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

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

[Agenda item 6]

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

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## Introduction

1. In accordance with the schedule set forth in his fourth report on the law of the non-navigational uses of international watercourses,<sup>1</sup> the Special Rapporteur deals in the present report with the remaining parts of the draft articles, concerning management of international watercourses, security of hydraulic installations, and settlement of disputes. Draft articles, together with supporting material, are submitted on each of these subtopics. In addition, the Special Rapporteur has included provisions on "Implementation of the articles", which deal with the facilitation of private remedies for actual or potential harm. These provisions grew out of comments in the Commission and in the Sixth Committee of the General Assembly, as well as the Special Rapporteur's own research, all of which suggest that all feasible steps should be taken to facilitate private redress as a first, practical step towards implementation of the obligations laid down in the present draft articles.

<sup>1</sup> *Yearbook* . . . 1988, vol. II (Part One), p. 208, document A/CN.4/412 and Add.1 and 2, para. 8.

## CHAPTER I

### Management of international watercourses

#### A. Introduction

2. The question of the management of international watercourses—also referred to as administrative arrangements for international watercourse systems—has been treated thoroughly by the previous two Special Rapporteurs, Mr. Stephen Schwebel<sup>2</sup> and Mr. Jens Evensen,<sup>3</sup>

and in various United Nations studies and reports.<sup>4</sup> In his third report, the present Special Rapporteur reviewed the relevant features of a modern system of water-resource management in order to provide a background

<sup>2</sup> See Mr. Schwebel's third report (*Yearbook* . . . 1982, vol. II (Part One), pp. 175-181, document A/CN.4/348, paras. 452-471).

<sup>3</sup> See Mr. Evensen's first report (*Yearbook* . . . 1983, vol. II (Part One), pp. 178-179, document A/CN.4/367, paras. 131-137) and second report (*Yearbook* . . . 1984, vol. II (Part One) and corrigendum, p. 116, document A/CN.4/381, para. 75).

<sup>4</sup> See: (a) *Integrated River Basin Development* (United Nations publication, Sales No. E.70.II.A.4); (b) *River Basin Management* (United Nations publication, Sales No. E.70.II.E.17); (c) *Management of International Water Resources: Institutional and Legal Aspects*, Natural Resources/Water Series No. 1 (United Nations publication, Sales No. E.75.II.A.2); (d) *Experiences in the Development and Management of International River and Lake Basins*, Natural Resources/Water Series No. 10 (United Nations publication, Sales No. E.80.II.A.17); (e) *Institutional Issues in the Management of International River Basins: Financial and Contractual Considerations*, Natural Resources/Water Series No. 17 (United Nations publication, Sales No. E.87.II.A.16).

for the consideration of procedural rules relating to the utilization of international watercourses.<sup>5</sup> The report described mechanisms for the multi-purpose planning and integrated development of watercourse systems that have been established wholly within one jurisdiction, between different units of a federal system, and on the international level. In view of the extensive previous coverage of this question, the Special Rapporteur will confine the present chapter to a brief review and update of the authorities that have been surveyed exhaustively in previous reports,<sup>6</sup> followed by a draft article on the subject for the consideration of the Commission.

## B. State practice

3. Herbert Arthur Smith, in his seminal work on the economic uses of international rivers, published in 1931,<sup>7</sup> concluded on the basis of his extensive study that a number of principles of international law had emerged from the practice of States with regard to international watercourses:

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. It is the positive duty of every government concerned to co-operate to the extent of its power in promoting this development, though it cannot be called upon to imperil any vital interest or to sacrifice without full compensation and provision for security any other particular interest of its own . . .<sup>8</sup>

One of the principles that flows from this first one, according to Smith, is the following:

(7) Where the circumstances of any river system are such that questions relating to its proper use are likely to be of frequent occurrence, permanent international commissions should be constituted to deal with all such questions, whenever they may arise.<sup>9</sup>

Indeed, Smith devoted chapter V of his work to "the function of international commissions". This was hardly a new idea, even in the first third of the twentieth century. Already in 1911, the Institute of International Law recommended, in paragraph 7 of its resolution on "International regulations regarding the use of international watercourses",<sup>10</sup>

. . . that the interested States appoint permanent joint commissions, which shall render decisions, or at least shall give their opinion, when, from the building of new establishments or the making of alterations in existing establishments, serious consequences might result in that part of the stream situated in the territory of [another] State.

<sup>5</sup> *Yearbook . . . 1987*, vol. II (Part One), pp. 17 *et seq.*, document A/CN.4/406 and Add.1 and 2, paras. 6-38.

<sup>6</sup> See especially Mr. Schwebel's third report, document A/CN.4/348 (footnote 2 above), paras. 452-471.

<sup>7</sup> H. A. Smith, *The Economic Uses of International Rivers* (London, 1931).

<sup>8</sup> *Ibid.*, pp. 150-151. It is interesting to note that the expression "river system" was used by Smith in a work written relatively early in the present century. The expression was also employed by J. L. Brierly, for example in the fifth edition of his well-known work *The Law of Nations* (Oxford, Clarendon Press, 1955), p. 205. The fact that such a conceptualization of international watercourses is of relatively long standing among students of the subject will be of interest to the Commission in connection with the decision it must ultimately take on the question of whether the draft articles should be based on the concept of the international watercourse "system".

<sup>9</sup> Smith, *op. cit.*, p. 152.

<sup>10</sup> Resolution adopted on 20 April 1911, see *Annuaire de l'Institut de droit international*, 1911 (Paris), vol. 24, pp. 365-367; reproduced in *Yearbook . . . 1974*, vol. II (Part Two), p. 200, document A/5409, para. 1072.

And the practice of States in this regard goes back considerably further in history. For example, the 1754 Treaty of Vaprio between the Empress of Austria, in her capacity as Duchess of Milan, and the Republic of Venice entrusted a pre-existing joint boundary commission with functions relating to the common use of the river Ollo.<sup>11</sup>

4. As has been seen in previous reports,<sup>12</sup> many of the early agreements concerning international watercourse systems, particularly those of the nineteenth century, were especially concerned with the regulation of navigation and fishing. The more recent agreements, especially those concluded since the Second World War, have been concerned principally with other aspects of the utilization or development of international watercourse systems, such as the study of the development potential of the watercourse, irrigation, flood control, hydroelectric power generation and pollution.<sup>13</sup> All these aspects, pushed to the forefront by the intensified demand for water, food and electricity, have necessitated to a much greater degree the establishment of joint institutional mechanisms for the implementation of the various agreements. Today there are nearly as many such joint bodies as there are international watercourses; they may be *ad hoc* or permanent, and they possess a wide variety of functions and powers.<sup>14</sup>

5. An annotated list of multipartite and bipartite commissions concerned with non-navigational uses of international watercourses compiled by the Secretariat in April 1979<sup>15</sup> lists 90 such bodies. While most of the commissions listed deal with watercourse systems in Europe, every region of the world is represented. Moreover, the number of administrative arrangements in the developing countries, particularly in Africa, was on the rise when the list was prepared. The Secretariat noted in this connection that the newly independent African States had demonstrated a commendable desire to co-operate in fluvial matters through the creation of international river commissions; while in 1959 there had been only one international river commission in Africa, the Permanent Joint Technical Commission for the River Nile, eight new river commissions had since been established in Africa. The

<sup>11</sup> See also the 1785 Treaty of Fontainebleau between Austria and the Netherlands, which formed a bipartite body to determine the best sites for joint construction of locks on the River Meuse, also referred to in the 1952 ECE report "Legal aspects of the hydro-electric development of rivers and lakes of common interest" (E/ECE/136), para. 175.

<sup>12</sup> See, for example, the survey of international agreements in the fourth report of the Special Rapporteur, document A/CN.4/412 and Add.1 and 2 (see footnote 1 above), paras. 39-48.

<sup>13</sup> See the discussion of multilateral agreements in *Management of International Water Resources . . .* (footnote 4 (c) above), paras. 91-97, especially para. 96.

<sup>14</sup> For summary descriptions of some of these agreements, "selected to illustrate the widest possible variety of arrangements", *ibid.*, annex IV. See also the list of agreements setting up joint machinery for the management of international watercourses in ILA, *Report of the Fifty-seventh Conference, Madrid, 1976* (London, 1978), pp. 256 *et seq.*, N. Ely and A. Wolman, "Administration", in A. H. Garretson, R. D. Hayton and C. J. Olmstead, eds., *The Law of International Drainage Basins* (Dobbs Ferry, N.Y., Oceana Publications, 1967), p. 124; and the extensive list of writings on international river and lake commissions given in Mr. Schwebel's third report, document A/CN.4/348 (see footnote 2 above), footnote 746.

<sup>15</sup> Unpublished list.

trend has continued since those observations were made.<sup>16</sup>

6. The sheer number of commissions and other administrative arrangements that have been established by watercourse States, especially States that use international watercourses most intensively,<sup>17</sup> suggests that such joint institutional mechanisms are a natural and logical outgrowth of heavy reliance on shared water resources, and of the interdependence that is its inevitable by-product. Of perhaps greater significance is the fact that one of the resolutions of the Mar del Plata Action Plan, adopted at the United Nations Water Conference, recognizing the intensified demands placed by burgeoning populations upon finite freshwater resources, pointed to "the imperative need" for accelerated progress in the investigation and development of water resources, and [their] integrated management for efficient use".<sup>18</sup> This need is

<sup>16</sup> See, for example, the agreements contained in *Treaties concerning the Utilization of International Watercourses for Other Purposes than Navigation: Africa*, Natural Resources/Water Series No. 13 (United Nations publication, Sales No. E/F.84.II.A.7), in particular the Convention of 30 June 1978 relating to the Creation of the Gambia River Basin Development Organization and the Convention of 21 November 1980 creating the Niger Basin Authority. See generally C. O. Okidi, "The State and the management of international drainage basins in Africa", *Natural Resources Journal* (Albuquerque, N.M.), vol. 28 (1988), p. 645; and K. V. Krishnamurthy, "The challenge of Africa's water development", *Natural Resources Forum* (New York), vol. 1 (1977), p. 369.

<sup>17</sup> Prominent examples that come readily to mind are the States sharing the Nile, the Great Lakes and other boundary waters between Canada and the United States of America, the Plata, the Ganges, the Indus, the Danube and the Rhine. See, for instance, the following agreements: for the Nile, the Agreement of 8 November 1959 between the United Arab Republic and Sudan and the Protocol of 17 January 1960 concerning the establishment of the Permanent Joint Technical Committee; for the Great Lakes and other boundary waters between Canada and the United States, 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 "1909 Boundary Waters Treaty"), establishing, in article VIII, the International Joint Commission of the United States and Canada (discussed in 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)); for the Plata, the Joint Declaration of Buenos Aires of 27 February 1967 by the Ministers for Foreign Affairs of the River Plate Basin States, establishing the Intergovernmental Co-ordinating Committee of the River Plate Basin (see OAS, *Rios y Lagos Internacionales (Utilización para fines agrícolas e industriales)*, 4th rev. ed. (OEA/Ser.I/VI, CIJ-75 rev.2), p. 148), summarized in *Yearbook . . . 1974*, vol. II (Part II), p. 322, document A/CN.4/274, para. 323; for the Ganges, the Agreement of 5 November 1975 on sharing of the Ganges waters at Farakka and on augmenting its flows, creating, in article IV, the Indo-Bangladesh Joint Committee to supervise the implementation of the arrangements for sharing of the waters; for the Indus, the Indus Waters Treaty 1960 of 19 September 1960 between India and Pakistan, establishing, in article VIII, the Permanent Indus Commission; for the Danube, the Convention of 18 August 1948 concerning the Regime of Navigation on the Danube, establishing, in chapter II, the Danube Commission; for the Rhine, *inter alia*, the Agreement of 29 April 1963 on the International Commission for the Protection of the Rhine against Pollution, and the Agreement of 3 December 1976 on the protection of the Rhine against chemical pollution.

For lists of agreements that establish joint commissions for the management of international watercourses, see the sources cited in footnote 4 above.

<sup>18</sup> Resolution VIII, on institutional arrangements for international co-operation in the water sector (see United Nations, *Report of the United Nations Water Conference, Mar del Plata, 14-25 March 1977* (United Nations publication, Sales No. E.77.II.A.12), chap. I). Apart from their principal function of integrating management and development of international watercourse systems, such joint bodies have also been able to attract financial support from multilateral development

perhaps felt nowhere more acutely than in Africa, where hydrologists have estimated that only approximately 2 per cent of total water resources are being utilized.<sup>19</sup> Similarly, although "one third of the world's potential hydropower is in Africa, . . . the ratio of energy generation to the exploitable potential is only 2 per cent".<sup>20</sup>

### C. The work of international organizations

7. The emergence of a large number of joint river and lake commissions in recent years may be attributed at least in part to work that has been carried on under United Nations auspices. The theme that emerges from the reports and recommendations of United Nations meetings is that, while there is no obligation under general international law to form such bodies, management of international watercourse systems through joint institutions is not only an increasingly common phenomenon, but also a form of co-operation between watercourse States that is almost indispensable if anything approaching optimum utilization and protection of the system of waters is to be attained.

