, p. 273), and, to conclude his treatment of the subject, he quotes the first two chapters of those Rules, but makes no attempt to reconcile his position with the equitable utilization approach adopted in the Rules. One is thus left in some doubt as to Brownlie's view of the present situation.

[308] *Loc. cit.* (footnote 76 above), p. 18. Lipper discusses the theory of limited territorial sovereignty on pp. 23-38. See also Andrassy, "L'utilisation des eaux des bassins fluviaux internationaux", *loc. cit.* (footnote 76 above), pp. 26 and 37; and Bourne, *loc. cit.* (footnote 114 above), p. 189.

[309] *Loc. cit.*, p. 38.

[310] "Les relations internationales de voisinage", *loc. cit.* (footnote 215 above), p. 120; Andrassy cites, *inter alia*, *Kansas* v. *Colorado* (1907) (see footnote 315 below).

[311] "Les relations internationales de voisinage", *loc. cit.*, p. 117. Andrassy also states that, "since nature draws no distinction according to the designations used by man for watercourses, all watercourses which are in connexity should be regarded as a unit" (*ibid.*, pp. 115-116).

[312] *Ibid.*, p. 110. Andrassy continues: "Hence, the first duty is to refrain. . . . Still more, in some cases States are obliged themselves to undertake certain acts to prevent harmful effects on the neighbouring State." (*Ibid.*)

[313] Document A/CN.4/348 (see footnote 14 above), para. 44.

[314] Paragraph 1 (*c*) of Article 38 of the Statute refers to "the general principles of law recognized by civilized nations", and paragraph 1 (*d*) refers, *inter alia*, to "judicial decisions . . . of the various nations". See generally H. Lauterpacht, "Decisions of municipal courts as a source of international law", *The British Year Book of International Law, 1929* (London), vol. 10, p. 65.

[315] *Kansas* v. *Colorado* (1907), *United States Reports*, vol. 206 (1921), p. 100.

[316] *Washington* v. *Oregon* (1936) (*ibid.*, vol. 297 (1936), p. 517). See also *Kansas* v. *Colorado* (1902) (*ibid.*, vol. 185 (1910), p. 125); *State of North Dakota* v. *State of Minnesota* (1923) (*ibid.*, vol. 263 (1924), p. 365); *Connecticut* v. *Massachusetts* (1931) (*ibid.*, vol. 282 (1931), p. 660); *New Jersey* v. *New York* (1931) (*ibid.*, vol. 283 (1931), p. 336); *Nebraska* v. *Wyoming* (1945) (*ibid.*, vol. 325 (1946), p. 589); and the other cases cited in Mr. Schwebel's third report, document A/CN.4/348 (see footnote 14 above), footnote 92.

[317] *Württemberg and Prussia* v. *Baden* (1927) (*Entscheidungen des Reichsgerichts in Zivilsachen* (Berlin), vol. 116 (1927), appendix, p. 18; *Annual Digest of Public International Law Cases, 1927-1928* (London), vol. 4 (1931), p. 128, case No. 86).

. . . The exercise of sovereign rights by every State in regard to international rivers traversing its territory is limited by the duty not to injure the interests of other members of the international community. . . . No State may substantially impair the natural use of the flow of such a river by its neighbour. . . .

The application of this principle is governed by the circumstances of each particular case. The interests of the States in question must be weighed in an equitable manner against one another. One must consider not only the absolute injury caused to the neighbouring State, but also the relation of the advantage gained by one to the injury caused to the other.[318]

167. In 1939, the Italian Court of Cassation rendered a decision in a dispute between a French company and an Italian company over the use of the River Roya.[319] The plaintiff had sued in France to recover for injuries allegedly suffered as a result of the defendant's construction of a power plant on the Italian portion of the river. The plaintiff recovered a judgment but the Italian courts refused to enforce it, relying on a treaty between France and Italy regulating the use of the river. Of present interest is the following statement made by the Italian Court of Cassation:

. . . International law recognizes the right on the part of every riparian State to enjoy, as a participant of a kind of partnership created by the river, all the advantages deriving from it for the purpose of securing the welfare and the economic and civil progress of the nation. . . . However, although a State, in the exercise of its right of sovereignty, may subject public rivers to whatever régime it deems best, it cannot disregard the international duty, derived from that principle, not to impede or to destroy, as a result of this régime, the opportunity of the other States to avail themselves of the flow of water for their own national needs.[320]

168. Finally, while not strictly speaking a judicial decision, the report of the Indus Commission (Rau Commission), established to hear the dispute between the Indian Provinces of Sind and Punjab over the latter's contemplated diversions of the Indus River, is relevant and instructive. The Commission obtained the agreement of the parties to a number of principles in order to achieve an agreed settlement of the dispute. Among those principles, which were distilled from an extensive review of the authorities, is the following:

(3) If there is no . . . agreement, the rights of the several Provinces and States must be determined by applying the rule of "equitable apportionment", each unit getting a fair share of the water of the common river ([citing] American decisions).[321]

### (vii) *Summary and conclusions*

169. It is clear from the foregoing survey of all the available evidence of the general practice of States, accepted as law, in respect of the non-navigational uses of international watercourses—evidence including treaty provisions, positions taken by States in specific disputes, decisions of international courts and tribunals, statements of law prepared by intergovernmental and non-governmental bodies, the views of learned commentators, and decisions of municipal courts in cognate cases—that there is overwhelming support for the doctrine of equitable utilization as a general, guiding principle of law for the determination of the rights of States in respect of the non-navigational uses of international watercourses. The doctrine is inherently general and flexible, making it suitable for adaptation and application to a wide variety of situations. Indeed, the applicability of the doctrine would appear to be limited only by potential political obstacles to the acceptance of equitable apportionment, rather than by legal considerations *per se*.[322]

170. Yet the very flexibility of the doctrine, which is its primary virtue, may be a source of disquietude to some, who may view it as affording insufficient protection, or as not lending itself to the formulation of precise rules. It is clear from the material reviewed above, however, that there does exist a "hard core" of norms in this area that are universally accepted, and that there do exist definite criteria to which States can refer in determining whether a particular allocation of uses and benefits is equitable or reasonable. As Lipper has noted:

It seems clear that the problems of each river are normally unique and general rules are valid only in so far as they are feasible in the particular situation. . . . On the other hand, the fundamental bases for water distribution need not be considered on an *ad hoc* basis.[323]

The following paragraphs contain a discussion of (*a*) the legal underpinnings of the doctrine, and (*b*) its "legal" nature. The Special Rapporteur will then conclude this portion of the report by giving an indication of his tentative views on how the Commission should deal, for the time being at least, with the matter of the determination of equitable use.

171. The bedrock upon which the doctrine of equitable utilization is founded is the fundamental prin-

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[318] *Entscheidungen* . . ., pp. 31-32; *Annual Digest* . . ., p. 131.

[319] *Société énergie électrique du littoral méditerranéen* v. *Compagnia imprese elettriche liguri* (1939) (*Il Foro Italiano* (Rome), vol. 64 (1939), part I, p. 1036; *Annual Digest and Reports of Public International Law Cases, 1938-1940* (London), vol. 9 (1942), p. 120, case No. 47).

[320] *Il Foro* . . ., p. 1046; *Annual Digest* . . ., p. 121. See also *Zürich* v. *Aargau*, judgment of 12 January 1878 of the Federal Court of Switzerland, affirming the equal rights of the cantons of Zürich and Aargau to the use of the waters in question (*Recueil officiel des arrêts du Tribunal fédéral suisse, 1878*, vol. IV, p. 34, at pp. 37 and 47); and the ECE study (see footnote 77 above) (E/ECE/136-E/ECE/EP/98/Rev.1 and Corr.1), para. 61.

[321] *Report of the Indus Commission and Printed Proceedings* (Simla, 1941; reprinted Lahore, 1950), pp. 10-11. The full set of principles is quoted in Whiteman, *op. cit.* (footnote 78 (*a*) above), pp. 943-944.

[322] This statement assumes, of course, the absence of an applicable agreement.

It may be inquired whether the practice in a few cases of giving at least a degree of preference to existing uses is an exception to the doctrine of equitable utilization. For example, the United States Supreme Court has treated the doctrine of "prior appropriation" as a kind of regional custom in cases involving states located in the arid western part of the country, where the doctrine is followed as a matter of the internal law of the states concerned (see, for example, *Wyoming* v. *Colorado* (1922) (footnote 204 above), and *Nebraska* v. *Wyoming* (1945) (footnote 316 above)). In the former case, because the States involved applied the prior appropriation doctrine internally, the Court "deemed it fair to apply the same principle in an interstate controversy between them" (Lipper, *loc. cit.* (footnote 76 above), p. 54). Cf. the fourth principle formulated by the Rau Commission in the context of the dispute between the Indian Provinces of Sind and Punjab:

"In the general interests of the entire community inhabiting dry, arid territories, priority may usually have to be given to an earlier irrigation project over a later one; . . ." (*Report of the Indus Commission* . . ., *op. cit.* (footnote 321 above), pp. 10-11.)

It is submitted that, where there is a pre-existing use by one State, this is properly seen in the international context as one factor to be taken into consideration in balancing the needs and interests of the States concerned in the process of arriving at an equitable allocation of the uses and benefits of the international watercourse. See generally Lipper, *loc. cit.*, pp. 49-62.

[323] *Loc. cit.*, p. 42.

ciple represented by the maxim *sic utere tuo ut alienum non laedas*. As seen above, this maxim is a generally accepted principle of law governing the relations between States.[324] In the context of the use of a watercourse which separates or traverses two or more States, this means that one of those States may not use or permit the use of the watercourse in such a way as to cause injury to the other(s). Thus the States are referred to as having "equal" or, perhaps more accurately, "correlative" rights in respect of use of the watercourse,[325] a concept which finds expression in the doctrine of limited territorial sovereignty: a State has the sovereign right to make whatever use it wishes of waters within its territory, but that right is limited by the duty not to cause injury to other States.

172. Crucial to an understanding of the latter statement, and indeed of the doctrine of equitable utilization in general, is an appreciation of the meaning of the term "injury" in this context: the term is used in its legal, as opposed to its factual sense. Thus an allocation of the uses and benefits of the waters of an international watercourse between two or more States may entail a certain degree of harm—in the factual sense of unmet needs[326]—to one, or usually both States, and still be "equitable". This follows inevitably from the nature of the typical situation giving rise to a question concerning the rights of States in respect of international watercourses, namely a state of affairs in which there is insufficient water to satisfy the needs of the States involved, resulting in a conflict between those needs. As Mr. Schwebel explained in his third report:

> . . . Each system State enjoys [the right to make use of the waters of an international watercourse system within its own territory], but, where the quantity or quality of the water is such that all the reasonable and beneficial uses of all the system States cannot be realized to their full extent, what is termed a "conflict of uses" results. International practice then recognizes that some adjustments or accommodations are required in order to preserve each system State's equality of right. Such adjustments or accommodations are to be calculated on the basis of equity, failing specific agreement with respect to each system State's "share" in the uses of the waters. . . .[327]

173. Thus, under the principle of equality of right, no State whose territory is bordered or traversed by an international watercourse has an inherently superior claim to the use of the waters of that watercourse. Where there is a conflict among the water needs of the States making beneficial use of those waters, that conflict is to be resolved on the basis of equity, taking all relevant factors into account.[328] Assuming two States are involved, an accommodation of their conflicting needs will, by definition, result in the full needs of one, or usually both States, not being met. The resulting non-fulfilment of needs may well entail harm in the factual sense to one or both States; but striking a reasonable balance between the interests or needs of the States involved, according to the doctrine of equitable apportionment, minimizes the factual harm to each to the extent possible, and produces a situation in which neither State suffers legally recognizable injury, for the right of one State ends where the other's right begins (which is simply another way of saying that the rights of the States involved are correlative rather than absolute). Each State may be said to have a right to an equitable share of the uses and benefits of the waters. In this way, the doctrine of equitable utilization is consistent with the *sic utere tuo* principle.