8. In a report dated January 1971 on issues of international water resources development,<sup>21</sup> prepared for the then newly formed Committee on Natural Resources, the Secretary-General reminds us that international watercourses can provide opportunities for strengthening relations between States, and points to the "need" for the establishment of institutional arrangements to that end:

3. The occurrence of international water resources offers 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. Water is a vital resource, the benefits from which can be multiplied through joint efforts and the harmful effects of which may be prevented or removed through joint efforts. An incentive towards international co-operation thus demonstrably accompanies the status of co-basin State in an international river basin. Moreover, when plans are made and implemented jointly, valuable experience is gained with international institutions at both the policy and working levels. A characteristic trend in more recent international arrangements for water resources development has been the broadening of the scope and diversity of the parties' international water development activities. New dimensions are being added to the traditional organizational patterns developed in Europe and in North America, which were largely based on single-purpose and non-consumptive uses of the international rivers.

. . .

#### *The need for new institutional solutions*

12. As the pressure rises for more extensive development and use of international water resources, and the potential for conflict and the need for co-operation become every day more evident, water administrators, political leaders, regional planners and international lawyers are called upon to devise improved institutional frameworks capable of coping with the increased requirements for international co-operation. New flexible and broad-based channels of communication are needed between countries embarking upon the development and use of international water resources and those organizations and individuals having experience and information in these fields.

banks and other international institutions for projects associated with the development of individual watercourses. See P. K. Menon, "Institutional mechanisms for the development of international water resources", *Revue belge de droit international* (Brussels), vol. 8 (1972), p. 99.

<sup>19</sup> See Krishnamurthy, *loc. cit.* (footnote 16 above), p. 371, and Okidi, *loc. cit.* (footnote 16 above), pp. 647-648.

<sup>20</sup> Okidi, p. 648.

<sup>21</sup> E/C.7.2/Add.6, reproduced in part in *Yearbook . . . 1974*, vol. II (Part Two), p. 328, document A/CN.4/274, para. 334.

13. The range of alternative institutional arrangements is impressive. It includes, for instance, the mere nomination of one official in each country who is empowered to exchange data or even development plans for a specific purpose; or it may entail the establishment of an international basin agency with its own professional staff, technical services and an intergovernmental governing body.

14. Institutional arrangements should be responsive to the specific co-ordination requirements in each case. Taking a long-term perspective, flexibility is also necessitated by the changing demands for water, the nature and characteristics of the resource base, and by other dynamic environmental influences. . . .

9. The efforts of international organizations to encourage watercourse States to build institutions for the management of international watercourses may be illustrated by way of the following examples.

10. The United Nations Conference on the Human Environment recommended, in recommendation 51 of the Action Plan for the Human Environment,<sup>22</sup> that States consider the formation of joint institutional arrangements and provided an inventory of the possible functions of such bodies:

*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.

. . .

(c) Such arrangements, when deemed appropriate by the States concerned, will permit undertaking on a regional basis:

- (i) Collection, analysis, and exchanges of hydrologic data through some international mechanism agreed upon by the States concerned;
- (ii) Joint data-collection programmes to serve planning needs;
- (iii) Assessment of environmental effects of existing water uses;
- (iv) Joint study of the causes and symptoms of problems related to water resources, taking into account the technical, economic, and social considerations of water quality control;
- (v) Rational use, including a programme of quality control, of the water resource as an environmental asset;
- (vi) Provision for the judicial and administrative protection of water rights and claims;

. . .

(viii) Financial and technical co-operation [in the case] of a shared resource;

(d) Regional conferences should be organized to promote the above considerations.

11. A recommendation addressed to the Economic and Social Council by the Committee on Natural Resources at its third session, in 1973,<sup>23</sup> led ultimately to the

<sup>22</sup> *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. II.

See also the "Draft principles of conduct in the field of the environment for the guidance of States in the conservation and harmonious utilization of natural resources shared by two or more States", approved by the Governing Council of UNEP in 1978 (decision 6/14 of 19 May 1978); according to principle 2, "States should consider the establishment of institutional structures, such as joint international commissions, for consultations on environmental problems relating to the protection and use of shared natural resources" (UNEP, *Environmental Law. Guidelines and Principles*, No. 2, *Shared Natural Resources* (Nairobi, 1978).) For the background and text of the draft principles, see the note presented by Mr. Constantin A. Stavropoulos to the Commission at its thirty-fifth session (*Yearbook . . . 1983*, vol. II (Part One), p. 195, document A/CN.4/L.353).

<sup>23</sup> *Official Records of the Economic and Social Council, Fifty-fourth Session, Supplement No. 4* (E/5247), para. 114.

convening, in 1977, of the United Nations Water Conference.<sup>24</sup> In addition to the numerous recommendations concerning management of shared water resources,<sup>25</sup> the Mar del Plata Action Plan adopted by the Conference contains a resolution on river commissions, which

*Recommends* to the Secretary-General to explore the possibility of organizing meetings between representatives of existing international river commissions involved that have competence in the management and development of international waters, with a view to developing a dialogue between the different river-basin organizations on potential ways of promoting the exchange of their experiences. Representatives from individual countries which share water resources but yet have no established basin-wide institutional framework should be invited to participate . . .<sup>26</sup>

12. That resolution led to the convening of a series of such conferences, the first of which was the United Nations Interregional Meeting of International River Organizations, held at Dakar in 1981. The Meeting's conclusions concerning institutional and legal arrangements contain important lessons that have been distilled from the experience of watercourse States having joint administrative machinery:

4. Where it is the intention of States to establish a permanent or *ad hoc* international organization for the management of shared water resources to reflect the common interests involved, the agreement establishing this organization should at least contain, within the framework of principles of international water law acceptable to the contracting States, the following elements, which should be defined as clearly as possible:

- Objectives
- Territorial jurisdiction
- Composition
- Authority and power
- Decision-making procedures
- Financial provisions
- Procedures for the prevention and settlement of disputes.

5. . . . in view of the hydrologic unity of the drainage basins, it would be desirable that integrated development programmes be drawn and possibly executed at the basin level by recognized agencies. Where this approach was not viable, co-ordination of the activities of the various agencies concerned should be sought.

6. . . . concerning the composition of administrative, managerial and technical personnel, it was felt that technical matters should be dealt with by specialists, that diplomats should assist them where problems arose and that the activities of both groups should complement one another.

7. With regard to internal decision-making . . . the decision-making processes of international river basin agencies vary and provision should be made in the agreement to ensure the effectiveness of decisions taken.<sup>27</sup>

13. More recently, an interregional meeting on river and lake basin development with emphasis on the African region was held at Addis Ababa from 10 to 15 October 1988.<sup>28</sup> Among the recommendations it adopted are the following, under the heading "Resource assessment and planning":

<sup>24</sup> For a discussion of the background of the Conference, see *Yearbook . . . 1974*, vol. II (Part Two), p. 329, document A/CN.4/274, para. 336.

<sup>25</sup> See *Report of the United Nations Water Conference . . .* (footnote 18 above), chap. I, "Recommendations", sects. A, D, G and H.

<sup>26</sup> *Ibid.*, chap. I, resolution VII.

<sup>27</sup> United Nations, *Experiences in the Development . . .* (see footnote 4 (d) above), part one, "Report of the Meeting", para. 28, conclusions on topic I; see also para. 49, conclusions 1, 3-6 and 8 on topic II (Progress in co-operative arrangements), and para. 69, conclusions 3 and 4 on topic III (Economic and other considerations).

<sup>28</sup> See *River and Lake Basin Development*, Natural Resources/Water Series No. 20 (United Nations publication, Sales No. 90.II.A.10).

The meeting recommended that national Governments and, where applicable, river basin organizations take action to implement the following proposals for improved resource assessment and for the integrated planning of multi-sectoral river basin development and management.

2. Develop and implement systems and institutional arrangements for the collection and storage of data relevant to river and lake basin projects, providing for and stimulating information exchange and access to data among concerned parties, for the better planning and management of basin resources. This should be supplemented by periodically updated programmes of priorities for data collection and networks, in support of phased basin plans.<sup>29</sup>

14. Under "Legal and institutional aspects", the following recommendations were made:<sup>30</sup>

2. Governments recognize that the system approach to the management of a basin's water resources is the necessary point of departure for regulating and managing the resources, given the interdependence and diversity of the components of the hydrological cycle—surface water, underground water, the water-atmosphere interface and the freshwater-marine interface;

3. Governments apply the general principles of international law applicable to the water resources which include, *inter alia*, the right of each basin State to an equitable utilization and the duty not to cause appreciable harm to a co-basin State (including to the environment), and recognize the duty to exchange available relevant information and data, the duty to notify and to consult reciprocally with co-basin States that may be adversely affected by a project or programme planned by one or more basin States and the duty to consult, concerning the institutionalization of co-operation or collaboration for basin development, upon the request of any other basin States; . . .<sup>31</sup>

7. Governments recognize that basin organizations are important and influential prime movers in the development process, and that Governments accord due importance to them and to enabling legislation which should provide for high-calibre personnel in both the policy-making and the technical bodies.

The interregional meeting also noted that river development strategies over the past 20 years had met with varying, and sometimes limited, success. In particular, the following factors were identified as having prevented administrative management schemes from achieving their full potential:

(a) In relation to the wide-ranging objectives of socio-economic development, the mandates and the scope of work entrusted to river basin organizations may be too restrictive to permit their timely, effective and flexible functioning;

(b) Institutional instruments and arrangements available to river basin organizations have proved inadequate;

<sup>29</sup> *Ibid.*, part one, "Report of the Meeting", sect. 3.A.

<sup>30</sup> *Ibid.*, sect. 3.B.

<sup>31</sup> This recommendation was followed by a parenthetical note:

"(During the plenary session, several participants expressed reservations on this recommendation and stated that, even where there is a moral obligation to exchange data or to consult reciprocally, this must proceed on the basis of agreement.)"

While it is relevant to the Commission's work on the topic as a whole, the note does not appear to indicate that any reservations were expressed with regard to the portion of the recommendation concerning "the institutionalization of co-operation or collaboration for basin development", which relates to the subtopic currently under consideration.

Also of interest in connection with the present subtopic is the recommendation immediately following recommendation 3, quoted above.

"4. Governments realize that a basin State's right to an equitable share in the uses of the waters of an international drainage basin may be conditional upon that State's willingness, on a reciprocal basis, to participate affirmatively in the reasonable measures and programmes necessary to keep the system of waters in good order (equitable participation);". (*Ibid.*, sect. 3.B.)

(c) River basin organizations have adopted unsuitable working methods;

(d) There has been insufficient harmonization and co-ordination of work between river basin organizations and their respective national Governments;

(e) Member States have not given adequate financial support to river basin organizations;

(f) Both financial and human resources have been insufficient;

(g) There has been unnecessary overlapping and a lack of harmonization between the work of river basin organizations and that of various subregional organizations engaged in the planning and implementation of joint development programmes and projects;

(h) Local participation has been inadequate at all stages of project conception, planning and implementation;

(i) In some instances of project implementation, there has been an imbalance between the involvement of member States and donors, sometimes with a lack of co-ordination among donors.<sup>32</sup>

15. The subject of joint institutional management of international watercourses has also been addressed by the Economic Commission for Europe. In the "Principles regarding co-operation in the field of transboundary waters", which it adopted at its forty-second session, in 1987,<sup>33</sup> ECE recommended that watercourse States consider the establishment of joint commissions and made the following recommendations concerning joint administrative mechanisms:

6. Riparian countries should consider the setting up, where not yet existent, of appropriate institutional arrangements such as joint commissions and working groups, as a means of promoting the objectives of the agreement and facilitating implementation of its provisions. The structure, task, competence and financing of joint commissions or other co-operating bodies should be defined in the agreement.

6(a). The formal character, functions and geographical and substantive scope of activity of the commission should be adjusted to the prevailing conditions in the best possible way. Existing national structures and legal provisions in the contracting countries, as well as intergovernmental structures, should be fully taken into account together with hydrological, environmental, economic and other relevant conditions.

6(b). Where institutional arrangements are already set up, contracting parties should make full use of them by providing all necessary means for the efficient implementation of their tasks.

6(c). The commissions, working groups or other institutional arrangements should be composed of delegations appointed for this purpose by the individual contracting parties. Commissions should have their own rules of procedures for their work. Commissions should have the right

<sup>32</sup> *Ibid.*, sect. 3.D.

<sup>33</sup> Decision I (42) of 10 April 1987 (see *Official Records of the Economic and Social Council, 1987, Supplement No. 13* (E/1987/33-E/ECE/1148), chap. IV).

See also the report entitled "Ecosystems approach to water management" (ENVWA/WP.3/R.7/Rev.1), which was submitted to the Working Party on Water Problems of the Senior Advisers to ECE Governments on Environmental and Water Problems at its third session (11-14 December 1989). Chapter III of that report, "Application of the ecosystems approach to water management", addresses, *inter alia*: institutional arrangements; planning; impact assessments; ecosystem evaluation; monitoring; ecological forecasting, simulations and modelling; and public participation and education.

Also of interest is the ongoing work of the Economic and Social Commission for Western Asia in this field. In a working paper (E/ESCWA/NR/89/WG.3/WP.5) prepared for the *Ad Hoc* Expert Group Meeting on Water Security in the ESCWA Region (13-16 November 1989), it is recommended that, as part of a proposed "Water strategy action plan", an institutional framework for water resources development, conservation and management be established. It is also noted in the working paper that ESCWA has proposed the establishment of a regional water resources council, which would be an institutional arrangement for the promotion of regional/subregional co-operation among the water resources governmental authorities in the field of water resources development in the ESCWA region.

to seek advice from experts and scientific institutes and to appoint *ad hoc* or permanent working parties.

6(d). In the case of small projects of limited duration, *ad hoc* working groups could be set up by contracting parties to deal with specific concerns in common. Where the scope of the activities is broader and the project more protracted in nature, joint commissions should be established, if necessary with permanent secretariats.

16. In the mid-1970s two important studies were produced concerning the management of international water resources through joint institutional arrangements. The first was a report prepared by the United Nations Panel of Experts on the Legal and Institutional Aspects of International Water Resources Development.<sup>34</sup> The following findings of the Panel indicate developments in recent State practice and point to the increasing significance of joint administrative management of international watercourses:

557. . . . The recent arrangements with respect to the Nile, the Indus, the Niger, the Senegal, the Plata, the Lower Mekong and the Yarmuk basins constitute serious attempts to realize mutual co-operation and collaboration for joint development and conservation of international water resources. These agreements, among others, reflect the growing acceptance of the principles of regional international planning for the achievement of interdependent national interests.

558. Mutual co-operation of riparian States . . . has in many cases led to a more efficient exploitation than otherwise would be possible. Investigation of the multiple-use potentials and the hydrological effects of water resources works considered in the context of the basin, rather than in the national context alone, has led to development schemes of significant net benefit to all States concerned. The exchange of hydrological and other data, the co-ordinated or joint construction and operation of projects such as dams and river training works and the sharing of the costs of such undertakings have been the subject-matter of numerous successful international arrangements.

...

561. Given these varying national circumstances and the individuality of each international water resources system, it remains for the co-system States to fashion the specific legal régime and institutional arrangements best suited to their purposes and capabilities. Existing international law and international practice, however, are the proper points of departure . . .<sup>35</sup>

17. The other comprehensive study from the 1970s was prepared by the Committee on International Water Resources Law of the International Law Association.<sup>36</sup> At its fifty-seventh Conference, held at Madrid in 1976, ILA approved a set of articles on international water resources administration, with guidelines for the establishment of an international water resources administration.<sup>37</sup> These articles read as follows:

#### Article 1

As used in this chapter, the term "international water resources administration" refers to any form of institutional or other arrange-

<sup>34</sup> *Management of International Water Resources* . . . (see footnote 4 (c) above). It is stated in the preface to this report that it was designed as "a forward-looking consultation manual systematically setting forth and discussing the range of available legal and organizational alternatives".

<sup>35</sup> *Ibid.*, chap. VI. sect. A.1.

<sup>36</sup> See ILA, *Report of the Fifty-seventh Conference, Madrid, 1976* (see footnote 14 above), pp. 239 *et seq.*, report on administration of international water resources by the Rapporteur for that topic, Mr. D. A. Caponera. The report contains, *inter alia*, a list of agreements setting up a joint machinery for international drainage basin water resources management, arranged by continent (*ibid.*, pp. 256 *et seq.*).

<sup>37</sup> *Ibid.*, p. xxxvii (articles) and pp. xxxviii *et seq.* (guidelines).

ment established by agreement among two or more basin States for the purpose of dealing with the conservation, development and utilization of the waters of an international drainage basin.

#### Article 2

1. With a view to implementing the principle of equitable utilization of the waters of an international drainage basin and consistent with the provisions of chapter VI [of the Helsinki Rules] relating to the procedures for the prevention and settlement of disputes, the basin States concerned and interested should negotiate in order to reach agreement on the establishment of an international water resources administration.

2. The establishment of an international water resources administration in accordance with paragraph 1 above is without prejudice to the existence or subsequent designation of any joint agency, conciliation commission or tribunal formed or referred to by co-basin States pursuant to article XXXI [of the Helsinki Rules] in the case of a question or dispute relating to the present or future utilization of the waters of an international drainage basin.

#### Article 3

Member States of an international water resources administration in appropriate cases should invite other States, including non-basin States or international organizations, which by treaty, other instrument or binding custom enjoy a right to, or have an interest in, the use of the waters of an international drainage basin, to participate in the activities of the international water resources administration.

#### Article 4

1. In order to provide for an effective international water resources administration the agreement establishing that administration should expressly state, among other things, its objective or purpose, nature and composition, form and duration, legal status, area of operation, functions and powers, and financial implications of such an international water resources administration.

2. The Guidelines annexed to these articles should be taken into account when an international water resources administration is to be established.

These articles, adopted 10 years after the Helsinki Rules on the Uses of the Waters of International Rivers, represent a distinct step forward in the approach to the joint administration of international watercourses. While the Helsinki Rules treated the subject in chapter 6, entitled "Procedures for the prevention and settlement of disputes",<sup>38</sup> the above articles focus clearly on the management function of such joint bodies.

<sup>38</sup> Chapter 6 of the Helsinki Rules provides in article XXXI as follows:

#### "Article XXXI

"1. If a question or dispute arises which relates to the present or future utilization of the waters of an international drainage basin, it is recommended that the basin States refer the question or dispute to a joint agency and that they request the agency to survey the international drainage basin and to formulate plans or recommendations for the fullest and most efficient use thereof in the interest of all such States.

"2. It is recommended that the joint agency be instructed to submit reports on all matters within its competence to the appropriate authorities of the member States concerned.

"3. It is recommended that the member States of the joint agency in appropriate cases invite non-basin States which by treaty enjoy a right in the use of the waters of an international drainage basin to associate themselves with the work of the joint agency or that they be permitted to appear before the agency."

(ILA, *Report of the Fifty-second Conference, Helsinki, 1966* (London, 1967), p. 524.)



## D. Conclusion

18. The present chapter began by noting the conclusion of H. A. Smith that watercourse States should establish permanent joint commissions where questions relating to the proper use of a watercourse are likely to occur frequently. The international agreements and studies reviewed above go further than this, however, recognizing a need for such institutions not only to resolve questions that may arise as to utilization of an international watercourse, but also to engage in affirmative development and protection of the international watercourse system. The late James L. Brierly reached a similar conclusion:

... it is increasingly recognized that, for international rivers of any size, some form of joint international administration will almost certainly be needed if the resources of the river system are to be put to the fullest use for the benefit of all the riparian States. . . .<sup>39</sup>

19. Studies by international organizations and individual publicists recognize that, while the generality and flexibility of the "equitable utilization" rule (enshrined in article 6) are its principal virtues, at the same time close co-operation, including regular communication, is required for its effective implementation. International agreements providing for the establishment of joint watercourse commissions reflect a recognition of this fact. The need for co-operation between watercourse States is addressed generally in articles 9 (General obligation to co-operate) and 10 (Regular exchange of data and information), and more specifically in part III of the draft articles, entitled "Planned measures". While the Special Rapporteur proposes further on in the present report the addition to the draft articles of an annex on implementation, the article submitted in the present chapter could itself be viewed as a form of implementation of the articles.<sup>40</sup> By encouraging the formation of permanent institutions for the management of international watercourses, the article provides for a practical context within which watercourse States can work together in planning and monitoring the utilization, protection and development of their joint water resources.

<sup>39</sup> J. L. Brierly, *The Law of Nations*, 6th ed., H. Waldock, ed. (Oxford, Clarendon Press, 1963), p. 232. See also Brierly's first edition (Oxford, 1928), p. 123. A number of other publicists have also recognized such a need, for example: F. Florio, "Sur l'utilisation des eaux non maritimes en droit international", *Festschrift für Friedrich Berber* (Munich, Beck, 1973), p. 156; B. Chauhan, "Management of international water resources through international water resources commissions", ILA, Indian Branch, "Proceedings of the annual seminar, March 10 and 11, 1973", New Delhi; R. D. Hayton and A. E. Utton, "Transboundary groundwaters: the Bellagio draft treaty" *Natural Resources Journal*, vol. 29 (1989), p. 663 (see especially art. III of the draft treaty, entitled "The Commission responsible under this Agreement", at p. 684). For a survey of the literature on the subject, see Mr. Schwebel's third report, document A/CN.4/348 (footnote 2 above), footnote 746.

Scientists have reached similar conclusions: "Only international co-operation in the integrated management of water resources can ameliorate [problems of short supply and pollution]" (*Scientific American* (New York, N.Y.), special issue, "Managing Planet Earth" (September 1989), p. 4, summarizing J. W. M. la Riviere, "Threats to the world's water", p. 48).

<sup>40</sup> Joint watercourse commissions could implement not only the general obligations of equitable utilization and participation (art. 6), co-operation (article 9), sharing of data and information (art. 10) and notification, consultation and negotiation with regard to planned measures (arts. 11-21), but also those concerning avoidance of appreciable harm (art. 8) and [watercourse] [system] agreements (arts. 4 and 5).

## E. The proposed article

### PART IX

## MANAGEMENT OF INTERNATIONAL WATERCOURSES

### Article 26. Joint institutional management

1. Watercourse States shall enter into consultations, at the request of any of them, concerning the establishment of a joint organization for the management of an international watercourse [system].

2. For the purposes of this article, the term "management" includes, but is not limited to, the following functions:

(a) implementation of the obligations of the watercourse States under the present articles, in particular the obligations under parts II and III of the articles;

(b) facilitation of regular communication, and exchange of data and information;

(c) monitoring international watercourse[s] [systems] on a continuous basis;

(d) planning of sustainable, multi-purpose and integrated development of international watercourse[s] [systems];

(e) proposing and implementing decisions of the watercourse States concerning the utilization and protection of international watercourse[s] [systems]; and

(f) proposing and operating warning and control systems relating to pollution, other environmental effects of the utilization of international watercourse[s] [systems], emergency situations, or water-related hazards and dangers.

3. The functions of the joint organization referred to in paragraph 1 may include, in addition to those mentioned in paragraph 2, *inter alia*:

(a) fact-finding and submission of reports and recommendations in relation to questions referred to the organization by watercourse States; and

(b) serving as a forum for consultations, negotiations and such other procedures for peaceful settlement as may be established by the watercourse States.

### Comments

(1) The numbering of part IX and draft article 26 is provisional only. As the Special Rapporteur indicated in his fourth report,<sup>41</sup> the present and the following sub-topics are ones that could, in his judgment, be dealt with in the draft articles themselves or in annexes thereto. If the Commission decides to deal with them in annexes, the numbering will have to be changed accordingly.

(2) In large measure, draft article 26 parallels the articles on the same subtopic that were submitted by two former Special Rapporteurs, Mr. Evensen and Mr. Schwebel. Those earlier articles are sufficiently different in approach, when compared both to draft article 26 and to each other, that they are reproduced here as points of reference for the members of the Commission in their consideration of draft article 26. The draft article submitted by Mr. Schwebel in his third report reads as follows:

<sup>41</sup> Document A/CN.4/412 and Add.1 and 2 (see footnote 1 above), para. 7.

*Article 15. Administrative management*

At the request of any system State and where the economic and social needs of the region are making substantial or conflicting demands on water resources, or where the international watercourse system requires protection or control measures, the system States concerned shall enter into negotiations with a view to the establishment of permanent institutional machinery, or to the strengthening of any existing organization, for the purpose of expanding their consultations, of preparing or implementing their decisions taken with respect to the international watercourse system, and of promoting rational, optimum utilization, protection and control of their shared water resources.<sup>42</sup>

The draft article submitted by Mr. Evensen in his second report reads as follows:

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

1. Watercourse States shall, where it is deemed practical and advisable for the rational administration, management, protection and control of the waters of an international watercourse, establish permanent institutional machinery or, where expedient, strengthen existing organizations or organs in order to establish a system of regular meetings and consultations, to provide for expert advice and recommendations and to introduce other processes and decision-making procedures for the purposes of promoting effective and friendly co-operation between the watercourse States concerned with a view to enhancing optimum utilization, protection and control of the international watercourse and its waters.

2. To this end, watercourse States should establish, where practical, bilateral, multilateral or regional joint watercourse commissions and agree upon the mode of operation, financing and principal tasks of such commissions.

Such commissions may, *inter alia*, have the following functions:

(a) to collect, verify and disseminate information and data concerning utilization, protection and conservation of the international watercourse or watercourses;

(b) to propose and institute investigations and research concerning utilization, protection and control;

(c) to monitor the international watercourse on a continuous basis;

(d) to recommend to watercourse States measures and procedures necessary for the optimum utilization and the effective protection and control of the watercourse;

(e) to serve as a forum for consultations, negotiations and other procedures for peaceful settlement entrusted to such commissions by watercourse States;

(f) to propose and operate control and warning systems with regard to pollution, other environmental effects of water uses, natural hazards or other hazards which may cause damage or harm to the rights or interests of watercourse States.<sup>43</sup>

(3) A review of treaty provisions concerning institutional arrangements reveals that watercourse States have established a wide variety of such organizations. Some agreements deal only with a particular watercourse, while others cover a number of watercourses forming and crossing common boundaries. The powers vested in the respective commissions are tailored to the subject-matter of the individual agreement. Thus the competence of a joint body may be defined rather specifically where a single watercourse is involved, and more generally where the agreement covers a series of boundary rivers, lakes and aquifers. Draft article 26 is cast in terms that are intended to be sufficiently general to be appropriate for a framework agreement. At the same time, the article is designed to provide guidance to watercourse States with regard to the powers and functions that could be

entrusted to such joint institutions as they may decide to establish. The drafting of article 26 was largely inspired by international agreements establishing joint institutions for the management of watercourses. Representative examples of such agreements follow. They are drawn from treaties relating to the River Niger, the "Indus system of rivers",<sup>44</sup> and the "boundary waters"<sup>45</sup> between Canada and the United States.