174. The line of demarcation separating or accommodating the rights of the States concerned is to be drawn so as to achieve a reasonable or equitable allocation of the uses and benefits of the waters. As has been seen, resolution of the conflicting water needs of States on the basis of equity is not new, and indeed there is increasing evidence of the use of the concept of equity in resolving disputes between States in other areas.[329] Its

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[324] Among the many authorities reviewed above supporting this proposition, see, for example: the *Corfu Channel* case (paras. 109-110 above); the *Lake Lanoux* arbitration (para. 121 above); the *Trail Smelter* arbitration (para. 127 above); Principle 21 of the Stockholm Declaration (para. 138 above); the Helsinki Rules, commentary (*a*) to article X (*op. cit.* (footnote 79 above), pp. 497-499); Lester, "Pollution", *loc. cit.* (footnote 178 above), p. 101; Oppenheim-Lauterpacht, *op. cit.* (footnote 294, *in fine* above), pp. 345-347; and the 1949 Memorandum by the Secretary-General (footnote 188 above), p. 34. See also the Charter of Economic Rights and Duties of States, adopted by the General Assembly in resolution 3281 (XXIX) of 12 December 1974, which provides:

> "*Article 3*
>
> "In the exploitation of natural resources shared by two or more countries, each State must co-operate on the basis of a system of information and prior consultations in order to achieve optimum use of such resources without causing damage to the legitimate interest of others."

For voluminous additional support for the inclusion of the *sic utere tuo* principle in the corpus of international law, see Mr. Schwebel's third report, document A/CN.4/348 (see footnote 14 above), paras. 113-129.

[325] As Lipper states, "the corner-stone of equitable utilization is equality of right". He goes on to explain that this concept "means in the first place that all States riparian to an international waterway stand on a par with each other in so far as their right to utilization of the water is concerned" (*loc. cit.* (footnote 76 above), pp. 44-45, and the authorities cited and discussed).

[326] Lipper's definition of the term "needs" will suffice for present purposes: "The term 'needs' embraces the economic and social requirements of the riparian States which cause them to be, to a greater or lesser degree, dependent on the river waters." (*Loc. cit.*, p. 44, and the authorities cited.)

[327] Document A/CN.4/348 (see footnote 14 above), para. 41, citing the resolution adopted by the Institute of International Law at its Salzburg session in 1961 (see para. 153 above). To the same effect, see, for example, the third principle formulated by the Rau Commission (para. 168 above).

[328] The process and goals of resolving the conflicting needs of two or more States on the basis of the principle of equitable utilization has been described by Lipper as follows:

> "Equitable utilization is concerned with:
>
> "(1) examination of the economic and social needs of the co-riparian States by an objective consideration of various factors and conflicting elements . . . relevant to their use of the waters;
>
> "(2) distribution of the waters among the co-riparians in such a manner as to satisfy their needs to the greatest extent possible;
>
> "(3) accomplishment of the distribution of the waters by achieving the maximum benefit for each co-riparian consistent with the minimum of detriment to each." (*Loc. cit* (footnote 76 above), p. 45.)

[329] The delimitation of maritime boundaries is another such area, and is in some ways analagous to the apportionment of the uses and benefits of an international watercourse: whereas, unlike in the allocation of water, the fixing of a boundary is involved, both areas are fundamentally concerned with the allocation of resources as between two or more States. The use of equity in the area of maritime boundary delimitation derives from the Truman Proclamation on the continental shelf of 28 September 1945 (*United States Statutes at Large, 1945*, vol. 59, part 2, p. 884, proclamation No. 2667). As Mark B. Feldman has noted ("The Tunisia-Libya continental shelf case: Geographic

use in delimiting the rights of States in respect of an international watercourse should not, therefore, be viewed as being novel or somehow alegal.[330]

175. Finally, a few words should be said about the application of the principle of equitable utilization—i.e. about the manner in which an equitable allocation of the uses and benefits of the waters of an international watercourse is to be determined. This subject has been covered in great detail in reports of previous special rapporteurs,[331] and it is not proposed to repeat such treatment here. In the most basic terms, the task of arriving at an equitable allocation involves striking a balance between the needs of the States concerned in such a way as to maximize the benefit, and minimize the detriment, to each. According to the great weight of authority, the process of striking such a balance is to be approached by taking into account all relevant considerations. As stated in the arbitral award rendered in the *Lake Lanoux* case:

> . . . Consideration must be given to all interests, whatever their nature, which may be affected by the works undertaken, even if they do not amount to a right. . . .
>
> . . . The Tribunal considers that the upper riparian State, under the rules of good faith, has an obligation to take into consideration the various interests concerned, to seek to give them every satisfaction compatible with the pursuit of its own interests and to show that it has, in this matter, a real desire to reconcile the interests of the other riparian with its own.[332]

176. Various bodies have drawn up indicative lists of the interests, as well as other factors, to be considered in arriving at an equitable allocation. Prominent among these bodies are the Asian-African Legal Consultative Committee and the International Law Association.[333] Similar lists are contained in article 8 as submitted by the previous Special Rapporteur and referred to the Drafting Committee in 1984 (see para. 28 above) and in article 7 as submitted by Mr. Schwebel in his third report.[334] However, all these lists are based on the recognition that:

> . . . no automatically applicable fixed sets of factors, or a given formula for ranking or weighing the factors, can be devised that would fit all situations.[335]

177. Thus the implementation of the principle of equitable utilization depends ultimately upon the good faith and co-operation of the States concerned. Ideally, such co-operation in good faith should take place through institutional mechanisms established by the States concerned for the purpose, *inter alia*, of making determinations of equitable allocation. Such a determination should thus not await a state of affairs which gives rise to a dispute, but should be made in advance, as part of the comprehensive management of the entire watercourse system. The management of an international watercourse through institutional machinery has a number of advantages, among which are that scientific and technical experts can be involved at the planning stages, and that use allocations can be made before expectations become deeply rooted, positions are changed, and fiscal resources are committed.

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justice or judicial compromise?", *American Journal of International Law* (Washington, D.C.), vol. 77 (1983), p. 228):

> ". . . [the Truman Proclamation's] criterion of equitable principles was adopted by the ICJ in the *North Sea* cases and by the court of arbitration in the *Anglo-French Continental Shelf* case. Moreover, the concept was carried forward in the reference to 'special circumstances' in article 6 of the Geneva Convention on the Continental Shelf."

The author refers to the *North Sea Continental Shelf* cases (Federal Republic of Germany/Denmark; Federal Republic of Germany/Netherlands), Judgment of 20 February 1969, *I.C.J. Reports 1969*, pp. 32-33, para. 47, p. 47, para. 86, and p. 53, para. 101 (C); the decision of 30 June 1977 by the Arbitral Tribunal in the *Case concerning the delimitation of the continental shelf between the United Kingdom of Great Britain and Northern Ireland, and the French Republic*, paras. 97 and 195 (United Nations, *Reports of International Arbitral Awards*, vol. XVIII (Sales No. E/F.80.V.7), pp. 57 and 92-93); and the 1958 Geneva Convention on the Continental Shelf (United Nations, *Treaty Series*, vol. 499, p. 311).

In its Judgment of 24 February 1982 in the *Continental Shelf (Tunisia/Libyan Arab Jamahiriya)* case, *I.C.J. Reports 1982*, p. 18, the ICJ stated:

> "the delimitation is to be effected in accordance with equitable principles, and taking account of all relevant circumstances;" (P. 92, para. 133, subpara. A (1).)

The Court made it clear that the result of the delimitation must be equitable:

> ". . . The result of the application of equitable principles must be equitable. . . . It is . . . the result which is predominant; the principles are subordinate to the goal. . . ." (P. 59, para. 70.)

See also the Judgment of 12 October 1984 by a Chamber of the Court in *Delimitation of the Maritime Boundary in the Gulf of Maine Area* (Canada/United States of America), *I.C.J. Reports 1984*, p. 246, in which it is stated:

> "The fundamental rule of general international law governing maritime delimitations . . . requires that the delimitation line be established while applying equitable criteria to that operation, with a view to reaching an equitable result. . . ." (P. 339, para. 230.)

See generally J. Schneider, "The Gulf of Maine case: The nature of an equitable result", *American Journal of International Law* (Washington, D.C.), vol. 79 (1985), p. 539.

The 1982 United Nations Convention on the Law of the Sea (*Official Records of the Third United Nations Conference on the Law of the Sea*, vol. XVII (United Nations publication, Sales No. E.84.V.3), p. 151, document A/CONF.62/122) also calls for the equitable delimitation of maritime boundaries in article 74, on the delimitation of the exclusive economic zone, and article 83, on the delimitation of the continental shelf. The relevant portions of paragraph 1 of those articles are identical and provide as follows:

> "1. The delimitation . . . shall be effected by agreement on the basis of international law, as referred to in Article 38 of the Statute of the International Court of Justice, in order to achieve an equitable solution."

Finally, the 1983 Vienna Convention on Succession of States in Respect of State Property, Archives and Debts (A/CONF.117/14) also makes use of equitable principles, for example in paragraph 2 of articles 28 and 31.

[330] In addition to the examples provided in the previous footnote of the use of equitable principles as a legal doctrine, it is perhaps worth recalling the analysis of Judge Hudson in his concurring opinion in the *Diversion of Water from the Meuse* case, concerning the derivation of the PCIJ's equitable powers from "general principles of law recognized by civilized nations" (*P.C.I.J., Series A/B, No. 70*, p. 76).

[331] See especially the discussion by Mr. Schwebel in his third report of the *Lake Lanoux* arbitration, the proposals submitted to the Asian-African Legal Consultative Committee, the resolutions of the International Law Association and the implications of international agreements (document A/CN.4/348 (see footnote 14 above), paras. 92-110).

[332] United Nations, *Reports of International Arbitral Awards*, vol. XII . . ., p. 315, para. 22 (second and third subparagraphs) of the award; English trans. in *Yearbook . . . 1974*, vol. II (Part Two), p. 198, document A/5409, para. 1068.

[333] The lists formulated by these two bodies are set out in Mr. Schwebel's third report, document A/CN.4/348 (see footnote 14 above), paras. 94-96.