(a) *Convention of 21 November 1980 creating the Niger Basin Authority*<sup>46</sup>

CHAPTER II

AIM AND OBJECTIVES OF THE AUTHORITY

*Article 3. Aim*

1. The aim of the Authority is to promote the co-operation among member States and to ensure an integrated development of the Niger Basin in all fields, by developing its resources particularly in the fields of energy, water resources, agriculture, animal husbandry, fishing and fisheries, forestry exploitation, transport, communications and industry.

2. In pursuance of the purpose mentioned in the preceding paragraph, the action of the Authority shall be directed to the harmonization of national development policies in the Basin through the implementation of integrated development projects and programmes.

*Article 4. Objectives*

1. The Authority shall be responsible for:

(a) The harmonization and the co-ordination of national development policies, in order to ensure an equitable policy as regards sharing of the water resources among member States.

(b) The formulation, in agreement with the member States, of the general policy of the development of the Basin which shall be consistent with the international status of the River Basin.

(c) The elaboration and the execution of an integrated development plan of the Basin.

(d) The initiating and monitoring of an orderly and rational regional policy for the utilization of the surface and underground waters in the Basin.

(e) The designing and conduct of studies, research and surveys.

(f) The formulation of plans, the construction, exploitation and maintenance of structure and projects realized within the general objectives of the integrated development of the Basin.

2. For the purpose set out in the above paragraph 1 the "Authority" shall notably undertake, in harmony with the development plans of States relating to the Niger Basin and in accordance with the general objectives of integrated development of the Basin, the following activities:

(a) *Statistics and planning*

(i) Collection, centralization, standardization, exploitation, dissemination, exchange of technical and related data;

(ii) Co-ordination of plans, projects and research carried out in the member States;

<sup>44</sup> This is the expression used in the preamble to the Indus Waters Treaty 1960 between India and Pakistan.

<sup>45</sup> This is the expression used in the 1909 Boundary Waters Treaty between Great Britain and the United States of America, in, for example, the preliminary article.

<sup>46</sup> This Convention transforms the former "River Niger Commission" into the "Niger Basin Authority" (preamble and art. 1). For other examples of agreements between African States creating joint watercourse commissions, see the Convention of 11 March 1972 establishing the Organization for the Development of the Senegal River; the Convention and Statutes of 22 May 1964 relating to the development of the Chad Basin; and the Agreement of 10 October 1973 establishing a development fund for the Chad Basin Commission.

<sup>42</sup> Document A/CN.4/348 (see footnote 2 above), para. 471.

<sup>43</sup> Document A/CN.4/381 (see footnote 3 above), para. 76.

- (iii) Consideration of projects presented by the member States with a view to making recommendations on co-ordinated programmes of research and implementation;
- (iv) Monitoring of research and works undertaken by member States and subsequent exploitation of reports which such States should submit periodically;
- (v) Drawing up a master plan and an integrated development programme of the Basin with an identification, at the various stages of the programme, of priorities among alternative uses, projects and sectors.

(b) *Infrastructure*

- (i) Designing, study and construction of hydraulic multi-purpose structures of all types and sizes;
- (ii) Designing, study and construction of works, plants and projects in the fields of transports and communications;
- (iii) Improvement and maintenance of navigable waterways;
- (iv) Development of river transport and promotion of an integrated multi-modal transport system (sea-river-rail-road) as a factor of integration and for opening up the land-locked Sahelian member States.

(c) *Water control and utilization*

- (i) Regulation of the flow and drainage of the main waterway;
- (ii) Flood control;
- (iii) Construction and maintenance of dykes;
- (iv) Prevention and control of drought and desertification;
- (v) Prevention of soil erosion and sedimentation;
- (vi) Setting up of structures and works for land development including salt water and drainage control.

(d) *Environment control and preservation*

- (i) Protection of the environment comprising the establishment of norms and measures applicable to the States in the alternative uses of waters in the Basin;
- (ii) Prevention and reduction of water pollution;
- (iii) Preservation of human health and genetic resources (fauna and flora).

(e) *Navigation control and regulation*

The control and the rules of all forms of navigation on the River, its tributaries and sub-tributaries are governed by the principles laid down in the Act of Niamey relating to the Navigation and the Economic Co-operation among the states of the Niger Basin, signed at Niamey in 1963.

(f) *Land and agro-pastoral development*

- (i) Development of food crops;
- (ii) Development of agro-pastoral, fishery and forestry resources;
- (iii) Implementation of programmes allowing the rational use of waters for domestic, industrial, agricultural and pastoral purposes.

(g) *Financing the projects and works*

Applying for financial and technical assistance on a bilateral, multilateral or international basis for carrying out studies and works for the development of the Niger River Basin and to that effect concluding agreements, provided that agreements involving financial commitments for the member States become effective only after approval by the Council of Ministers.

3. The terms, conditions and statutory provisions to be defined with the view to achieving the objectives as stated in paragraph (2) above, shall be, if necessary and in each case, provided for in riders which shall be annexed to the Convention of which they shall form an integral part.

4. The member States pledge to keep the Executive Secretariat informed of all the projects and works they might intend to carry out in the Basin.

Moreover, they pledge not to undertake any work on the portion of the River, its tributaries and sub-tributaries under their territorial jurisdiction which pollute the waters or modify the biological features of the fauna and the flora.

## CHAPTER III

### THE INSTITUTIONS OF THE AUTHORITY

#### *Article 5. Institutions*

1. The Institutions of the Authority shall be as follows:

- (a) The Summit of Heads of State and Government;
- (b) The Council of Ministers;
- (c) The Technical Committee of Experts;
- (d) The Executive Secretariat and its specialized organs.

#### *(b) Indus Waters Treaty 1960 of 19 September 1960 between India and Pakistan*

#### *Article VIII. Permanent Indus Commission*

(1) India and Pakistan shall each create a permanent post of Commissioner for Indus Waters, and shall appoint to this post, as often as a vacancy occurs, a person who should ordinarily be a high-ranking engineer competent in the field of hydrology and water-use. Unless either Government should decide to take up any particular question directly with the other Government, each Commissioner will be the representative of his Government for all matters arising out of this Treaty, and will serve as the regular channel of communication on all matters relating to the implementation of the Treaty, and, in particular, with respect to:

(a) the furnishing or exchange of information or data provided for in the Treaty; and

(b) the giving of any notice or response to any notice provided for in the Treaty.

(2) The status of each Commissioner and his duties and responsibilities towards his Government will be determined by that Government.

(3) The two Commissioners shall together form the Permanent Indus Commission.

(4) The purpose and functions of the Commission shall be to establish and maintain co-operative arrangements for the implementation of this Treaty, to promote co-operation between the Parties in the development of the waters of the Rivers and, in particular,

(a) to study and report to the two Governments on any problem relating to the development of the waters of the Rivers which may be jointly referred to the Commission by the two Governments: in the event that a reference is made by one Government alone, the Commissioner of the other Government shall obtain the authorization of his Government before he proceeds to act on the reference;

(b) to make every effort to settle promptly, in accordance with the provisions of Article IX (1), any question arising thereunder;

(c) to undertake, once in every five years, a general tour of inspection of the Rivers for ascertaining the facts connected with various developments and works on the Rivers;

(d) to undertake promptly, at the request of either Commissioner, a tour of inspection of such works or sites on the Rivers as may be considered necessary by him for ascertaining the facts connected with those works or sites; and

(e) to take, during the Transition Period, such steps as may be necessary for the implementation of the provisions of Annexure H.

(5) The Commission shall meet regularly at least once a year, alternately in India and Pakistan. This regular annual meeting shall be held in November or in such other month as may be agreed upon between the Commissioners. The Commission shall also meet when requested by either Commissioner.

(6) To enable the Commissioners to perform their functions in the Commission, each Government agrees to accord to the Commissioner of the other Government the same privileges and immunities as are accorded to representatives of member States to the principal and subsidiary organs of the United Nations under Sections 11, 12 and 13 of Article IV of the Convention on the Privileges and Immunities of the

United Nations (dated 13th February 1946) during the periods specified in those Sections. It is understood and agreed that these privileges and immunities are accorded to the Commissioners not for the personal benefit of the individuals themselves but in order to safeguard the independent exercise of their functions in connection with the Commission; consequently, the Government appointing the Commissioner not only has the right but is under a duty to waive the immunity of its Commissioner in any case where, in the opinion of the appointing Government, the immunity would impede the course of justice and can be waived without prejudice to the purpose for which the immunity is accorded.

(7) For the purposes of the inspections specified in paragraph (4) (c) and (d), each Commissioner may be accompanied by two advisers or assistants to whom appropriate facilities will be accorded.

(8) The Commission shall submit to the Government of India and to the Government of Pakistan, before the first of June of every year, a report on its work for the year ended on the preceding 31st of March, and may submit to the two Governments other reports at such times as it may think desirable.

(9) Each Government shall bear the expenses of its Commissioner and his ordinary staff. The cost of any special staff required in connection with the work mentioned in Article VII (1) shall be borne as provided therein.

(10) The Commission shall determine its own procedures.

#### *Article IX. Settlement of differences and disputes*

(1) Any question which arises between the Parties concerning the interpretation or application of this Treaty or the existence of any fact which, if established, might constitute a breach of this Treaty shall first be examined by the Commission, which will endeavour to resolve the question by agreement.

...

(c) *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 (1909 Boundary Waters Treaty)*

#### *Article VII*

The High Contracting Parties agree to establish and maintain an International Joint Commission of the United States and Canada, composed of six commissioners, three on the part of the United States, appointed by the President thereof, and three on the part of the United Kingdom, appointed by His Majesty on the recommendation of the Governor in Council of the Dominion of Canada.

#### *Article VIII*

This International Joint Commission shall have jurisdiction over and shall pass upon all cases involving the use or obstruction or diversion of the waters, with respect to which, under Articles III and IV of this Treaty, the approval of this Commission is required, and in passing upon such cases the Commission shall be governed by the following rules and principles which are adopted by the High Contracting Parties for this purpose:

The High Contracting Parties shall have, each on its own side of the boundary, equal and similar rights in the use of the waters hereinbefore defined as boundary waters.

...

The majority of the Commissioners shall have power to render a decision. In case the Commission is evenly divided upon any question or matter presented to it for decision, separate reports shall be made by the Commissioners on each side to their own Government. The High Contracting Parties shall thereupon endeavour to agree upon an adjustment of the question or matter of difference, and if an agreement is reached between them, it shall be reduced to writing in the form of a protocol, and shall be communicated to the Commissioners, who shall take such further proceedings as may be necessary to carry out such agreement.

#### *Article IX*

The High Contracting Parties further agree that any other questions or matters of difference arising between them involving the rights, obligations, or interests of either in relation to the other or to the inhabitants of the other, along the common frontier between the United States and the Dominion of Canada, shall be referred from time to time to the International Joint Commission for examination and report whenever either the Government of the United States or the Government of the Dominion of Canada shall request that such questions or matters of difference be so referred.

The International Joint Commission is authorized in each case so referred to examine into and report upon the facts and circumstances of the particular questions and matters referred, together with such conclusions and recommendations as may be appropriate, subject, however, to any restrictions or exceptions which may be imposed with respect thereto by the terms of the reference.

Such reports of the Commission shall not be regarded as decisions of the questions or matters so submitted either on the facts or the law, and shall in no way have the character of an arbitral award.

The Commission shall make a joint report to both Governments in all cases in which all or a majority of the Commissioners agree, and in case of disagreement the minority may make a joint report to both Governments, or separate reports to their respective Governments.

In case the Commission is evenly divided upon any question or matter referred to it for report, separate reports shall be made by the Commissioners on each side to their own Government.

#### *Article X*

Any questions or matters of difference arising between the High Contracting Parties involving the rights, obligations, or interests of the United States or of the Dominion of Canada either in relation to each other or to their respective inhabitants, may be referred for decision to the International Joint Commission by consent of the two Parties, it being understood that on the part of the United States any such action will be by and with the advice and consent of the Senate, and on the part of His Majesty's Government with the consent of the Governor-General in Council. In each case so referred the said Commission is authorized to examine into and report upon the facts and circumstances of the particular questions and matters referred, together with such conclusions and recommendations as may be appropriate, subject, however, to any restrictions or exceptions which may be imposed with respect thereto by the terms of the reference.

A majority of the said Commission shall have power to render a decision or finding upon any of the questions or matters so referred.

If the said Commission is equally divided or otherwise unable to render a decision or finding as to any questions or matters so referred, it shall be the duty of the Commissioners to make a joint report to both Governments, or separate reports to their respective Governments, showing the different conclusions arrived at with regard to the matters or questions so referred, which questions or matters shall thereupon be referred for decision by the High Contracting Parties to an umpire chosen in accordance with the procedure prescribed in the 4th, 5th and 6th paragraphs of Article XLV of the Hague Convention for the Pacific Settlement of International Disputes, dated the 18th October, 1907. Such umpire shall have power to render a final decision with respect to those matters and questions so referred on which the Commission failed to agree.