[334] *Ibid.*, para. 106.

[335] *Ibid.*, para. 101.

. . . In the past, such machinery has been lacking in most international watercourse systems, and the defensive, one might say "adversary", context within which use conflicts were taken up all too often gave rise to acrid and protracted disputes.[336]

178. Given the intensified demands being made upon freshwater resources throughout the world in connection with the development of States, the potential for disputes over increasingly scarce supplies of water is itself only too likely to grow. In the view of the Special Rapporteur, it would be most unfortunate if the Commission did not take advantage of the opportunity presented by its work on international watercourses to provide guidance to States by recommending that they establish institutional mechanisms with a view, *inter alia*, to avoiding such disputes over the allocation of international watercourses. Nevertheless, the Commission's immediate, and primary, task is the progressive development and codification of rules of law governing the non-navigational uses of international watercourses. In this regard, it is the tentative view of the Special Rapporteur—subject very much, of course, to the wishes of the Commission—that, while an explication of the types of factors to be taken into account in arriving at an equitable allocation should be offered in connection with a statement of the principle of equitable utilization (probably in the commentary to an article on that subject), the question whether an article containing a list of such factors should have a place in the draft could be postponed for future consideration. Such a course would allow the Commission to concentrate its attention at present on the formulation of the core of rules of general international law concerning the topic, while providing needed guidance on the determination of an equitable allocation.

### (c) *The duty to refrain from causing "appreciable harm"*

179. Article 9 as submitted by the previous Special Rapporteur in his second report and referred to the Drafting Committee in 1984 (see para. 29 above) provides:

A watercourse State shall refrain from and prevent (within its jurisdiction) uses or activities with regard to an international watercourse that may cause appreciable harm to the rights or interests of other watercourse States, unless otherwise provided for in a watercourse agreement or other agreement or arrangement.

This article may be seen as an expression, in the context of international watercourses, of the principle *sic utere tuo ut alienum non laedas*,[337] which in turn forms the essential foundation for the doctrine of equitable utilization, as discussed earlier. The broad support for the *sic utere tuo* principle and its general acceptance as a norm of international law have already been noted. In the view of the Special Rapporteur, the major task of the Commission in relation to its consideration of article 9 is to determine how the principle is best expressed in the context of the non-navigational uses of international watercourses.

180. It has already been explained that an equitable allocation of the uses and benefits of an international watercourse may well entail the non-fulfilment of the full needs of all the States concerned. Thus an equitable use by one State could cause "appreciable" or "significant" harm to another State using the same watercourse, yet not entail a legal "injury" or be otherwise wrongful. For this reason, the Special Rapporteur believes that the above text of article 9 should be redrafted in such a way as to bring it into conformity with the article or articles setting forth the principle of equitable utilization.

181. There are various possible ways in which this could be done. Regardless of the method chosen, the object should be to make clear that what is prohibited is conduct by which one State exceeds its equitable share, or deprives another State of its equitable share of the uses and benefits of the watercourse. To put it another way, the focus should be on the duty not to cause legal injury (by making a non-equitable use) rather than on the duty not to cause factual harm. This is not to deny by any means that there is a general duty to refrain from causing harm, in the factual sense, to another State; the point is simply that, in the context of watercourses, suffering even significant harm may not infringe the rights of the harmed State if the harm is within the limits allowed by an equitable allocation.

182. One way of achieving the goal described above would be simply to replace the words "appreciable harm to the rights or interests of" in the text of article 9 cited above by "injury to". The article would then read:

> "A watercourse State shall refrain from and prevent (within its jurisdiction) uses or activities with regard to an international watercourse that may cause injury to other watercourse States, unless otherwise provided for in a watercourse agreement or other agreement or arrangement."

This approach has the advantage of not requiring redrafting of the entire article, but has the disadvantage of not making clear, in express terms, how the article fits in with the principle of equitable utilization. While this could be done in the commentary to the article, the Special Rapporteur believes that the better course would be to make the point clearly in the article itself: the articles should, where possible, speak for themselves, so that the set of articles clearly forms an integrated whole.

183. A second way of bringing article 9 into line with the principle of equitable utilization would be to replace the reference to causing appreciable harm by a reference to a State exceeding its equitable share, or depriving another State of its equitable share. Such a formulation might read:

> "A watercourse State shall refrain from and prevent (within its jurisdiction) uses or activities with regard to an international watercourse that may cause that State to exceed its equitable share or to deprive another watercourse State of its equitable share of the uses and benefits of the watercourse, unless otherwise provided for in a watercourse agreement or other agreement or arrangement."

This wording is, in the Special Rapporteur's estimation, preferable to the first alternative set out above, because it focuses squarely on the kind of conduct which, in the field of the law of international watercourses, gives rise to legally recognizable injury. It also embodies the con-

[336] *Ibid.*, para. 102.

[337] *Ibid.*, para. 113.

cept that a State has a right to its equitable share, but no more.

184. A third method of formulating article 9 would be to make express reference to the duty to refrain from causing harm, but to make it clear that, even if a State's utilization of a watercourse does cause harm, the duty is not violated so long as the utilization is an equitable one *vis-à-vis* the other State(s). The article could thus be formulated as follows:

> "In its use of an international watercourse, a watercourse State shall not cause appreciable harm to another watercourse State, except as may be allowable within the context of the first State's equitable utilization of that international watercourse."

The particular advantage of this formulation is that it embodies in express terms the duty not to cause harm, but makes clear that this duty is subject to the rights a State may have by virtue of its equitable utilization of the international watercourse.[338] This third alternative thus clearly reconciles the right of equitable utilization with the duty not to cause harm: a State's right to use a watercourse is limited by a duty not to cause harm to other States, but this duty is not absolute; some harm may have to be tolerated (i.e. is not wrongful), provided it is caused by conduct falling within the ambit of a use by one State that is "equitable" *vis-à-vis* the other State(s) concerned. Because it is more precise than the other two alternative formulations, the Special Rapporteur would submit that an article drafted along the general lines of this third alternative would best achieve the goals of a provision on this subject, viz. to set forth the "no harm" rule while making it consistent with the principle of equitable utilization.

185. As noted earlier in connection with the principle of equitable utilization, there is no mechanical formula for determining whether a particular use by one State is "equitable" *vis-à-vis* another State and thus whether, if it causes harm to that other State, the use is wrongful. Such a determination would obviously be simplified if use of the watercourse were governed by an agreement or arrangement between the States concerned that applied the principle of equitable utilization to the watercourse; if use of the watercourse were governed by an authoritatively established régime of equitable utilization; or if there were an institutional mechanism within which such determinations could be made.

186. In the absence of such agreed means for facilitating a determination, however, the situation would be governed by the system of procedural rules (and the consequences of their non-observance) envisaged in chapter III of the outline submitted by the previous Special Rapporteur. (Some of these rules are contained in the articles submitted for the Commission's consideration in chapter III of the present report.) Thus conduct by which a State would exceed its equitable share, or deprive another State of its equitable share, would in principle be avoided by the rules of international law concerning notification and consultation in relation to new projects, programmes or uses that might cause appreciable harm to other States. If such notice is not provided, and a State claims that it may suffer or has suffered appreciable harm as a result of the new activities, that State is entitled to receive information from the State undertaking the new activities concerning the activities, their consequences and any proposed remedial measures.[339] The (potentially) affected State is also entitled to compensation for any harm suffered as a result of being deprived of its equitable share.

187. The general and flexible nature of the principle of equitable utilization makes procedural rules such as those just described crucial, if possibly serious and protracted disputes over watercourse use are to be avoided. It is therefore not surprising that the myriad situations that have arisen throughout the world involving actual or potential use conflicts have given rise over the years to a large body of State practice supporting such procedural requirements. These requirements are the subject of chapter III of the present report.

[338] See paragraph 1 of article 8 as submitted by Mr. Schwebel in his third report, *ibid.*, para. 156.

[339] See section 2, paragraph 2, of the "schematic outline" submitted by Robert Q. Quentin-Baxter in his third report on international liability for injurious consequences arising out of acts not prohibited by international law, *Yearbook . . . 1982*, vol. II (Part One), pp. 62-63, document A/CN.4/360, para. 53.

## ANNEXES[a]

### Treaty provisions concerning equitable utilization

ABBREVIATIONS

| | |
|---|---|
| *BFSP* | *British and Foreign State Papers* |
| *Legislative Texts* | United Nations Legislative Series, *Legislative Texts and Treaty Provisions concerning the Utilization of International Rivers for Other Purposes than Navigation* (Sales No. 63.V.4). |
| Document A/5409 | "Legal problems relating to the utilization and use of international rivers", report by the Secretary-General, reproduced in *Yearbook . . . 1974*, vol. II (Part Two), p. 33. |
| Document A/CN.4/274 | "Legal problems relating to the non-navigational uses of international watercourses", supplementary report by the Secretary-General, reproduced in *Yearbook . . . 1974*, vol. II (Part Two), p. 265. |

NOTE. The instruments are listed in chronological order; to conserve space, the titles of many of them have been abbreviated.

[a] These annexes, placed for convenience at the end of chapter II, relate to paragraphs 75-99, which deal, in this chapter, with equitable utilization and participation.

## ANNEX I

### Treaty provisions concerning contiguous watercourses

The following is an illustrative list of treaty provisions relating to contiguous watercourses which recognize the equality of the rights of the riparian States in the use of the waters in question.[a]

#### AFRICA

Agreement of 2 and 9 February 1888 between Great Britain and France with regard to the Somali Coast (British and French Protectorate): common use of wells on boundary (*BFSP, 1890-1891*, vol. 83, p. 672; *Legislative Texts*, p. 118, No. 16; document A/5409, para. 132);

Convention of 27 June 1900 between France and Spain for the demarcation of the French and Spanish possessions on the Sahara Coast and the Gulf of Guinea Coast: *art. V* (control and use of the waters of the Muni and Outamboni Rivers to be the subject of arrangements to be agreed between the two Governments) (*BFSP, 1899-1900*, vol. 92, p. 1014; *Legislative Texts*, p. 117, No. 15; document A/5409, para. 139);

Exchange of notes of 19 October 1906 constituting an Agreement between the United Kingdom and France relating to the frontier between the British and French possessions from the Gulf of Guinea to the Niger: respect for established rights (*BFSP, 1905-1906*, vol. 99, p. 217; *Legislative Texts*, p. 122, No. 22; document A/5409, para. 125). See the similar agreements between the United Kingdom and France defining the frontiers: (i) between the British and French possessions to the north and east of Sierra Leone (22 January and 4 February 1895) (*BFSP, 1894-1895*, vol. 87, p. 17; *Legislative Texts*, p. 119, No. 18; document A/5409, para. 130); (ii) between French Equatorial Africa and the Anglo-Egyptian Sudan (21 January 1924) (*BFSP, 1924*, vol. 119, p. 354; *Legislative Texts*, p. 125, No. 25; document A/5409, para. 127); (iii) between the British and French Mandated Territories in Togoland (21 October 1929, and 30 January and 19 August 1930) (G. F. de Martens, ed., *Nouveau Recueil général de traités*, 3rd series, vol. XXV, p. 452; *Legislative Texts*, p. 127, No. 26; document A/5409, para. 126);

Agreement of 22 November 1934 between Belgium and the United Kingdom regarding water rights on the boundary between Tanganyika and Ruanda-Urundi: *art. 4* (right to divert up to half the volume of water); *art. 3* (prohibition of mining or industrial operations which may pollute the waters of contiguous or successive rivers or any tributary thereof) (League of Nations, *Treaty Series*, vol. CXC, p. 103; *Legislative Texts*, p. 97, No. 4; document A/5409, paras. 87 (*a*) and 88 (*b*));

Exchange of notes of 11 May 1936 and 28 December 1937 constituting an Agreement between the United Kingdom and Portugal regarding the boundary between Tanganyika Territory and Mozambique: *note I, para. 5* ("the inhabitants of both banks shall have the right over the whole breadth of the river to draw water, to fish and to remove saliferous sand for the purpose of extracting salt therefrom") (League of Nations, *Treaty Series*, vol. CLXXXV, p. 205; *Legislative Texts*, p. 136, No. 30; document A/5409, para. 148);

Convention of 26 July 1963 between Guinea, Mali, Mauritania and Senegal relating to the general development of the Senegal River basin:* *art. 8* (development programmes affecting a riparian State must be approved by the Inter-State Committee established by article 1); *art. 13* (the Senegal River, including its tributaries, is declared an "international river") (*Revue juridique et politique* (Paris), vol. XIX (1965), p. 299; document A/CN.4/274, paras. 37-38);

Convention of 7 February 1964 between Guinea, Mali, Mauritania and Senegal relating to the status of the Senegal River:* *art. 3* (riparian States undertake to submit to the Inter-State Committee established by the Convention of 26 July 1963, as from their initial stage, projects whose execution is likely appreciably to alter certain features of the régime of the river); cf. *art. 2* (utilization of the river is open to each riparian State in respect of the portion lying in its territory and within its sovereignty) (*Revue juridique et politique . . .* (1965), p. 302; document A/CN.4/274, paras. 46-47);

Convention of 11 March 1972 between Mali, Mauritania and Senegal relating to the status of the Senegal River:* *art. 1* (the Senegal River, in the territories of the contracting parties, is declared an "international river"); *art. 4* (any project likely to modify the characteristics of the régime of the river, etc., must have the prior approval of the contracting parties) (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. 16);

Cf. Act of 26 October 1963 regarding navigation and economic co-operation between the States of the Niger Basin (Cameroon, Ivory Coast, Dahomey, Guinea, Upper Volta, Mali, Niger, Nigeria and Chad): *art. 2* ("utilization of the River Niger, its tributaries and sub-tributaries, is open to each riparian State in respect of the portion of the River Niger basin lying in its territory and without prejudice to its sovereign rights") (United Nations, *Treaty Series*, vol. 587, p. 9; document A/CN.4/274, para. 41).

#### AMERICA

Treaty of 11 January 1909 between Great Britain and the United States of America relating to boundary waters: *art. IV* (the parties will not permit construction or maintenance of works, etc., the effect of which is to raise the natural level of waters on the other side of the boundary, unless the action in question is approved by the Commission established by the Treaty); *art. VIII* (equal and similar rights in the use of boundary waters) (*BFSP, 1908-1909*, vol. 102, p. 137; *Legislative Texts*, p. 260, No. 79; document A/5409, paras. 161 and 165 (*a*));

Treaty of Peace, Friendship and Arbitration of 20 February 1929 between the Dominican Republic and Haiti: *art. 10* (use of contiguous and successive rivers in a just and equitable manner) (League of Nations, *Treaty Series*, vol. CV, p. 215; *Legislative Texts*, p. 225, No. 68; document A/5409, para. 275);

Convention of 20 December 1933 regarding the determination of the legal status of the frontier between Brazil and Uruguay: *art. XIX* ("each of the two States shall be entitled to dispose of half the water") (League of Nations, *Treaty Series*, vol. CLXXXI, p. 69; *Legislative Texts*, p. 174, No. 49; document A/5409, para. 268);

Preliminary Convention of 17 July 1935 between Bolivia and Peru for the exploitation of fisheries in Lake Titicaca: *art. 3* (a convention shall be concluded providing for equality of rights and economic opportunities for Bolivian and Peruvian fishermen) (*Legislative Texts*, p. 164, No. 42; document A/5409, para. 247);

Treaty of 9 April 1938 for the delimitation of the boundary between Guatemala and El Salvador: *art. II* ("each Government reserves the right to utilize half the volume of water") (League of Nations, *Treaty Series*, vol. CLXXXIX, p. 275; *Legislative Texts*, p. 227, No. 70; document A/5409, para. 279);

Treaty of 3 February 1944 between the United States of America and Mexico relating to the utilization of the waters of the Colorado and Tijuana Rivers, and of the Rio Grande (Rio Bravo) from Fort Quitman, Texas, to the Gulf of Mexico: *art. 4* (allocation of the waters of the Rio Grande, including certain tributaries, without regard to the fluvial boundary line) (United Nations, *Treaty Series*, vol. 3, p. 313; *Legislative Texts*, p. 236, No. 77; document A/5409, para. 213 (*a*));

Agreement of 30 December 1946 between Argentina and Uruguay relating to the utilization of the rapids of the Uruguay River: *art. 1* (the waters of the river "shall be utilized jointly on a basis of equality") (*Legislative Texts*, p. 160, No. 40; document A/5409, para. 258).

#### ASIA

Treaty of Friendship of 26 February 1921 between Persia and the Russian Socialist Federal Soviet Republic: *art. 3* (equal rights of usage of waters) (League of Nations, *Treaty Series*, vol. IX, p. 383; *Legislative Texts*, p. 371, No. 102; document A/5409, para. 402);

Convention of 20 February 1926 between the USSR and Persia regarding the mutual use of frontier rivers and waters: apportionment

[a] See also the instruments cited by J. Lipper, "Equitable utilization", *The Law of International Drainage Basins*, A. H. Garretson, R. D. Hayton and C. J. Olmstead, eds. (Dobbs Ferry (N.Y.), Oceana Publications, 1967), pp. 70-71, footnote 31.

* No information is available regarding the entry into force of this Convention.

of frontier waters (*Legislative Texts*, p. 371, No. 103; document A/5409, para. 325);

Convention of 8 January 1927 between the USSR and Turkey regarding the use of frontier waters: *art. 1* (the two parties shall have the use of one half of the water); *art. 11* (equal rights to use the waters); *art. 3 of Protocol* annexed to the Convention (the right of the Turkish Government to divert up to 50 per cent of the water contained in the reservoir formed by the dam) (*BFSP, 1927*, vol. 127, p. 926; *Legislative Texts*, p. 384, No. 106; document A/5409, paras. 306, 317 and 324);

Final Demarcation Protocol of 3 May 1930 of the Commission on the Demarcation of the Turco-Syrian Frontier: *clause II* ("joint use" of the Tigris necessitates the formulation of rules concerning the rights of the parties; "the settlement of all questions relating to fishing and to the industrial or agricultural utilization of the waters shall be based on the principle of complete equality") (*Legislative Texts*, p. 290, No. 94; document A/5409, para. 416);

Treaty of 18 January 1958 between the USSR and Afghanistan concerning the régime of the Soviet-Afghan State frontier: *art. 8, para. 1* (free use of frontier waters) (United Nations, *Treaty Series*, vol. 321, p. 77; *Legislative Texts*, p. 276, No. 86; document A/5409, para. 395).

EUROPE

Exchange of notes of 29 August and 2 September 1912 constituting an Agreement between Spain and Portugal on the exploitation of border rivers for industrial purposes: *note I, clause I* ("the two nations shall have the same rights in the border sections of the rivers, each accordingly being entitled to half the flow") (*Legislative Texts*, p. 908, No. 246; document A/5409, para. 584);

Agreement of 10 April 1922 between Denmark and Germany for the settlement of questions relating to watercourses and dikes on the German-Danish frontier: *art. 35* (equal rights to use of the water; allocation of half the water; consent required for allocation of more than half the water) (League of Nations, *Treaty Series*, vol. X, p. 201; *Legislative Texts*, p. 577, No. 166; document A/5409, para. 561 (*b*));

Treaty of 27 January 1926 between Germany and Poland for the settlement of frontier questions: *art. 28* ("frontier waters may be utilized up to the frontier by persons having a right of user under the laws of the country [in question]"); *art. 31* ("the flow of the water must not be impeded by installations set up . . . in frontier waterways"); *art. 34* (the provisions regarding frontier waterways "shall apply by analogy to [non-frontier] waterways . . . which . . . flow into such waterways or lead water from the territory of one Party to that of the other") (League of Nations, *Treaty Series*, vol. LXIV, p. 113);

Convention of 10 May 1927 between Finland and Sweden concerning the joint exploitation of the salmon fisheries in the Tornea and Muonio Rivers: *art. III* (each of the two States "shall be entitled to half the yield of the fisheries") (League of Nations, *Treaty Series*, vol. LXX, p. 201; *Legislative Texts*, p. 621, No. 171; document A/5409, para. 754);

Convention of 14 November 1928 between Hungary and Czechoslovakia relating to the settlement of questions arising out of the delimitation of the frontier between the two countries: *art. 25, para. 1* (each party "is entitled to dispose of half the water flowing through frontier watercourses, subject to the rights already acquired") (League of Nations, *Treaty Series*, vol. CX, p. 425);

Convention of 19 November 1930 between France and Switzerland respecting the Châtelôt Falls Concession on the Doubs: *art. 5* (each of the two riparian States shall have the right to half the output of the power-station) (*BFSP, 1930*, vol. 133, p. 487; *Legislative Texts*, p. 713, No. 199; document A/5409, para. 674);

Agreement of 16 April 1954 between Czechoslovakia and Hungary concerning the settlement of technical and economic questions relating to frontier watercourses: *art. 23, para. 1* (the parties are entitled to half the natural flow of water) (United Nations, *Treaty Series*, vol. 504, p. 231; *Legislative Texts*, p. 564, No. 163; document A/5409, para. 539 (*a*));

Convention of 17 September 1955 between Italy and Switzerland concerning the regulation of Lake Lugano: *art. III, para. 1* (the parties recognize the regulation of the lake "as a work of public interest") (United Nations, *Treaty Series*, vol. 291, p. 213; *Legislative Texts*, p. 856, No. 234; document A/5409, para. 724);

Treaty of 9 April 1956 between Hungary and Austria concerning the regulation of water economy questions in the frontier region: *art. 2, para. 5* (without prejudice to acquired rights, each party shall have the use of half the natural water yield of sectors of watercourses forming the frontier) (United Nations, *Treaty Series*, vol. 438, p. 123; document A/5409, para. 570);

Convention of 29 January 1958 between Romania, Bulgaria, Yugoslavia and the USSR concerning fishing in the waters of the Danube: *preamble* (the parties recognize "a common interest in the rational utilization and expansion of the stocks of fish in the river") United Nations, *Treaty Series*, vol. 339, p. 23; *Legislative Texts*, p. 427, No. 125; document A/5409, para. 439);