#### *Article XI*

A duplicate original of all decisions rendered and joint reports made by the Commission shall be transmitted to and filed with the Secretary of State of the United States and the Governor-General of the Dominion of Canada, and to them shall be addressed all communications of the Commission.

#### *Article XII*

The International Joint Commission shall meet and organize at Washington promptly after the members thereof are appointed, and when organized the Commission may fix such times and places for its meetings as may be necessary, subject at all times to special call or direction by the two Governments. Each Commissioner, upon the first joint meeting of the Commission after his appointment, shall, before

proceeding with the work of the Commission, make and subscribe a solemn declaration in writing that he will faithfully and impartially perform the duties imposed upon him under this Treaty, and such declaration shall be entered on the records of the proceedings of the Commission.

The United States and Canadian sections of the Commission may each appoint a secretary, and these shall act as joint secretaries of the Commission at its joint sessions, and the Commission may employ engineers and clerical assistants from time to time as it may deem advisable. The salaries and personal expenses of the Commission and of the secretaries shall be paid by their respective Governments, and all reasonable and necessary joint expenses of the Commission incurred by it shall be paid in equal moieties by the High Contracting Parties.

The Commission shall have power to administer oaths to witnesses and to take evidence on oath whenever deemed necessary in any proceeding, or enquiry, or matter within its jurisdiction under this Treaty, and all parties interested therein shall be given convenient opportunity to be heard, and the High Contracting Parties agree to adopt such legislation as may be appropriate and necessary to give the Commission the powers above mentioned on each side of the boundary, and to provide for the issue of subpoenas and for compelling the attendance of witnesses in proceedings before the Commission. The Commission may adopt such rules of procedure as shall be in accordance with justice and equity, and may make such examination in person and through agents or employees as may be deemed advisable.

(4) *Paragraph 1* of draft article 26 attempts to strike a balance between two approaches, one requiring that joint institutions be established, which is not an obligation of watercourse States under general international law and may not even be necessary with regard to certain international watercourses, and the other merely recommending that watercourse States consider establishing such bodies, which would not adequately reflect the importance attached to joint institutional management by States and experts in the field. Thus paragraph 1 requires that watercourse States enter into consultations, if any of them should so request, concerning the formation of a joint organization. It does not require "negotiations" *per se*, in view of the discussions in the Commission relating to articles 7 and 11-21. A particular question that the Commission may wish to consider is whether a stronger obligation, such as that envisaged in draft article 15 proposed by Mr. Schwebel in his third report,<sup>47</sup> would be preferable.

(5) *Paragraph 2* contains an illustrative list of functions that joint organizations might perform. As indicated in the treaty provisions quoted in paragraph (3) of the present comments, the range of possible functions that might be performed by such an organization is extremely broad. An effort was made to confine the list in paragraph 2 to the most important and common of these functions. It will be noted, however, that subparagraph (a) embraces a wide variety of functions since it relates to the implementation of the substantive and

procedural obligations under the draft articles. The same technique is employed in the Indus Waters Treaty 1960, which provides in its article VIII that the Permanent Indus Commission shall "serve as the regular channel of communication on all matters relating to the implementation of the Treaty" (para. (1)) and that the "purpose and functions of the Commission shall be to establish and maintain co-operative arrangements for the implementation of this Treaty, to promote co-operation between the parties in the development of the waters of the Rivers" (para. (4)).

(6) *Paragraph 3* contains a non-exhaustive list of additional functions that might be entrusted to a joint organization. The functions enumerated in the paragraph go beyond management *per se*. They are, however, functions that are often assigned to joint institutional mechanisms, as in the case of the Permanent Indus Commission (India and Pakistan)<sup>48</sup> and the International Joint Commission (Canada and the United States).<sup>49</sup> Applicable international agreements usually provide that the reports and recommendations submitted by such bodies are of a non-binding nature.

(7) Joint commissions are normally staffed largely by technical experts and, to this extent, are particularly well suited to finding facts and recommending alternative methods of accommodating any differences between watercourse States. The report of the Panel of Experts on the Legal and Institutional Aspects of International Water Resources Development recommends that differences be resolved at the technical level, whenever possible,

... because professionally qualified and experienced officers who are dealing on a day-to-day basis with international water resources problems and with their professional counterparts are in the best position to marshal and evaluate the extensive and complex factual data and to weigh the scientific, engineering and management considerations involved in a water resources matter on which there is some disagreement. . . . every effort should be made to promote the resolution of differences by the provision of competent accommodation machinery at the operating level.<sup>50</sup>

This same theme—that procedures should be made available for the resolution of disputes at lower levels before they are referred to higher governmental authorities—has inspired the Special Rapporteur's recommendations in chapters III and IV of the present report, dealing respectively with implementation and with the settlement of disputes.

<sup>48</sup> See article VIII, para. (4), and article IX, para. (1), of the Indus Waters Treaty 1960, quoted above in paragraph (3) (b) of the present comments.

<sup>49</sup> See article VIII and, in particular, articles IX and X of the 1909 Boundary Waters Treaty, quoted above in paragraph (3) (c) of the present comments.

<sup>50</sup> *Management of International Water Resources* . . . (see footnote 4 (c) above), para. 457.

<sup>47</sup> This draft article, which is quoted in full in paragraph (2) of the present comments, provides *inter alia* that "the system States concerned shall enter into negotiations with a view to the establishment of permanent institutional machinery . . .".

## CHAPTER II

## Security of hydraulic installations

## A. Introduction and overview

20. The previous two Special Rapporteurs have considered extensively the subtopic of security of hydraulic installations and have submitted draft articles on the subject.<sup>51</sup> These treatments on the subtopic have identified a number of possible elements that could be included in one or more draft articles: (1) an obligation to design, construct and maintain "works or installations containing dangerous forces",<sup>52</sup> including dams, dykes and weirs, in such a manner as to provide reasonable assurances of their safety;<sup>53</sup> (2) an obligation to prevent poisoning; (3) an obligation not to attack, destroy or damage hydraulic installations and other facilities in peacetime or in time of armed conflict (unless in use for military purposes); (4) an obligation not to use hydraulic installations or other facilities capable of releasing dangerous forces or substances in preparation for, or in the conduct of, offensive military operations; (5) an obligation to consult, upon request, concerning security and safety measures for protection against poisoning and terrorist acts; (6) an obligation to maintain during times of armed conflict, in so far as possible, previously established systems for warning other States of water-related hazards and emergencies; and (7) an obligation not to withhold, during times of peace or armed conflict, water from a watercourse State so as to jeopardize the survival of the civilian population or to imperil the viability of the environment.

21. While both Mr. Schwebel and Mr. Evensen have regarded the subtopic as a whole as being extremely important, Mr. Evensen expressed doubts in his first report about the advisability of dealing in the draft articles with the aspect of the subtopic regarding protection of water resources and installations in time of armed conflict:

... The two Protocols of the 1949 Geneva Conventions were agreed on after long and delicate negotiations. The Special Rapporteur fears

<sup>51</sup> See, in the third report of Mr. Schwebel, the discussion of hydraulic installations and water security and draft article 13 (Water resources and installation safety) (document A/CN.4/348 (see footnote 2 above), paras. 390-415); in the first report of Mr. Evensen, draft article 28 (Safety of international watercourse systems, installations and constructions) and the accompanying comments (document A/CN.4/367 (see footnote 3 above), paras. 186-190), and in his second report, draft articles 28 (Safety of international watercourses, installations and constructions, etc.) and 28 *bis* (Status of international watercourses, their waters and constructions, etc. in armed conflicts) and the accompanying comments (document A/CN.4/381 (see footnote 3 above), paras. 94-97).

<sup>52</sup> The quoted language is from article 56, para. 1, of the Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I) (see para. 32 below).

<sup>53</sup> Under paragraph 1 of both versions of article 28 proposed by Mr. Evensen, watercourse States would be required to "employ their best efforts to maintain and protect" both the international watercourse and the installations and constructions pertaining thereto. The danger that could be posed by such installations, in particular to downstream States, is recognized in Mr. Schwebel's third report, document A/CN.4/348 (see footnote 2 above), para. 391.

that the inclusion of such provisions here might be considered as constituting an amendment or an addition to the two Protocols and thus renew the discussions on the principles and rules pertaining to international and internal armed conflicts. . . .<sup>54</sup>

These considerations led Mr. Evensen to exclude any reference to armed conflict from the version of article 28 proposed in his first report. However, the discussions on this article in 1983 in the Commission and in the Sixth Committee of the General Assembly convinced him that the subject should be addressed, at least in a general way, in a draft article. He accordingly proposed in his second report a new draft article (art. 28 *bis*) that deals, in a single paragraph, with the status of international watercourses and related installations in armed conflicts.<sup>55</sup> Mr. Schwebel, for his part, addresses armed conflict in four of the six paragraphs of article 13 proposed in his third report.<sup>56</sup>

22. The present Special Rapporteur, while fully recognizing the signal importance of the protection of water resources and installations in time of armed conflict, cannot help being influenced by the considerations identified by Mr. Evensen, and by similar concerns expressed both in the Commission and in the Sixth Committee. After careful consideration of the matter, he has reached the conclusion that an approach to the subtopic more along the lines of the two articles proposed in Mr. Evensen's second report would be least likely to give rise to serious objections. The Special Rapporteur will therefore submit draft articles following this basic approach after briefly reviewing the most important precedents in the field.

## B. State practice and views of commentators

23. The nature of the problem of water resources and installation safety was well described by Mr. Schwebel in his third report:

Questions of public safety with respect to the possible failure, mismanagement or sabotage of major hydraulic works and of the security of the installations themselves are not novel. The collapse of a high storage dam, for example, may take thousands of lives as well as have devastating economic and financial consequences. As more elaborate and much more costly multi-purpose projects have been constructed, especially in recent decades, concern has heightened. In addition to the potential for catastrophe posed by intensified occupation and use of low-lying areas downstream, the vulnerability of such works to acts of terrorism has led, or should have led, waterworks administrators to enhance their security precautions and to review their emergency operating procedures.

...

System States have a legitimate interest in the safety and security of water-related installations, and not simply because of their potential for death and destruction. More and more major projects are part of a regional or system-wide plan for development, control and environmental protection, with benefits and costs, direct and indirect, to each participating system State. In their consultations and their sharing of information and data, system States will increasingly include questions

<sup>54</sup> See document A/CN.4/367 (footnote 3 above), para. 186.

<sup>55</sup> See document A/CN.4/381 (footnote 3 above), para. 96.

<sup>56</sup> See document A/CN.4/348 (footnote 2 above), para. 415.

of installation security and water safety, as well as the more familiar concern for safe construction and operation.<sup>57</sup>

24. Of course, these concerns are not confined to peacetime. But the fact that armed conflict can pose particularly grave dangers to the safety of drinking water and the security of hydraulic installations should not obscure the importance of proper construction, maintenance and management in time of peace. Recognition of the disastrous consequences of, for example, the burst of hydraulic works such as dams has led a number of Governments, notably Switzerland, Sweden and Germany,<sup>58</sup> to enact municipal legislation providing for special protection.

25. State treaty practice evinces similar concerns. An example is the Convention of 23 August 1963 on the Emosson hydroelectric project, by which France and Switzerland agreed to share the power produced by the project from waters originating in both countries. The Convention provides that the designs and general plans for the works shall be prepared by a concessionaire but may not be carried out without the prior approval of the parties (art. 2); it also defines the obligations of the concessionaire relating to drainage and spillways and obliges him to allow the flows deemed necessary to safeguard general interests, such as those relating to public health, irrigation, fish conservation and environmental protection, to run downstream from the dam and the water intakes (art. 3). A permanent supervisory commission is established to enforce the provisions of the Convention (art. 4). The security of the works is also specifically made subject to the legislation of the State in whose territory they are constructed (art. 2).

26. Another example of an agreement addressing the issue of water installation safety is the Convention of 27 May 1957 between Switzerland and Italy concerning the use of the water power of the Spöl. Article 8 of the Convention deals with the conditions for the construction of the dam, and protection against flooding. It provides that the dam is to be constructed in such a way as to assure maximum safety for Switzerland and is to be in accordance with the laws in force in that country. The article further provides that the dam is to be designed in such a way as to afford adequate free outlets for water, so that flood waters may flow away at all times.

27. With regard to armed conflict, publicists from Gentili, Grotius and Vattel to Fauchille and Oppenheim have condemned the poisoning of water supplies as a means of waging war.<sup>59</sup> The subject was also addressed in the Regulations annexed to the 1907 Hague Convention (IV) respecting the Laws and Customs of War on Land. In particular, article 23(e) of the Regulations concerns the use of weapons or material "calculated to cause unnecessary suffering". In his analysis of article 23, Oppenheim concluded that "wells, pumps, rivers, and the like from

which the enemy draws drinking water must not be poisoned".<sup>60</sup> Also addressing this question, the 1956 field manual on the law of land warfare of the army of the United States of America includes in a list of acts "representative of violations of the law of war ('war crimes')", the "poisoning of wells or streams".<sup>61</sup>

28. The portion of the British manual of military law of 1958 that deals with the law of war on land similarly provides:

Water in wells, pumps, pipes, reservoirs, lakes, rivers and the like, from which the enemy may draw drinking water, must not be poisoned or contaminated. The poisoning or contamination of water is not made lawful by posting up a notice informing the enemy that the water has been thus polluted.<sup>62</sup>

29. While the question of poisoning water supplies has thus been addressed by a variety of authorities and instruments down through the centuries, it is only recently that attempts have been made systematically to study and codify rules on the broader subject of water resources and installation safety. In the "Intermediate report" submitted at the International Law Association's fifty-sixth Conference, held at New Delhi in 1974, the ILA Committee on International Water Resources Law recognized this development:

It is only in the last decade that the new awareness of the world-wide threat to the human environment has meant a turning point also in the considerations concerning the protection of water and water installations in times of armed conflict although these considerations are still far from being materially comprehensive or methodically systematic.<sup>63</sup>

30. Subsequently, at its fifty-seventh Conference, held at Madrid in 1976, ILA adopted the following provisions on the protection of water resources and water installations in times of armed conflict:

#### Resolution

*Recalling* the significant increase, during recent decades, in the demand for water and the consequent development of water installations;

*Being aware* of the destructive power of modern weapons;

*Taking into account* the vital importance of water and water installations for the health and even the survival of people all over the world and the susceptibility of water and water installations to damage and destruction;

*Considering* the lack of specific rules of international law for the protection of water and water installations against damage or destruction in times of armed conflict;

*Convinced* of the urgent need to establish precise rules for the protection of water and water installations against damage or destruction and thus to contribute to the development of international humanitarian law applicable to armed conflicts;

<sup>57</sup> Document A/CN.4/348 (see footnote 2 above), paras. 390 and 392.

<sup>58</sup> See "Intermediate report on the protection of water resources and water installations in times of armed conflict" by F. J. Berber, Rapporteur of the ILA Committee on International Water Resources Law for that topic, in ILA, *Report of the Fifty-sixth Conference, New Delhi, 1974* (London, 1976), p. 136.

<sup>59</sup> But see, to the contrary, the conclusion of Michel d'Amboise, in *Le guidon des gens de guerre* (1543), that it was legally permissible to "gaster, infester, intoxiquer et empoisonner les eaux des ennemis". The views of all these writers are noted in Mr. Schwabel's third report, document A/CN.4/348 (see footnote 2 above), paras. 400-401.

<sup>60</sup> L. Oppenheim, *International Law: A Treatise*, 7th ed., H. Lauterpacht, ed. (London, Longmans, Green, 1952), vol. II, *Disputes, War and Neutrality*, p. 340, sect. 110. Oppenheim added that "an armed force besieging a town may . . . cut off the river which supplies drinking water to the besieged, but must not poison the river" (*ibid.*, p. 419, sect. 157).

<sup>61</sup> United States of America, Department of the Army, Field Manual (FM 27-10) on the Law of Land Warfare (1956), para. 504 (i), as quoted in M. M. Whiteman, *Digest of International Law* (Washington, D.C., U.S. Government Printing Office), vol. 10 (1968), p. 455. See also para. 37 (b), of the manual, quoted in Whiteman, *ibid.*

<sup>62</sup> United Kingdom, War Office, *The Law of War on Land, Being Part III of the Manual of Military Law* (1958), p. 42, as quoted in Whiteman, *op. cit.*, p. 458.

<sup>63</sup> ILA, *Report of the Fifty-sixth Conference . . .* (see footnote 58 above), p. 136.

Adopts the following articles as guidelines for the elaboration of such rules:

#### Article I

Water which is indispensable for the health and survival of the civilian population should not be poisoned or rendered otherwise unfit for human consumption.

#### Article II

Water supply installations which are indispensable for the minimum conditions of survival of the civilian population should not be cut off or destroyed.

#### Article III

The diversion of waters for military purposes should be prohibited when it would cause disproportionate suffering to the civilian population or substantial damage to the ecological balance of the area concerned. A diversion that is carried out in order to damage or destroy the minimum conditions of survival of the civilian population or the basic ecological balance of the area concerned or in order to terrorize the population should be prohibited in any case.

#### Article IV

The destruction of water installations such as dams and dykes, which contain dangerous forces, should be prohibited when such destruction might involve grave dangers to the civilian population or substantial damage to the basic ecological balance.

#### Article V

The causing of floods as well as any other interference with the hydrologic balance by means not mentioned in articles II to IV should be prohibited when it involves grave dangers to the civilian population or substantial damage to the ecological balance of the area concerned.

#### Article VI

1. The prohibitions contained in articles I to V above should be applied also in occupied enemy territories.
2. The occupying Power should administer enemy property according to the indispensable requirements of the hydrologic balance.
3. In occupied territories, seizure, destruction or intentional damage to water installations should be prohibited when their integral maintenance and effectiveness would be vital to the health and survival of the civilian population.

#### Article VII

The effect of the outbreak of war on the validity of treaties or of parts thereof concerning the use of water resources should not be termination but only suspension. Such suspension should take place only when the purpose of the war or military necessity imperatively demand the suspension and when the minimum requirements of subsistence for the civil population are safeguarded.

#### Article VIII

1. It should be prohibited to deprive, by the provisions of a peace treaty or similar instrument, a people of its water resources to such an extent that a threat to the health or to the economic or physical conditions of survival is created.

2. When, as a result of the fixing of a new frontier, the hydraulic system in the territory of one State is dependent on works established in the territory of another State, arrangements should be made for the safeguarding of uninterrupted delivery of water supplies indispensable for the vital needs of the people.<sup>64</sup>

<sup>64</sup> ILA, *Report of the Fifty-seventh Conference* . . . (see footnote 14 above), pp. xxxv-xxxvi.

ILA adopted the above provisions "with the understanding that these rules should be applied also with respect to other conduct intended to damage or destroy the water resources of a State or area".<sup>65</sup>

31. One year after the fifty-seventh Conference of the International Law Association, the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflict, following three years of meetings, adopted by consensus, on 8 June 1977, two protocols additional to the Geneva Conventions of 12 August 1949, certain provisions of which are pertinent to the present inquiry. These provisions are articles 54 and 56 of Protocol I, relating to the protection of victims of international armed conflicts, and articles 14 and 15 of Protocol II relating to the protection of victims of non-international armed conflicts. Article 54 of Protocol I, which deals with the "Protection of objects indispensable to the survival of the civilian population", provides in its paragraph 2 as follows:

2. It is prohibited to attack, destroy, remove or render useless objects indispensable to the survival of the civilian population, such as foodstuffs, agricultural areas for the production of foodstuffs, crops, livestock, *drinking water installations and supplies and irrigation works*,\* for the specific purpose of denying them for their sustenance value to the civilian population or to the adverse Party, whatever the motive, whether in order to starve out civilians, to cause them to move away, or for any other motive.<sup>66</sup>

Paragraph 4 of the same article provides further: "These objects shall not be made the objects of reprisals".

32. Article 56 of Protocol I is entitled "Protection of works and installations containing dangerous forces" and provides in part as follows:

1. Works or installations containing dangerous forces, namely dams, dykes and nuclear electrical generating stations, shall not be made the object of attack, even where these objects are military objectives, if such attack may cause the release of dangerous forces and consequent severe losses among the civilian population. Other military objectives located at or in the vicinity of these works or installations shall not be made the object of attack if such attack may cause the release of dangerous forces from the works or installations and consequent severe losses among the civilian population.

2. The special protection against attack provided by paragraph 1 shall cease:

(a) For a dam or a dyke only if it is used for other than its normal function and in regular, significant and direct support of military operations and if such attack is the only feasible way to terminate such support;

(b) For a nuclear electrical generating station only if it provides electric power in regular, significant and direct support of military operations and if such attack is the only feasible way to terminate such support;

4. It is prohibited to make any of the works, installations or military objectives mentioned in paragraph 1 the object of reprisals.

<sup>65</sup> *Ibid.*, p. xxxiv. Mr. Schwebel remarked in his third report that, useful as ILA's articles were, they should not be taken as an indication that the Commission's articles should be limited to situations of armed conflict (document A/CN.4/348 (see footnote 2 above), para. 407).

<sup>66</sup> The ICRC commentary to this provision explains that "the verbs 'attack', 'destroy', 'remove' and 'render useless' are used in order to cover all possibilities, including pollution, by chemical or other agents, of water reservoirs . . ." (ICRC, *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949* (Geneva, Martinus Nijhoff, 1987), p. 655.)



5. The Parties to the conflict shall endeavour to avoid locating any military objectives in the vicinity of the works or installations mentioned in paragraph 1. Nevertheless, installations erected for the sole purpose of defending the protected works or installations from attack are permissible and shall not themselves be made the object of attack, provided that they are not used in hostilities except for defensive actions necessary to respond to attacks against the protected works or installations and that their armament is limited to weapons capable only of repelling hostile action against the protected works or installations.

6. The High Contracting Parties and the Parties to the conflict are urged to conclude further agreements among themselves to provide additional protection for objects containing dangerous forces.

7. In order to facilitate the identification of the objects protected by this article, the Parties to the conflict may mark them with a special sign consisting of a group of three bright orange circles placed on the same axis, as specified in article 16 of annex I to this Protocol. The absence of such marking in no way relieves any Party to the conflict of its obligations under this article.<sup>67</sup>

33. Article 14 of Protocol II, entitled "Protection of objects indispensable to the survival of the civilian population", provides as follows:

Starvation of civilians as a method of combat is prohibited. It is therefore prohibited to attack, destroy, remove or render useless, for that purpose, objects indispensable to the survival of the civilian population, such as foodstuffs, agricultural areas for the production of foodstuffs, crops, livestock, drinking water installations and supplies and irrigation works.<sup>68</sup>

34. Article 15, on the "Protection of works and installations containing dangerous forces", provides:

Works or installations containing dangerous forces, namely dams, dykes and nuclear electrical generating stations, shall not be made the object of attack, even where these objects are military objectives, if such attack may cause the release of dangerous forces and consequent severe losses among the civilian population.<sup>69</sup>

35. As noted above (para. 21), Mr. Evensen expressed reservations about the advisability of addressing, in the Commission's draft articles, the subjects dealt with in the 1977 Geneva Protocols. He stated in particular:

... In view of the great difficulties with which the Geneva Diplomatic Conference of 1977 was faced, it seems doubtful whether questions pertaining to the laws of armed conflicts should be introduced in the

<sup>67</sup> The ICRC commentary to this article recalls the widespread devastation that can be wreaked by the destruction of dykes, dams and other works:

"... In 1938 the Chinese authorities breached the dykes of the Yellow River near Chang-Chow to stop the Japanese troops, resulting in extensive losses and widespread damage. In 1944 ... in the Netherlands, German troops flooded many thousands of hectares of agricultural land with sea water to prevent the advance of the enemy.

"It was also during the Second World War that deliberate attacks were mounted against hydro-electric dams. The best known are those which destroyed the dams in the Eder and the Möhne in Germany in May 1943. These operations resulted in considerable damage: 125 factories were destroyed or seriously damaged and in addition 3,000 hectares of cultivated land were lost for the harvest of that year, 1,300 persons were killed, including some deported persons and allied prisoners, and finally, 6,500 head of livestock were lost." (*Ibid.*, p. 667.)

<sup>68</sup> The background and an explanation of this provision may be found in the ICRC commentary (*ibid.*, pp. 1455 *et seq.*).

<sup>69</sup> The ICRC commentary to this article notes that:

"... The list is exhaustive, which does not mean that there are not other kinds of works or installations whose destruction is likely to entail heavy losses among the civilian population. Thus, for example, the problem of storage facilities for crude oil and oil products and the risks of oil rigs were raised during the Diplomatic Conference. In the end it was only possible to arrive at a consensus on the items listed above, though this does not exclude the protection of other types of installations under different international legal régimes." (*Ibid.*, p. 1462.)

present draft convention. ... This may create unforeseen difficulties in the Commission's work. ...<sup>70</sup>

### C. The proposed articles

36. For the reasons set forth in section A of the present chapter, the following draft articles do not deal in detail with the protection of water resources and hydraulic installations in times of armed conflict. Draft article 27 focuses on the safety of water resources and installations, while draft article 28 deals generally with their status in times of armed conflict.

## PART X

### PROTECTION OF WATER RESOURCES AND INSTALLATIONS

#### *Article 27. Protection of water resources and installations*

1. Watercourse States shall employ their best efforts to maintain and protect international watercourses and related installations, facilities and other works.

2. Watercourse States shall enter into consultations with a view to concluding agreements or arrangements concerning:

(a) general conditions and specifications for the establishment, operation and maintenance of installations, facilities and other works;

(b) the establishment of adequate safety standards and security measures for the protection of international watercourses and related installations, facilities and other works from hazards and dangers due to the forces of nature, or to wilful or negligent acts.

3. Watercourse States shall exchange data and information concerning the protection of water resources and installations and, in particular, concerning the conditions, specifications, standards and measures mentioned in paragraph 2 of this article.

#### *Comments*

(1) For the reasons given in paragraph (1) of the comments on draft article 26, the numbering of part X and of draft article 27 is provisional only.

(2) *Paragraph 1* of draft article 27 requires watercourse States to use their "best efforts" to keep international watercourses, as well as any installations or works, in safe condition and to protect them from sabotage, as by poisoning or destruction.