State Treaty of 10 July 1958 between Luxembourg and the *Land* Rhineland Palatinate of the Federal Republic of Germany concerning the construction of hydroelectric power installations on the Our: *art. 1* (the parties agree to utilize the waters of the Our for the operation of hydroelectric power installations and to strive for the most effective possible utilization of the power resources available) (*Legislative Texts*, p. 726, No. 202; document A/5409, para. 773);

Treaty of 15 February 1961 concerning the régime of the Soviet-Polish State frontier and co-operation and mutual assistance in frontier matters: *art. 12, para. 2* (respect for the rights and interests of the other party in the use of frontier waters); *art. 18, para. 1* (equal division of the costs of cleaning frontier waters) (United Nations, *Treaty Series*, vol. 420, p. 161; document A/CN.4/274, paras. 179 and 185);

Agreement of 30 November 1963 between Yugoslavia and Romania concerning the construction and operation of the Iron Gates Water Power and Navigation System on the River Danube: *art. 6, para. 1* (the parties shall participate in equal shares in the total investments required for construction of the system); *art. 8* (utilization of the water power potential harnessed by the system in equal shares) (United Nations, *Treaty Series*, vol. 512, p. 42; document A/CN.4/274, paras. 240-241);

Treaty of 7 December 1967 between Austria and Czechoslovakia concerning the regulation of water management questions relating to frontier waters: *art. 3, para. 1* (each party undertakes to refrain from carrying out, without the consent of the other party, any measures relating to frontier waters which would adversely affect water conditions in the territory of the other party); *art. 3, para. 2* (each party undertakes to discuss in the Austrian-Czechoslovak Frontier Water Commission (established by the Treaty), before instituting proceedings concerning water rights, any planned measures relating to frontier waters); *art. 3, para. 3* (without prejudice to acquired rights, each party shall have the use, in frontier waters, of half the natural water yield); *art. 3, para. 5* (each party shall ensure that the operation of hydraulic installations of all kinds in frontier waters does not harm the water management interests of the other party) (United Nations, *Treaty Series*, vol. 728, p. 313);

Agreement of 16 September 1971 between Finland and Sweden concerning frontier rivers: *chap. 1, art. 5* (in frontier rivers with branches, each party shall be entitled to an equal share of the water volume, even if a larger portion thereof discharges in one State than in the other) (United Nations, *Treaty Series*, vol. 825, p. 191; document A/CN.4/274, para. 310);

Cf. Treaty of 8 April 1960 between the Netherlands and the Federal Republic of Germany concerning arrangements for co-operation in the Ems Estuary: *arts. 1 and 48* (the parties shall co-operate in the Ems Estuary in a spirit of good-neighbourliness, and this co-operation shall extend to questions not expressly regulated in the Treaty which may affect common interests) (United Nations, *Treaty Series*, vol. 509, p. 64; document A/CN.4/274, para. 165).

## ANNEX II

### Treaty provisions concerning successive watercourses

The following is an illustrative list of treaty provisions relating to successive watercourses which apportion the waters, limit the freedom of action of the upstream State, provide for sharing of the benefits of the waters or in some other way equitably apportion the benefits, or recognize the correlative rights of the States concerned.

AFRICA

Protocol of 15 April 1891 between Italy and the United Kingdom for the demarcation of their respective spheres of influence in Eastern Africa: *art. III* (Italy undertakes not to construct on the Atbara, for irrigation purposes, any works which might sensibly modify its flow into the Nile) (*BFSP, 1890-1891*, vol. 83, p. 19; *Legislative Texts*, p. 127, No. 27; document A/5409, para. 128);

Treaty of 15 May 1902 between Ethiopia and the United Kingdom relative to the frontiers between the Anglo-Egyptian Sudan, Ethiopia and Eritrea: *art. III* (Ethiopia undertakes not to construct any work across the Blue Nile, Lake Tsana or the Sobat which would arrest the flow of their waters into the Nile, except in agreement with the United Kingdom and Sudanese Governments) (*BFSP, 1901-1902*, vol. 95, p. 467; *Legislative Texts*, p. 115, No. 13; document A/5409, para. 129);

Agreement of 9 May 1906 between Great Britain and the Independent State of the Congo, modifying the 1894 Agreement relating to their respective spheres of influence in East and Central Africa: *art. III* (the Congo undertakes not to construct any work on or near the Semliki (Isango) River which would diminish the volume of water entering Lake Albert, except in agreement with the Sudanese Government) (*BFSP, 1905-1906*, vol. 99, p. 173; *Legislative Texts*, p. 99, No. 5; document A/5409, para. 149);

Agreement of 22 November 1934 between Belgium and the United Kingdom regarding water rights on the boundary between Tanganyika and Ruanda-Urundi: *art. 1* (water diverted shall be returned without substantial reduction at some point before the river or stream flows into the other territory) (League of Nations, *Treaty Series*, vol. CXC, p. 103; *Legislative Texts*, p. 97, No. 4; document A/5409, para. 86);

Agreement of 8 November 1959 between the United Arab Republic and Sudan for the full utilization of the Nile waters: *art. 1* (confirming certain "present acquired rights" of the parties); *art. 2* (highly detailed provisons on "Nile control projects and the division of their benefits between the two Republics"); *art. 3* ("projects for the utilization of lost waters in the Nile Basin")—*para. 1* ("the net yield of these projects shall be divided equally between the two Republics and each of them shall also contribute equally to the costs"); *art. 5, para. 2* (if a joint consideration by the two parties of claims of other riparian States to a share of Nile waters "results in the acceptance of allotting an amount of the Nile water to one or the other of the said States, the accepted amount shall be deducted from the shares of the two Republics in equal parts, as calculated at Aswan") (United Nations, *Treaty Series*, vol. 453, p. 51; *Legislative Texts*, p. 143, No. 34; document A/5409, paras. 110-111 and 113);

Cf. Convention of 26 July 1963 between Guinea, Mali, Mauritania and Senegal relating to the general development of the Senegal River basin: *arts. 8 and 13*;*

Act of 26 October 1963 regarding navigation and economic co-operation between the States of the Niger Basin (Cameroon, Ivory Coast, Dahomey, Guinea, Upper Volta, Mali, Niger, Nigeria and Chad): *art. 2*;*

Convention of 7 February 1964 between Guinea, Mali, Mauritania and Senegal relating to the status of the Senegal River: *arts. 2 and 3*;*

Convention of 11 March 1972 between Mali, Mauritania and Senegal relating to the status of the Senegal River: *arts. 1 and 4*;*

Agreement of 24 August 1977 for the establishment of the Organization for the Management and Development of the Kagera River Basin (Rwanda, Burundi and the United Republic of Tanzania): the parties commit themselves to the integrated management and development of the water resources of the Kagera Basin (United Nations, *Treaty Series*, vol. 1089, p. 165).

AMERICA

Convention of 21 May 1906 between the United States of America and Mexico concerning the equitable distribution of the waters of the Rio Grande[a] for irrigation purposes: *preamble* ("desirous to provide for the equitable distribution of the waters"); *arts. I, II and III* (the United States agrees to deliver a specified volume of water to Mexico annually, without charge) (C. Parry, ed., *The Consolidated Treaty Series*, vol. 201 (1906), p. 225; *Legislative Texts*, p. 232, No. 75; document A/5409, paras. 201-203);

Treaty of 11 January 1909 between Great Britain and the United States of America relating to boundary waters: *art. IV* (the parties will not permit construction or maintenance of any works, etc., in waters flowing from boundary waters or in waters at a lower level than the boundary in rivers flowing across the boundary the effect of which is to raise the natural level of waters on the other side of the boundary, except with the approval of the Commission established by the Treaty); *art. VI* (the waters of the St. Mary and Milk Rivers and their tributaries "shall be apportioned equally between the two countries, but in making such equal apportionment more than half may be taken from one river and less than half from the other, by either country, so as to afford a more beneficial use to each") (*BFSP, 1908-1909*, vol. 102, p. 137; *Legislative Texts*, p. 260, No. 79; document A/5409, para. 167 (*b*));

Treaty of Peace, Friendship and Arbitration of 20 February 1929 between the Dominican Republic and Haiti: *art. 10*;*

Treaty of 3 February 1944 between the United States of America and Mexico relating to the utilization of the waters of the Colorado and Tijuana Rivers, and of the Rio Grande (Rio Bravo) from Fort Quitman, Texas, to the Gulf of Mexico: *art. 10* (allocation of the waters of the Colorado River, including delivery to Mexico of a "guaranteed annual quantity", and additional amounts in case of a surplus); *art. 16, para. 1* (preparation by the International Boundary and Water Commission of recommendations for the "equitable distribution between the two countries of the waters of the Tijuana River system") (United Nations, *Treaty Series*, vol. 3, p. 313; *Legislative Texts*, p. 236, No. 77; document A/5409, paras. 214 (*a*) and 215 (*a*));

Treaty of 17 January 1961 between Canada and the United States of America relating to co-operative development of the water resources of the Columbia River Basin: *art. V* (Canada is entitled to one half of the downstream power benefits); *art. XII* (flooding of land in Canada necessary for the storage reservoir of a dam in the United States is permitted in exchange for the benefits accruing to Canada from the dam) (United Nations, *Treaty Series*, vol. 542, p. 244; *Legislative Texts*, p. 206, No. 65; document A/5409, paras. 194 (*b*) and 195);

Treaty of the River Plate Basin of 23 April 1969 (Brazil, Argentina, Bolivia, Paraguay and Uruguay): *art. 1* (the parties agree to join forces to promote the harmonious development and physical integration of the River Plate basin, and to take steps to promote the rational utilization of water resources, in particular by the regulation of watercourses and their multi-purpose and equitable development, etc.) (United Nations, *Treaty Series*, vol. 875, p. 3; document A/CN.4/274, para. 61);

Act of Santiago of 26 June 1971 concerning hydrologic basins (Argentina and Chile): *preamble* (the parties agree on fundamental rules which shall serve as a basis for a convention and which they declare to be immediately applicable); *para. 1* ("the waters of rivers and lakes shall always be utilized in a fair and reasonable manner"); *para. 4* ("each Party shall recognize the other's right to utilize the waters of their common lakes and successive international rivers within its territory in accordance with its needs, provided that the other Party does not suffer any appreciable damage") (OAS, *Ríos y Lagos Internacionales (Utilización para fines agrícolas e industriales)*, 4th ed. rev. (OEA/Ser.I/VI, CIJ-75 Rev.2), pp. 495-496; document A/CN.4/274, para. 327);

Cf. Joint Declaration of 23 September 1960 of the tripartite conference at Buenos Aires (Argentina, Brazil and Uruguay) to examine the situation created by the 1946 Agreement between Argentina and Uruguay relating to the utilization of the rapids of the Uruguay River: Argentina and Uruguay recognize Brazil's right, in accordance with existing international instruments and the rules of international law, freely to carry out hydraulic works of any nature on the Brazilian reaches of the Uruguay River and its tributaries; Brazil will, in turn, in accordance with international doctrine and practice, consult with the other riparian States before carrying out any hydraulic works which may alter the present régime of the Uruguay River; the three States declare their intention to prepare a

* See annex I.

a The Rio Grande is a successive river in the sense that it rises in and flows through the United States before reaching the point at which it begins to form the boundary between the United States and Mexico.