(3) In contrast to paragraph 1 of draft article 26, *paragraph 2* would require watercourse States to enter into consultations whether or not any watercourse State so requests. This is consistent with paragraph 2 of the comparable draft article proposed by Mr. Evensen (art. 28)<sup>71</sup> and, in the judgment of the present Special Rapporteur, is made necessary by the disastrous consequences that could ensue from the failure of a major installation or from the contamination of water supplies.

<sup>70</sup> See Mr. Evensen's first report, document A/CN.4/367 (footnote 3 above), para. 46.

<sup>71</sup> *Ibid.*, para. 186.

The consultations would be aimed at reaching agreement upon such matters as conditions and specifications for the construction and maintenance of dams, for example as provided for in article 8 of the 1957 Convention between Switzerland and Italy concerning the use of the water power of the Spöl.<sup>72</sup> Under subparagraph (b) of paragraph 2, watercourse States are further to consult with regard to the establishment of adequate safety standards and security measures in relation to "hazards and dangers due to the forces of nature, or to wilful or negligent acts". The corresponding provision submitted by Mr. Evensen (art. 28, para. 2(b)) also referred to "hazards and dangers created by faulty construction, insufficient maintenance or other causes". These matters are not included in subparagraph (b) because it is believed that they are covered by the terms of subparagraph (a).

(4) Finally, paragraph 3 requires watercourse States to exchange data and information relating to the protection of water resources and installations. It makes particular mention of the "conditions" and "specifications" referred to in subparagraph (a) of paragraph 2, and of the safety "standards" and security "measures" referred to in subparagraph (b). Watercourse States have a legitimate interest in such information because of their larger interest in protecting their population from disasters, as well as from harm due to interference with any of the increasingly common bilateral or multilateral arrangements for development of the watercourse, sharing of power, conservation and management of living resources, or the like.

**Article 28. Status of international watercourses and water installations in time of armed conflict**

**International watercourses and related installations, facilities and other works shall be used exclusively for peaceful purposes consonant with the principles enshrined in the Charter of the United Nations and shall be inviolable in time of international as well as internal armed conflicts.**

*Comments*

(1) Draft article 28 closely parallels the draft article 28 *bis* submitted by Mr. Evensen in his second

<sup>72</sup> See para. 26 above.

report.<sup>73</sup> It has been somewhat simplified, but the basic substantive elements are retained.

(2) While the first limb of the draft article, viz. that international watercourses and works are to be used exclusively for peaceful purposes, is consistent with article 56 of Additional Protocol I to the 1949 Geneva Conventions, it is not clearly required by that article.<sup>74</sup> It is likewise uncertain whether the second limb of the draft article, viz. that such watercourses and works are inviolable in international as well as in internal armed conflicts, is literally required by international law. Indeed, while the poisoning of water supplies is universally condemned, cutting off an enemy's source of water has been found permissible by Fauchille<sup>75</sup> and Oppenheim,<sup>76</sup> as well as in the 1956 United States army field manual in commenting upon the Regulations annexed to the 1907 Hague Convention (IV).<sup>77</sup> Yet the importance and scarcity of fresh water in today's world are such that the rule proposed by Mr. Evensen has compelling force. To these considerations may be added the humanitarian principles underlying the 1977 Geneva Protocols—in particular, the principle of protection of resources indispensable to the survival of the civilian population<sup>78</sup>—and the notion of inviolability of international watercourses and installations seems fundamental indeed. The principle is therefore submitted once again for the Commission's consideration.

<sup>73</sup> See footnote 51 above.

<sup>74</sup> Paragraph 5 of article 56 (set forth in para. 32 above) provides only that the "Parties to the conflict shall endeavour to avoid locating any military objectives in the vicinity of . . . works or installations" that are protected under paragraph 1 of the article.

<sup>75</sup> Fauchille maintained that it was "permissible to perforate dykes and to demolish sluice gates", and that "one may also divert the course of a river, cut off the enemy's sources of water" (P. Fauchille, *Traité de droit international public*, 8th rev. ed. of *Manuel de droit international public* by H. Bonfils, tome II (Paris, 1921), p. 123)).

<sup>76</sup> See footnote 60 above.

<sup>77</sup> The manual states, in para. 37 (b), that article 23 (a) of the Regulations "does not prohibit measures being taken to dry up springs, to divert rivers and aqueducts from their courses . . ." (as quoted in Whiteman, *op. cit.* (footnote 61 above)).

<sup>78</sup> Chapter III (Civilian objects) of part IV (Civilian population) of Protocol I deals, in article 54, with "Protection of objects indispensable to the survival of the civilian population" (quoted above, para. 31). There is no provision concerning "resources" indispensable to the survival of the civilian population, but "objects" expressly covers "drinking water installations and supplies and irrigation works".

## CHAPTER III

### Implementation of the articles

#### A. Introduction

37. Although they were not initially reflected in the outline of remaining issues presented to the Commission in his fourth report,<sup>79</sup> the Special Rapporteur believes

<sup>79</sup> Document A/CN.4/412 and Add.1 and 2 (see footnote 1 above), para. 7.

that provisions dealing with implementation of the articles are of great importance to the smooth functioning of the future instrument. While the proposed annex (sect. B below) is entitled "Implementation of the articles", it does not purport—nor should a framework agreement attempt—to deal with every aspect of the subject. Instead it lays down several overarching principles that should facilitate implementation of the articles, make redress

more readily available to private parties and help to avoid disputes between watercourse States.

38. The first of these principles is that of non-discrimination. Draft article 2 of annex I provides for implementation of the principle by requiring that watercourse States give extraterritorial effects the same weight as domestic ones in considering the permissibility of activities affecting an international watercourse system. Draft article 3 of the annex requires that recourse be available under the domestic legal system of watercourse States to those injured in other States. Draft article 4 provides for equal rights of access by persons in other States to the relevant administrative and judicial procedures in a watercourse State that is the source of actual or potential harm. To make the latter provision meaningful, draft article 5 requires that watercourse States take appropriate measures to provide potentially affected persons in other States with sufficient information to allow them to exercise their rights under article 4. Draft article 6 deals with jurisdictional immunity, providing that a watercourse State that has caused harm to persons in other States should enjoy no greater jurisdictional immunity with regard to those persons than it does with regard to its own citizens. Draft article 7 establishes a procedure for regular meetings of a "Conference of the Parties" to review the implementation of the articles and perform other functions. Finally, draft article 8 sets forth procedures for amendment of the articles by the conference of the parties. The Special Rapporteur recognizes that draft articles 7 and 8, like other articles of the annex, could well form a part of the main body of the draft articles. He has included them in the annex not for substantive reasons but because the outline of the draft articles approved by the Commission did not contain provisions of the kind proposed in the present chapter. The Special Rapporteur recommends, however, that the Commission consider the possibility of including the provisions contained in annex I in the body of the draft articles.

39. Mr. Schwebel emphasized the "utility of several 'echelons'" of procedures for the avoidance and resolution of differences.<sup>80</sup> He also noted that

In some international watercourse systems, a rule of equal access to information and to administrative and judicial process by nationals of co-system States—a matter of equal treatment—has already attained considerable importance. . . .<sup>81</sup>

It is a major premise of the proposed annex that actual and potential watercourse problems should be resolved at the private level, through courts and administrative bodies, in so far as possible.<sup>82</sup> Beyond being supported by

policies underlying the doctrine of exhaustion of local remedies,<sup>83</sup> resolution at this level will usually bring relief to those actually suffering injury more rapidly than diplomatic procedures<sup>84</sup> and will prevent problems from escalating and from becoming unnecessarily politicized. Moreover, a State may be loath to espouse the claim of an individual for fear of jeopardizing relations with the State which the individual alleges to have caused his injury. The availability of access by natural and legal persons to the judicial and administrative procedures of other watercourse States should help to avoid many disputes between the States themselves by resolving problems at the level of those most directly affected. If these procedures are not applicable or if the problem cannot be resolved at that level, however, the procedures in annex II, on the settlement of disputes, would be available to the States involved.

## B. The proposed annex

### ANNEX I

#### IMPLEMENTATION OF THE ARTICLES

##### Article 1. Definition

**For the purposes of this annex, "watercourse State of origin" means a watercourse State within which activities are carried on or planned that affect or may affect an international watercourse [system] and that give rise or may give rise to appreciable harm in another watercourse State.**

##### Comments

(1) The definition of "watercourse State of origin" is based on the definition of "country of origin" in the

<sup>80</sup> According to Brownlie:

"... This is a rule which is justified by practical and political considerations and not by any logical necessity deriving from international law as a whole. The more persuasive practical considerations advanced are the greater suitability and convenience of national courts as forums for the claims of individuals and corporations, the need to avoid the multiplication of small claims on the level of diplomatic protection, the manner in which aliens by residence and business activity have associated themselves with the local jurisdiction, and the utility of a procedure which may lead to classification of the facts and liquidation of the damages. . . ." (I. Brownlie, *Principles of Public International Law*, 3d ed. (Oxford, Clarendon Press, 1979), p. 496.)

While this doctrine has been applied for the most part in cases involving claims against a State in which an injury was suffered, it would also seem applicable in cases where an act in one State causes an injury to the claimant in another:

"... The policy underlying the customary requirement that injured parties exhaust all local remedies before seeking governmental assistance is particularly well suited to this situation since the offensive activity will often be located in the same ecological region as, and in proximity to, the injured party." (McCaffrey, "Trans-boundary pollution injuries . . .", *loc. cit.* (footnote 82 above), p. 191.)

<sup>84</sup> For example, in the *Elettronica Sicula S.p.A. (ELSI)* case between the United States of America and Italy, the facts giving rise to the case—in particular, the requisitioning of ELSI's plant by the Mayor of Palermo—occurred in 1968, the claim by the United States Government was initially submitted to the Italian Government in 1974, and the Chamber of the ICJ delivered its judgment on 20 July 1989 (*I.C.J. Reports 1989*; p. 15, at p. 32, paras. 30 *et seq.*).

<sup>80</sup> Document A/CN.4/348 (see footnote 2 above), paras. 478-479.

<sup>81</sup> *Ibid.*, para. 515.

<sup>82</sup> In the context of transfrontier pollution injuries, this thesis is developed in S. C. McCaffrey, "Trans-boundary pollution injuries: Jurisdictional considerations in private litigation between Canada and the United States", *California Western International Law Journal* (San Diego), vol. 3 (1973), p. 191, especially pp. 192-193; and *Private Remedies for Transfrontier Environmental Disturbances*, IUCN Environmental Policy and Law Paper No. 8 (Morges, Switzerland, International Union for the Conservation of Nature and Natural Resources, 1975), especially pp. 11-12. See also A. Rest, *Convention on Compensation for Transfrontier Environmental Injuries*, Beiträge zur Umweltgestaltung, No. A 53 (Berlin, Erich Schmidt, 1976) (in English, French and German); and *Luftverschmutzung und Haftung in Europa* (Kehl am Rhein, N. P. Engel, 1986).

annex to the OECD Council of 17 May 1977 on "Implementation of a régime of equal right of access and non-discrimination in relation to transfrontier pollution",<sup>85</sup> which provides as follows:

(e) "Country of origin" means any Country within which, and subject to the jurisdiction of which, transfrontier pollution originates or could originate in connection with activities carried on or contemplated in that Country.<sup>86</sup>

(2) The term "activities" is used in its broad sense, referring to any use of land or water, including "measures" within the meaning of part III, "Planned measures", of the draft articles. The term "activities" was employed, rather than "measures", because the latter was not considered broad enough to cover the full panoply of uses that should be covered. The term "activities" has also been used in the draft articles on "International liability for injurious consequences arising out of acts not prohibited by international law".<sup>87</sup>

### Article 2. Non-discrimination

**In considering the permissibility of proposed, planned or existing activities, the adverse effects that such activities entail or may entail in another State shall be equated with adverse effects in the watercourse State where the activities are or may be situated.**

#### Comments

(1) Draft article 2 is based on article 2 of the Convention on the Protection of the Environment of 19 February 1974<sup>88</sup> ("Nordic Convention"), which provides as follows:

#### Article 2

In considering the permissibility of environmentally harmful activities, the nuisance which such activities entail or may entail in another Contracting State shall be equated with a nuisance in the State where the activities are carried out.

(2) The purpose of article 2 is twofold: to implement the general principle of non-discrimination, and to provide a legal basis for administrative consideration of extraterritorial effects of planned activities. It implements the

<sup>85</sup> Recommendation C(77)28(Final) (OECD, *OECD and the Environment* (Paris, 1986), pp. 150 *et seq.*). See generally S. Van Hoogstraten, P. Dupuy and H. Smets, "Equal right of access: Transfrontier pollution", *Environmental Policy and Law* (Lausanne), vol. 2 (1976), p. 77.

<sup>86</sup> Transfrontier pollution is defined as follows in the annex to the OECD recommendations:

"(c) 'Transfrontier pollution' means any intentional or unintentional pollution whose physical origin is subject to, and situated wholly or in part within the area under, the national jurisdiction of one Country and which has effects in the area under the national jurisdiction of another Country." (OECD, *op. cit.*, p. 151.)

<sup>87</sup> The term "activities" is used throughout the draft articles proposed in the fifth report of the Special Rapporteur on the topic, Mr. Barboza, although it is not defined. For example, article 1 of that draft provides in part: "The present articles shall apply with respect to activities carried on in the territory of a State . . ." (*Yearbook . . . 1989*, vol. II (Part One), p. 134, document A/CN.4/423, para. 16.)