* See annex I.

joint regional plan for the utilization and reclamation of the entire basin of the Uruguay River and the adjacent regions (document A/5409, para. 267 and footnote 228).

### Asia

Agreement of 20 October 1921 between France and Turkey with a view to promoting peace: *art. XII* ("the waters of Kuveik shall be shared . . . in such a way as to give equitable satisfaction to the two Parties") (League of Nations, *Treaty Series*, vol. LIV, p. 177; *Legislative Texts*, p. 288, No. 91; document A/5409, para. 409);

Treaty of 22 November 1921 between Afghanistan and the United Kingdom for the establishment of neighbourly relations (Indo-Afghan frontier): *art. 2* (protection of existing rights of irrigation) (League of Nations, *Treaty Series*, vol. XIV, p. 47; *Legislative Texts*, p. 273, No. 83; document A/5409, para. 412);

Agreement of 4 December 1959 between Nepal and India on the Gandak River Irrigation and Power Project: *clause 10* (*pro rata* reduction of water supplies during periods of shortage) (*Legislative Texts*, p. 295, No. 96; document A/5409, para. 350);

Cf. Agreement of 5 November 1977 between Bangladesh and India on sharing of the Ganges waters: *preamble* ("sharing" and "optimum utilization" of the water resources of the region by joint efforts) (*International Legal Materials*, vol. XVII (1978), p. 103; to be published in United Nations, *Treaty Series*, No. 16210).

### Europe

Treaty of 12 May 1863 between Belgium and the Netherlands to regulate the régime of the diversion of water from the Meuse (concluded to settle definitively the régime governing diversions of water from the Meuse for the feeding of navigation canals and irrigation channels): *art. 5* (allocation of the amount of water to be removed); *art. 7* (prohibition of diversion from their natural courses of watercourses which rise in Belgium and flow into the Netherlands) (G. F. de Martens, ed., *Nouveau Recueil général de traités*, 2nd series, vol. 1, p. 117; *Legislative Texts*, p. 550, No. 157; document A/5409, paras. 736 and 738-739);

Boundary Treaty between Spain and France of 26 May 1866: *art. XX* (the canal carrying the waters of the Aravo to Puigcerdá, situated almost entirely in France, is the private property of the Spanish town of Puigcerdá) (*BFSP, 1865-1866*, vol. 56, p. 212; *Legislative Texts*, p. 671, No. 184; document A/5409, para. 959). See also Final Act of the delimitation of the international frontier of the Pyrenees between France and Spain of 11 July 1868: *sect. IV, art. 1* (distribution of water of the Puigcerdá canal on the basis of the rotation principle: 12 hours per day for each group of users) (*BFSP, 1868-1869*, vol. 59, p. 430; *Legislative Texts*, p. 674, No. 186; document A/5409, para. 982 (*a*));

Convention of 28 October 1922 between Finland and the Russian Soviet Republic concerning the maintenance of river channels and the regulation of fishing on watercourses forming part of the frontier between Finland and Russia: *art. 3* (prohibition of diversion of water from the watercourses or erection of any constructions therein likely to have a detrimental effect on the flow of water, the fish, land or other property in the territory of the other State) (League of Nations, *Treaty Series*, vol. XIX, p. 183; *Legislative Texts*, p. 642, No. 173; document A/5409, para. 520);

Provisions of 6 November 1922 relating to the common frontier between Belgium and Germany, drawn up by a Boundary Commission made up of representatives of the British Empire, France, Italy, Japan, Belgium and Germany under the terms of the Treaty of Versailles of 28 June 1919 concerning that frontier: *part III, art. 4* (Belgium and Germany undertake not to permit any deterioration of the present régime of the watercourses which cross their common frontier); *part II, clause 8, and part III, arts. 1 and 3* (Germany and Belgium undertake to reach agreement prior to taking any measures which might have an adverse effect on the quantity or quality of water flowing through supply pipes crossing the frontier); *part III, art. 2* (no construction, establishment or factory which might pollute the waters of the Dreilägerbach and Vesdre Basins with its effluents shall be permitted; agreement on protective measures required prior to the construction of any installation which might have an adverse effect on the nature of those waters; neither State may permit any diversion of watercourses which might adversely affect the supply of water from basins on its territory without prior agreement with the other State) (G. F. de Martens, ed., *Nouveau Recueil général de traités*, 3rd series, vol. XIV, p. 834; *Legislative Texts*, p. 411, No. 118; document A/5409, paras. 465-466);

Convention of 11 May 1929 between Norway and Sweden on certain questions relating to the law on watercourses: *art. 12, para. 1* (one country may not authorize an undertaking without the approval of the other country if the undertaking is likely to involve considerable inconvenience in the latter country in the use of a watercourse) (League of Nations, *Treaty Series*, vol. CXX, p. 263; *Legislative Texts*, p. 871, No. 237; document A/5409, para. 545 (*h*) (i));

Agreement of 16 October 1950 between Austria and the Bavarian State Government concerning the diversion of water: apportionment of water (Austria waives, without compensation, the right to divert any water of one river and its tributaries; Bavaria, in return, agrees, without compensation, to the diversion by Austria of a portion of the waters of four other rivers, except during specified low-water periods) (*Legislative Texts*, p. 469, No. 136; document A/5409, para. 627);

Convention of 25 May 1954 between Yugoslavia and Austria concerning water economy questions relating to the Drava: *preamble* (developing the utilization of the waters of the Drava for hydroelectric purposes with a view to preventing any harmful effects from the operation of Austrian power-stations and having regard to the diversion of water from the Drava Basin); *art. 4* (prior consultation required should Austria contemplate plans for new diversions or works which might affect the Drava River régime to the detriment of Yugoslavia; failing an agreed settlement, the matter shall be referred to the Court of Arbitration provided for by the Convention) (United Nations, *Treaty Series*, vol. 227, p. 111; *Legislative Texts*, p. 513, No. 144; document A/5409, paras. 693 and 697);

Treaty of 9 April 1956 between Hungary and Austria concerning the regulation of water economy questions in the frontier region: *art. 2, para. 6* (the State situated upstream on a watercourse which intersects the frontier shall not be entitled to decrease by more than one third the natural minimum water flow into the territory of the other State, as determined by the Commission established by the Treaty) (United Nations, *Treaty Series*, vol. 438, p. 123; document A/5409, para. 570);

Convention of 27 May 1957 between Switzerland and Italy concerning the use of the water power of the Spöl: *preamble* (utilization of the waters of the Spöl is of major interest to the development of the electrical resources of Italy (upstream) and Switzerland (downstream); the two States agree to fix the shares of hydraulic power to which each is entitled); *art. 1* (Switzerland consents to the diversion of some of the water flowing from Italy and to the use of the corresponding water power on the Italian side) (*Legislative Texts*, p. 859, No. 235; document A/5409, paras. 849 and 850 (*a*)). See also Agreement of 18 June 1949 between Switzerland and Italy on the Reno di Lei hydraulic power concession (*Legislative Texts*, p. 846, N. 231; document A/5409, paras. 792 *et seq.*);

Agreement of 18 July 1957 between Italy and Yugoslavia concerning the supply of water to the commune of Gorizia: *art. 1* (continuation of the water supply to the commune of Gorizia) (*Legislative Texts*, p. 866, No. 236; document A/5409, para. 711).

# CHAPTER III

## Consideration of selected issues dealt with in chapter III of the outline

188. In his preliminary report, the Special Rapporteur proposed giving consideration, in his second report, to certain of the issues dealt with in chapter III of the outline submitted by the previous Special Rapporteur (see para. 47 above). The first five articles (arts. 10-14) of that chapter, entitled "Co-operation and management in regard to international watercourses", deal with the kinds of procedural requirements that are an indispensable adjunct to the general principle of equitable utilization. Some of these requirements have already been alluded to in the previous chapter of the present report. In this final chapter, the Special Rapporteur proposes to offer a broad overview of procedural rules, and to consider the manner in which they best fit into the framework of the draft as a whole. This discussion will be of a somewhat preliminary nature, as it is offered with a view to facilitating consideration by the Commission of the manner in which the elaboration of this part of the draft should proceed. The Special Rapporteur will conclude the report by submitting five draft articles for the Commission's consideration and offering some observations concerning future work on procedural rules.

### A. Overview

189. As indicated earlier, procedural rules—most of which amount to obligations of conduct rather than obligations of result[340]—form an essential part of the overall system of law governing the non-navigational uses of international watercourses. It has been seen that this is due to the flexibility of the principle of equitable utilization, a principle which derives from the necessity of reconciling conflicting needs in order to maximize benefits and minimize harm to States utilizing the same resource.

190. The necessity of adjustments that is implicit in the principle of equitable utilization requires that channels of communication between the States concerned remain open in order to permit the free flow of information as well as the resolution of actual or potential inconsistencies between watercourse uses. It is clear that the modalities for such communication are best provided for in specific agreements tailored to take into account the unique characteristics of the individual States and watercourses concerned. It does not follow, however, that there exist no general norms concerning the methods by which equitable shares are determined and allocations are readjusted. Indeed, the practice of States in relation to international watercourses throughout the world has increasingly recognized that, where water resources are insufficient to satisfy the needs of all the States concerned, allocations of uses, benefits and obligations concerning conservation must be arrived at through mutual consultation and co-operation.

191. The norms operative in this field derive from the same fundamental considerations that apply to the apportionment of other resources upon which more than one State depends. It is therefore not surprising that allocation of those resources is governed by the same kinds of obligation. Apportionment of fisheries[341] and delimitation of the continental shelf[342] are two examples of other situations in which international law has been held to require (*a*) an equitable apportionment, and (*b*) negotiations in good faith with a view to achieving such an apportionment. More generally, the necessity of co-operation between two or more States in respect of an international watercourse flows both from the fact of their mutual dependence upon the watercourse and, as the ICJ has said of the duty to negotiate in respect of fisheries, "from the very nature of the respective rights of the Parties".[343] Previous special rapporteurs have surveyed in their reports the extensive support for the obligation to co-operate and for the other procedural rules for the implementation of the principle of equitable utilization.[344]

192. The object of procedures for the determination and maintenance of an equitable allocation of the uses and benefits of an international watercourse is always the attainment of such an apportionment through an agreed resolution of any actual or potential conflict between the uses two or more States wish to make of the watercourse. Common sense indicates, and the practice

[340] Of course, some obligations of conduct inevitably shade into obligations of result. For example, the obligation to negotiate with regard to the determination of equitable shares is linked with the obligation to achieve an equitable apportionment of those shares. See, for example, the passage from the arbitral award in the *Lake Lanoux* case cited above (para. 123 and footnote 214). Cf. also the obligations to negotiate and to achieve an equitable apportionment in respect of marine resources, enunciated, for example, by the ICJ in *Fisheries Jurisdiction (United Kingdom* v. *Iceland), Merits,* Judgment of 25 July 1974, *I.C.J. Reports 1974*, pp. 31-34, paras. 73-75, 78 and 79 (3); and in the *North Sea Continental Shelf* cases (Federal Republic of Germany/Denmark; Federal Republic of Germany/Netherlands), Judgment of 20 February 1969, *I.C.J. Reports 1969*, pp. 46-47, para. 85.

[341] See the *Fisheries Jurisdiction* case (footnote 340 above). This case, in which a State (the United Kingdom) other than the coastal State (Iceland) had rights in a fishery, concerned the sort of situation generally encountered when a watercourse is used by more than one State.

[342] See the *North Sea Continental Shelf* cases (footnote 340, *in fine* above).

[343] *Fisheries Jurisdiction, I.C.J. Reports 1974*, p. 32, para. 75. Of course, the nature of the States' rights in the *Fisheries* case differs from the nature of States' rights in respect of watercourses. In both cases, however, there is the potential for harm to be caused to one or more States due to their conflicting demands upon a finite resource, and the consequent need to arrive at an equitable adjustment of the parties' shares.

[344] See especially the third report of Mr. Schwebel, document A/CN.4/348 (see footnote 14 above), paras. 113-186, and particularly paras. 170-186. See also C. B. Bourne, "Procedure in the development of international drainage basins: The duty to consult and to negotiate", *The Canadian Yearbook of International Law, 1972* (Vancouver), vol. X, p. 212; and Kirgis, *op. cit.* (footnote 85 above), pp. 16-87.

of States confirms, that such a system of procedures will not function effectively if: (*a*) it does not provide a mechanism for determining whether a State is exceeding its equitable share; (*b*) it gives a "veto" to a State potentially affected by another State's planned use; or (*c*) it allows a State to take action that could significantly affect other States without first notifying and consulting with those States.[345] Thus, to be effective, procedural rules must, at minimum, provide for several different situations. For convenience of discussion, these situations will be divided into two categories: problems concerning existing uses, and problems concerning new uses. In all cases, it will be assumed for the sake of simplicity that only two States, States A and B, are involved.

193. With regard to the first category, the typical situation would be one in which State A believes that State B is exceeding its equitable share—or, to put it another way, that State B is depriving State A of the latter's equitable share. Resolution of such a situation will require: (*a*) determination whether State B is in fact exceeding its equitable share; (*b*) if so, correction of the situation through appropriate measures (e.g. adjustment of State B's uses, or compensation of State A in some appropriate manner). The smooth and effective functioning of this resolution process cannot perhaps be guaranteed in every case by rules of general international law, but such rules at least provide a framework for the achievement of an equitable accommodation. This framework can, and should, be supplemented by more detailed procedural rules, tailored to the individual situation, in specific basin-wide agreements.

194. The question arises whether this kind of situation is adequately provided for in the articles in chapter II of the outline, concerning equitable utilization, or whether, alternatively or in addition, it should be addressed in separate provisions in chapter III. The principal obligations in question are the duties to cooperate,[346] consult [347] and negotiate in good faith with a view to arriving at an equitable allocation.[348] These obligations are dealt with in paragraph 2 of article 8 and paragraphs 1 and 3 of article 10 as submitted by the previous Special Rapporteur.[349] It is the tentative view of the present Special Rapporteur that, since such a situation essentially calls for the determination of the proper shares of the States involved, it would be appropriate to address it in article 8, which deals with that subject. Additional treatment of this issue in chapter III would not seem necessary. The duties in question could be stated more specifically in paragraph 2 of article 8 if the Commission considers it appropriate.

195. The second category of situations which articles on procedural rules must take into account encompasses problems concerning new uses of watercourses. In this connection, at least two types of situation must be addressed. With regard to both, we may begin with the hypothesis that States A and B are availing themselves of no more (qualitatively or quantitatively) than their respective equitable shares of the uses and benefits of the watercourse. In the first type of situation in this category, State A wishes to initiate a new use of the watercourse which may have significant adverse effects on State B's use thereof. State B's right to an equitable share will be adequately protected only if, at minimum:[350] (*a*) State A informs State B of the proposed use; (*b*) State A consults with State B concerning, for example, the effect of the proposed use on the parties' shares, as well as any adjustments that may be necessary to maintain an equitable apportionment; (*c*) State A negotiates with State B concerning any differences as to the above or other matters, with a view to arriving at an equitable allocation; (*d*) in the event that State A fails to inform State B of the proposed use and State B is generally aware of the proposal, State B is entitled to invoke State A's obligations to provide information, consult and negotiate.

196. This kind of situation is addressed in chapter III of the outline submitted by the previous Special Rapporteur in his second report, in particular in articles 11 to 14.[351] Alternatively, it could be dealt with in connection with the obligation not to cause appreciable harm set out in article 9.[352] However, since article 9 as referred

[345] These very basic criteria do not, of course, exhaust the requirements for a comprehensive set of procedures for international watercourse management. The regular collection and exchange of information and data, control and management of pollution, and a warning system concerning hazards are some of the other subjects which should be addressed and for which States have seen fit to make provision. For an extensive discussion of these and other aspects of international watercourse management, see Mr. Schwebel's third report, document A/CN.4/348 (see footnote 14 above), paras. 187 *et seq.*

[346] See the *North Sea Continental Shelf* cases (footnote 340, *in fine* above) and the *Lake Lanoux* arbitration (footnote 192 above), particularly the fifth, seventh, eighth and ninth principles summarized in paragraph 124 of the present report. See also, for example, General Assembly resolution 3129 (XXVIII) of 13 December 1973 on "Co-operation in the field of the environment concerning natural resources shared by two or more States"; and article 3 of the Charter of Economic Rights and Duties of States, adopted by the General Assembly in resolution 3281 (XXIX) of 12 December 1974.

[347] See generally Kirgis, *op. cit.* (footnote 85 above), and the sources cited therein; and Bourne, "Procedure in the development of international drainage basins . . .", *loc. cit.* (footnote 344 above). Cf. article 6 of the Montreal Rules on Water Pollution in an International Drainage Basin:

"*Article 6*

"Basin States shall consult one another on actual or potential problems of water pollution in the drainage basin so as to reach, by methods of their own choice, a solution consistent with their rights and duties under international law. This consultation, however, shall not unreasonably delay the implementation of plans that are the subject of the consultation." (ILA, *op. cit.* (footnote 291 above), p. 541.)

[348] See the *North Sea Continental Shelf* and *Fisheries Jurisdiction* cases (footnote 340 above).

[349] For the text of article 8, see footnote 28 above; for the text of article 10, see document A/CN.4/381 (see footnote 16 above), para. 64. Cf. article 7, paragraph 2 (duty to consult to determine equitable use), as submitted by Mr. Schwebel in his third report, document A/CN.4/348 (see footnote 14 above), para. 106.

[350] These procedures are characterized as being the minimum necessary because, ideally, they should not be *ad hoc*, but should be part of an institutionalized programme of regular exchange of data and information.

[351] Document A/CN.4/381 (see footnote 16 above), paras. 67-74.

[352] See article 8 as submitted by Mr. Schwebel in his third report, which sets out the obligation not to cause appreciable harm in paragraphs 1 and 2, and lays down rules concerning notification, consultation and negotiation in paragraphs 3 *et seq.* (document A/CN.4/348 (see footnote 14 above), para. 156).

to the Drafting Committee does not make provision for the kinds of procedural rules outlined above, the Commission may find it convenient, for the time being at least, to deal with them in chapter III.

197. The second type of situation involving new uses that should, in some manner, be addressed in the draft is the following: State A wishes to make a new use of the international watercourse but is factually not able to, at least in part because of uses already being made (pursuant, it may be assumed, to a previously accepted equitable allocation) by State B. Whether a readjustment of the parties' shares is required by the principle of equitable utilization obviously depends on a number of factors not mentioned in this illustration.[353] This type of situation is not expressly provided for either by the articles in chapter II or by those in chapter III of the outline submitted by the previous Special Rapporteur. It may be covered implicitly by articles 6 and 7, and possibly by article 8, depending on how those provisions are interpreted. But, since State A's proposed new use, by definition, cannot be made unilaterally, the specific provisions in chapter III on notification and consultation would not appear to be intended to address such a situation. It could, of course, be considered to fall within the more general provisions of article 10 of the outline. The Special Rapporteur would therefore appreciate the Commission's guidance as to how and in what part of the draft this type of situation should be covered.

## B. Draft articles concerning procedural rules

198. In the light of the foregoing discussion, and bearing in mind the authorities surveyed in chapter II and in the present chapter, the Special Rapporteur submits for the Commission's consideration five draft articles which address some of the situations outlined above. It may be that, due to various of the factors identified in section A above, this consideration should be only of a preliminary nature. The Special Rapporteur is nevertheless prepared to proceed with formal consideration of the articles if the Commission deems this advisable.

[353] See, for example, the factors listed in: article 8 as referred to the Drafting Committee in 1984 (see footnote 28 above); article 7 as submitted by Mr. Schwebel in his third report, document A/CN.4/348 (see footnote 14 above), para. 106; and article V of the Helsinki Rules (see para. 154 above). Relevant factors might include, for example: the extent to which the competing uses are essential to human life, socially and economically valuable, capable of modification in order that they may be accommodated, or capable of being satisfied by increasing the efficiency of basin-wide water utilization; and the extent to which the conflict in uses may be resolved through the payment of compensation by State A to State B. A fact which is important but not mentioned here because it is implicit in the facts posited is that State B is presently making uses of the watercourse which State A may request be modified. It is clear that existing uses should be given some degree of protection, but not so much as to freeze development of an international watercourse system. Thus such a use should be allowed to continue so long as the factors justifying it are not outweighed by factors indicating that it should be modified, phased out, or terminated (with the payment of compensation, where appropriate) in order to accommodate a competing use that is incompatible. Cf. article VIII of the Helsinki Rules and commentary (*a*) thereto (see footnote 79 above).

### *Article 10. Notification concerning proposed uses*

**A [watercourse] State shall provide other [watercourse] States with timely notice of any proposed new use, including an addition to or alteration of an existing use, that may cause appreciable harm to those other States. Such notice shall be accompanied by available technical data and information that is sufficient to enable the other States to determine and evaluate the potential for harm posed by the proposed new use.**

*Comments*

(1) The fact that this article is identified as article 10 is without prejudice to future inclusion of an article concerning, for example, general principles of co-operation, along the lines of article 10 submitted by the previous Special Rapporteur.

(2) This article covers the same general subject as article 11 submitted by the previous Special Rapporteur.

(3) The term "watercourse" appears in square brackets when used as an adjective to modify "State(s)" pending the Commission's decision on the use of the term "system".

(4) The term "timely" is intended to require notice sufficiently early in the planning stages to permit meaningful consultation and negotiation, if these are necessary.

(5) The term "proposed" is intended to indicate that the new use is still in the preliminary planning stages and has not yet been undertaken, authorized or permitted.

(6) The Commission may find it desirable to define, at an appropriate juncture, such terms as "use" and "proposed use", in order to avoid the necessity of making clear, in the articles themselves or in commentaries, that such terms refer to use of the watercourse concerned and include, for example, projects, programmes and additions to or alterations of existing uses.

(7) It would seem obvious that the proposed new use contemplated by the article is one that is to be undertaken by or within the State that is required to give the notification. If this is not sufficiently clear from the present formulation of the article, however, it can easily be made so.

(8) While, technically, no legal injury is caused unless a State is deprived of its equitable share, the article is couched in terms of "harm" in order to facilitate a joint determination of whether any harm entailed by the new use would be wrongful (because the new use would exceed the proposing State's equitable share) or would have to be tolerated by potentially affected States (because the new use would not exceed the proposing State's equitable share).

(9) The reference to "available" technical data and information is intended to indicate that the notifying State is generally not required to do additional research at the request of the potentially affected State, but must provide only such relevant data and information as have been developed in relation to the proposed use and are readily accessible. (A subsequent article will cover information that need not be disclosed for national security

reasons.) If the notified State desires information that is not readily available, but is in the sole possession of the notifying State, it would generally be appropriate for the former to offer to indemnify the latter for expenses incurred in producing that information.

### *Article 11. Period for reply to notification*

**1. A [watercourse] State providing notice of a proposed new use under article 10 shall allow the notified States a reasonable period of time within which to study and evaluate the potential for harm entailed by the proposed use and to communicate their determinations to the notifying State. During this period, the notifying State shall co-operate with the notified States by providing them, on request, with any additional data and information that is available and necessary for an accurate evaluation, and shall not initiate, or permit the initiation of, the proposed new use.**

**2. If the notifying State and the notified States do not agree on what constitutes, under the circumstances, a reasonable period of time for study and evaluation, they shall negotiate in good faith with a view to agreeing upon such a period, taking into consideration all relevant factors, including the urgency of the need for the new use and the difficulty of evaluating its potential effects. The process of study and evaluation by the notified State shall proceed concurrently with the negotiations provided for in this paragraph, and such negotiations shall not unduly delay the initiation of the proposed use or the attainment of an agreed resolution under paragraph 3 of article 12.**

#### *Comments*

(1) This article covers the same general subject as article 12 submitted by the previous Special Rapporteur.

(2) It will be observed that paragraph 1 does not refer to a specific period of time (e.g. six months) that must be allowed, at minimum, for study and evaluation. This is because what is a "reasonable" period will vary widely according to the circumstances of each case. A six-month period may be unreasonably long in some cases and unreasonably short in others. If the notified State is automatically given what under the circumstances is an unreasonably long period for study and evaluation, this may operate to discourage the notifying, or proposing, State from giving notice. Conversely, a specific, generally applicable period that is unreasonably short when applied to a concrete case may none the less raise a presumption of reasonableness which is so strong that it is very difficult for the potentially affected States to overcome. Notwithstanding these considerations, however, it may be desirable to have some objective point of reference—such as a six-month period—built into the article in order to assist the States concerned, in the event of disagreement, in arriving at a mutually acceptable period that is reasonable under the circumstances. This is an issue that merits careful consideration by the Commission.

(3) The obligation to negotiate set forth in paragraph 2 is drawn by analogy from the same obligation in respect of the determination of reasonable or equitable shares. Both processes entail a weighing of relevant considerations. Moreover, since an unduly short period may result in the initiation of a use which upsets an equitable allocation, the opportunity for meaningful study and evaluation is closely tied to both the duty to avoid causing injury and the principle of equitable utilization.

(4) The last sentence of paragraph 2 is designed to ensure, as far as possible, that the flexible means provided in that paragraph for the determination of a reasonable period for study and evaluation do not themselves consume an unreasonable amount of time or unduly impede other aspects of the process of accommodation.

### *Article 12. Reply to notification; consultation and negotiation concerning proposed uses*

**1. If a State notified under article 10 of a proposed use determines that such use would, or is likely to, cause it appreciable harm, and that it would, or is likely to, result in the notifying State's depriving the notified State of its equitable share of the uses and benefits of the international watercourse, the notified State shall so inform the notifying State within the period provided for in article 11.**

**2. The notifying State, upon being informed by the notified State as provided in paragraph 1 of this article, is under a duty to consult with the notified State with a view to confirming or adjusting the determinations referred to in that paragraph.**

**3. If under paragraph 2 of this article the States are unable to adjust the determinations satisfactorily through consultations, they shall promptly enter into negotiations with a view to arriving at an agreement on an equitable resolution of the situation. Such a resolution may include modification of the proposed use to eliminate the causes of harm, adjustment of other uses being made by either of the States, and the provision by the proposing State of compensation, monetary or otherwise, acceptable to the notified State.**

**4. The negotiations provided for in paragraph 3 shall be conducted on the basis that each State must in good faith pay reasonable regard to the rights and interests of the other State.**

#### *Comments*

(1) This article covers the same general subject as article 13 submitted by the previous Special Rapporteur.

(2) It will be noted that two separate determinations are necessary under paragraph 1: a determination that the proposed use would, or is likely to, cause the notified State appreciable harm; and a determination that such use would, or is likely to, result in the notifying State's depriving the notified State of its equitable share. The reason both are required is that, as explained earlier in this report, the fact that one State's use of a watercourse causes another State harm does not, in itself, mean that the second State has sustained legally recognizable injury.

(3) The compensation envisaged in paragraph 3 may take a variety of forms, including the payment of an indemnity, the provision of electric power or flood-

control measures, or allowing the notified State to increase one of its existing uses.

(4) The obligation to negotiate set out in paragraph 3 is based on the requirements laid down by the ICJ in paragraph 85 of its judgment in the *North Sea Continental Shelf* cases.[354]

(5) The requirements of paragraph 4 are based on paragraph 78 of the ICJ's judgment in the *Fisheries Jurisdiction* case[355] and the arbitral award in the *Lake Lanoux* case.[356] The use of the term "interests" is based on the *Lake Lanoux* award, which required that consideration be given "to all interests, whatever their nature, which may be affected by the works undertaken, even if they do not amount to a right".[357]

### *Article 13. Effect of failure to comply with articles 10 to 12*

**1. If a [watercourse] State fails to provide notice to other [watercourse] States of a proposed new use as required by article 10, other [watercourse] States which believe that the proposed use may cause them appreciable harm may invoke the obligations of the former State under article 10. In the event that the States concerned do not agree upon whether the proposed new use may cause appreciable harm to other States within the meaning of article 10, they shall promptly enter into negotiations, in the manner required by paragraphs 3 and 4 of article 12, with a view to resolving their differences.**

**2. Subject to article 9, if the notified State fails to reply to the notification within a reasonable period in accordance with article 12, the notifying State may proceed with the initiation of the proposed use, in accordance with the notification and other data and information communicated to the notified State, provided that the notifying State is in full compliance with articles 10 and 11.**

**3. If a [watercourse] State fails to provide notification of a proposed use as required by article 10, or otherwise fails to comply with articles 10 to 12, it shall incur liability for any harm caused to other States by the new use, whether or not such harm is in violation of article 9.**

#### *Comments*

(1) This article covers the same general subject as article 14 submitted by the previous Special Rapporteur.

(2) Paragraph 1 provides for the situation in which the proposing State fails to provide notice of a planned new use as required by article 10. It allows another State—which may have learned indirectly and only in very general terms of the proposed new use—to invoke the proposing State's obligations under article 10 to provide a detailed notification.

(3) The proposing State may not have provided notice because of its belief that the new use would not be likely to cause appreciable harm to other States. In such a case, paragraph 1 would require the proposing State, at the request of the other States concerned, to enter promptly into negotiations with them with a view to reaching agreement on whether appreciable harm might result from the proposed new use.

(4) Paragraph 2 would allow the proposing State to proceed with the new use if the notified State fails to reply within a reasonable period. However, the proposing State remains under the obligation set forth in article 9 not to cause legal "injury" to other States using the watercourse.

(5) Paragraph 3 is intended to encourage compliance with the notification, consultation and negotiation requirements of articles 10 to 12 by making a proposing State liable for any harm to other States resulting from the new use, even if such harm would otherwise be allowable under article 9 as being a consequence of the proposing State's equitable utilization of the watercourse. This assumes, of course, that article 9 will be reformulated to take into account the distinction between factual "harm" and legal "injury".

### *Article 14. Proposed uses of utmost urgency*

**1. Subject to paragraph 2, a State providing notice of a proposed use under article 10 may, notwithstanding affirmative determinations by the notified State under paragraph 1 of article 12, proceed with the initiation of the proposed use if the notifying State determines in good faith that the proposed use is of the utmost urgency, due to public health, safety, or similar considerations, and provided that the notifying State makes a formal declaration to the notified State of the urgency of the proposed use and of its intention to proceed with the initiation of that use.**

**2. The notifying State may not proceed with the initiation of a proposed use under paragraph 1 unless it is in full compliance with the requirements of articles 10, 11 and 12.**

**3. The notifying State shall be liable for any appreciable harm caused to the notified State by the initiation of the proposed use under paragraph 1, except such as may be allowable under article 9.**

#### *Comments*

(1) This article is similar in some respects to paragraph 3 of article 13 submitted by the previous Special Rapporteur in his first report[358] and paragraph 7 of article 8 submitted by Mr. Schwebel in his third report.[359]

(2) The principal object of the article is to permit the notifying, or proposing, State to proceed with the new use in certain extraordinary situations involving public emergencies. The examples of threats to public health or safety are given in the text of the article in order to em-

[354] See footnote 340 above.

[355] *Ibid.*

[356] See the passages from paragraph 22 of the award cited above (para. 122 and footnotes 212 and 213).

[357] See footnote 212 above.

[358] Document A/CN.4/367 (see footnote 15 above), para. 125.

[359] Document A/CN.4/348 (see footnote 14 above), para. 156.

phasize the gravity and exceptional nature of the circumstances envisaged.[360]

(3) The requirement in paragraph 1 that the proposing State make a determination of utmost urgency "in good faith" is drawn by analogy from the good faith requirement laid down in paragraph 78 of the ICJ's judgment in the *Fisheries Jurisdiction* case.[361]

(4) As in the case of paragraph 3 of article 13, the reference to article 9 in paragraph 3 of the present article is based on the assumption that article 9 will be reformulated to distinguish between factual "harm" and legal "injury".

[360] For further explanation of the purposes and requirements of this article, see Mr. Schwebel's third report, *ibid.*, paras. 165-166.

[361] See footnote 340 above.

### C. Concluding remarks concerning further draft articles on procedural rules

199. The draft articles set out above do not address some of the situations described in section A of the present chapter, in particular those in which: (*a*) State A believes that State B is currently exceeding its equitable share; (*b*) State A wishes to make a new use of the watercourse but is factually unable to do so because of uses being made by State B. Whether it is necessary to draft other articles containing procedural rules governing these and other situations will depend on the Commission's views as to how the various situations outlined above should be addressed.