<sup>88</sup> On this Convention, see generally A. C. Kiss, "La convention nordique sur l'environnement", *Annuaire français de droit international*, 1974 (Paris), vol. XX, p. 808; and C. Flinterman, B. Kwiatkowska and J. G. Lammers, eds., *Transboundary Air Pollution* (Dordrecht, Martinus Nijhoff, 1986), chap. 8 by B. Broms and chap. 9 by C. Phillips.

principle of non-discrimination<sup>89</sup> by requiring that, in regulating existing or prospective activities, the authorities of a watercourse State treat any adverse effects which those activities may have in other States in the same way as they would treat domestic effects. For example, if the legislation of State A requires that the competent authority consider the harmful effects of a proposed activity in determining whether to grant it an operating licence, the proposed article 2 would require that any harmful effects that the activity would cause in State B be given the same weight in the decision-making process as harmful effects in State A itself. In requiring consideration of the extraterritorial impact from the beginning of the licensing process, this provision would also help to reduce the possibility of disagreements between watercourse States arising out of the application of the provisions of part III of the draft articles, which deals with planned measures.

(3) The second purpose of draft article 2 is to provide a legal basis for the consideration by administrative authorities of the comments of persons residing or carrying on activities in other States. Such comments are provided for in draft article 4, below. In many legal systems, administrative authorities are empowered to consider only such effects as may occur within the State whose legislation established them. However, a right of aliens to participate in administrative proceedings would be meaningless if the body in question lacked authority to consider extraterritorial effects. Draft article 2 would therefore require that watercourse States empower their otherwise competent administrative authorities to take into consideration, when evaluating the permissibility of proposed activities, effects that are, or may be, produced in other States.

(4) The reference to adverse effects "in another State" indicates that it is not only such effects in other watercourse States that are to be taken into consideration, but those in any State other than that in which an activity is or may be situated. This provision would apply, for example, to a case in which pollutants discharged into an international watercourse ultimately affected persons or property in, or the environment of, a coastal State that was not a watercourse State.

(5) As in the case of article 12, provisionally adopted in 1988, the expression "adverse effects" is intended to refer to effects that do not necessarily rise to the level of "appreciable harm" within the meaning of article 8, also provisionally adopted in 1988. However, the expression "adverse effects" is used in an even more generic sense than that of "appreciable adverse effect" in draft article 12, since all kinds of negative consequences that the administrative body may consider under its enabling legislation—which may go beyond "appreciable" ones—must be covered by draft article 2.

<sup>89</sup> See OECD document "Non-discrimination in regard to transfrontier pollution" (1978). See also the UNEP "Draft principles of conduct in the field of the environment . . ." (footnote 22 above), principle 13 of which reads:

#### "Principle 13

"It is necessary for States, when considering, under their domestic environmental policy, the permissibility of domestic activities, to take into account the potential adverse environmental effects arising out of the utilization of shared natural resources, without discrimination as to whether the effects would occur within their jurisdiction or outside it."

### Article 3. Recourse under domestic law

1. Watercourse States shall ensure that recourse is available in accordance with their legal systems for prompt and adequate compensation or other relief in respect of appreciable harm caused or threatened in other States by activities carried on or planned by natural or juridical persons under their jurisdiction.

2. With the objective of assuring prompt and adequate compensation or other relief in respect of the appreciable harm referred to in paragraph 1, watercourse States shall co-operate in the implementation of existing international law and the further development of international law relating to responsibility and liability for the assessment of and compensation for damage and the settlement of related disputes, as well as, where appropriate, development of criteria and procedures for payment of adequate compensation, such as compulsory insurance or compensation funds.

#### Comments

(1) Paragraph 1 is based on article 235, paragraph 2, of the 1982 United Nations Convention on the Law of the Sea, which provides as follows:

2. States shall ensure that recourse is available in accordance with their legal systems for prompt and adequate compensation or other relief in respect of damage caused by pollution of the marine environment by natural or juridical persons under their jurisdiction.

(2) The requirement of paragraph 1 that compensation "or other relief" be available for harm caused "or threatened" in other States is intended to apply in particular to cases in which the implementation of measures in a watercourse State poses a significant likelihood of causing appreciable harm in another State. In such instances, persons threatened with harm in the second State should be entitled, to the same extent as persons in the first State, to seek injunctive or similar relief<sup>90</sup> through the competent judicial or administrative authorities of the first State in order to prevent the harm. It is in this sense that the phrase "or other relief" is used in paragraph 1. The paragraph requires that such recourse be made available to those potentially affected in other States.

(3) As in the case of draft article 2 of the present annex, the reference to appreciable harm "in other States" indicates that it is not only such harm in other watercourse States for which recourse must be made available.<sup>91</sup> Thus, if a person acting in State A, a watercourse State, discharged substances into the watercourse that ultimately caused appreciable pollution harm to the operator of an activity in the territorial sea of State B, article 3 would require that recourse be available in the first State to that operator.

<sup>90</sup> As used here, the expression "injunctive relief" includes an order that an activity not commence operation or that it be halted, or that measures be taken to clean up pollution or rehabilitate damaged property, ecosystems or plant or animal life. The term "injunction" has been defined as a judicial order "operating in personam, and requiring [the] person to whom it is directed to do or refrain from doing a particular thing". (*Black's Law Dictionary*, 5th ed. (St. Paul, Minn., West Publishing Co., 1979), p. 705.)

<sup>91</sup> See above, paragraph (4) of the comments on draft article 2.

(4) Paragraph 2 is based on article 235, paragraph 3, of the United Nations Convention on the Law of the Sea, which provides as follows:

3. With the objective of assuring prompt and adequate compensation in respect of all damage caused by pollution of the marine environment, States shall co-operate in the implementation of existing international law and the further development of international law relating to responsibility and liability for the assessment of and compensation for damage and the settlement of related disputes, as well as, where appropriate, development of criteria and procedures for payment of adequate compensation, such as compulsory insurance or compensation funds.

(5) The purpose of paragraph 2 is to highlight the importance of the implementation and further development by States of the substantive and procedural law relating to remedies for transfrontier harm occasioned or threatened by water-related activities. Paragraph 2 concerns, in particular, the implementation and further development of (a) international legal norms concerning compensation or other relief for harm resulting from violations of articles of the future convention and (b) procedures and mechanisms for the assessment of harm and the payment of compensation. These objectives could be accomplished through bilateral, regional or multilateral meetings and instruments designed to facilitate the provision of appropriate remedies for harm to persons, property or the environment. Such efforts by watercourse States should be aimed at eliminating any substantive or procedural obstacles to redress through courts or administrative bodies and at assuring the availability of compensation through such devices as compulsory insurance or funds for the indemnification of injured parties. The phrase "or other relief" is intended to include not only injunctive relief of the kind described above but also environmental rehabilitation<sup>92</sup> and clean-up.

### Article 4. Equal right of access

1. A watercourse State of origin shall ensure that any person in another State who has suffered appreciable harm or is exposed to a significant risk thereof receives treatment that is at least as favourable as that afforded in the watercourse State of origin in cases of domestic appreciable harm, and in comparable circumstances, to persons of equivalent condition or status.

2. The treatment referred to in paragraph 1 of this article includes the right to take part in, or have resort to, all administrative and judicial procedures in the watercourse State of origin which may be utilized to prevent domestic harm or pollution, or to obtain compensation for any harm that has been suffered or rehabilitation of any environmental degradation.

#### Comments

(1) Paragraph 1 is based on the principles concerning transfrontier pollution annexed to OECD Council recommendation C(77)28 of 17 May 1977 on "Implementation of a régime of equal right of access and non-discrimination in relation to transfrontier pollution". Paragraph 4(a) of these principles provides as follows:

4. (a) Countries of origin should ensure that any person who has suffered transfrontier pollution damage or is exposed to a significant

<sup>92</sup> The term "rehabilitation" is discussed below, in the comments on draft article 4.

risk of transfrontier pollution, shall at least receive equivalent treatment to that afforded in the country of origin in cases of domestic pollution and in comparable circumstances, to persons of equivalent condition or status;<sup>93</sup>

(2) Similar rights are guaranteed by the 1974 Nordic Convention on the protection of the environment, which provides in article 3 as follows:

*Article 3*

Any person who is affected or may be affected by a nuisance caused by environmentally harmful activities in another Contracting State shall have the right to bring before the appropriate Court or Administrative Authority of that State the question of the permissibility of such activities, including the question of measures to prevent damage, and to appeal against the decision of the Court or the Administrative Authority to the same extent and on the same terms as a legal entity of the State in which the activities are being carried out.

The provisions of the first paragraph of this article shall be equally applicable in the case of proceedings concerning compensation for damage caused by environmentally harmful activities. The question of compensation shall not be judged by rules which are less favourable to the injured Party than the rules of compensation of the State in which the activities are being carried out.<sup>94</sup>

(3) In article 8 of its Rules on Water Pollution in an International Drainage Basin, adopted at its sixtieth Conference, held at Montreal in 1982, the International Law Association called upon States to provide affected persons with access to judicial and administrative procedures on a non-discriminatory basis:

*Article 8*

States should provide remedies for persons who are or may be adversely affected by water pollution in an international drainage basin. In particular, States should, on a non-discriminatory basis, grant these persons access to the judicial and administrative agencies of the State in whose territory the pollution originates, and should provide, by agreement or otherwise, for such matters as the jurisdiction of courts, the applicable law, and the enforcement of judgments.<sup>95</sup>

(4) As in the case of draft articles 2 and 3 of the present annex, the reference to appreciable harm "in other States" indicates that it is not only such harm in other watercourse States for which recourse must be made available.<sup>96</sup>

(5) Paragraph 2 is also based on the principles concerning transfrontier pollution annexed to recommendation C(77)28 adopted by the OECD Council on 17 May 1977, paragraph 4 (b) of which reads:

(b) From a procedural standpoint, this treatment includes the right to take part in, or have resort to, all administrative and judicial

<sup>93</sup> OECD, *op. cit.* (footnote 85 above), p. 152.

<sup>94</sup> See also the UNEP "Draft principles of conduct in the field of the environment . . ." (footnote 22 above), principle 14 of which reads:

*"Principle 14"*

"States should endeavour, in accordance with their legal systems and, where appropriate, on a basis agreed by them, to provide persons in other States who have been or may be adversely affected by environmental damage resulting from the utilization of shared natural resources with equivalent access to and treatment in the same administrative and judicial proceedings, and make available to them the same remedies as are available to persons within their own jurisdictions who have been or may be similarly affected."

<sup>95</sup> ILA, *Report of the Sixtieth Conference, Montreal, 1982* (London, 1983), p. 544.

<sup>96</sup> See the explanations given above in paragraph (4) of the comments on article 2 and in paragraph (3) of the comments on article 3.

procedures existing within the country of origin, in order to prevent domestic pollution, to have it abated and/or to obtain compensation for the damage caused.<sup>97</sup>

(6) The term "rehabilitation" is used in reference to the environment since "restoration" of the environment, in the strict sense, would not be possible.<sup>98</sup> The term would include, for example, clean-up of petroleum or chemical spills, treatment of wildlife affected by such spills and restoration to the extent practicable of natural systems, including habitat and spawning grounds. Where it is not feasible or desirable for the operator of the harmful activity to carry out rehabilitation in the territory of the affected State, other alternatives, such as indemnification for the costs incurred by affected persons or entities in that State, should be available.

*Article 5. Provision of information*

1. A watercourse State of origin shall take appropriate measures to provide persons in other States who are exposed to a significant risk of appreciable harm with sufficient information to enable them to exercise in a timely manner the rights referred to in paragraph 2 of this article. To the extent possible under the circumstances, such information shall be equivalent to that provided in the watercourse State of origin in comparable domestic cases.

2. Watercourse States shall designate one or more authorities which shall receive and disseminate the information referred to in paragraph 1 in sufficient time to allow meaningful participation in existing procedures in the watercourse State of origin.

<sup>97</sup> OECD, *op. cit.* (footnote 85 above), p. 152.

For a case allowing a citizen of another country to take part in administrative proceedings in a country of origin, see the *Emsland* case (1986), in which a Netherlands citizen was allowed to take part in administrative proceedings in the Federal Republic of Germany. The proceedings concerned whether to authorize the construction of a nuclear power plant (the Emsland plant) on the German side of the border, 25 kilometres from the plaintiff's residence in the Netherlands; the plaintiff had challenged the adequacy of the plant's safety and precautionary measures (see the decision of the Federal Administrative Court of the Federal Republic of Germany of 17 December 1986 (*Entscheidungen des Bundesverwaltungsgerichts*, vol. 75 (1987), p. 285)). According to an article on this case, the Court had observed that States were under an obligation to prevent, reduce and control pollution to avoid injury to foreign territory; therefore, when authorizing nuclear power stations in a frontier area, authorities must be sure to implement the high standards of the federal Atomic Energy Act in consideration of foreign interests; granting an equal right of access was one more way of ensuring the fulfilment of this obligation of international customary law. (Flormann, "Nuclear power plant at the border: The right of a Netherlands citizen before the Administrative Court of West Germany", *Transboundary Resources Report* (Albuquerque, N.M.), vol. 3, No. 3 (1989).)

<sup>98</sup> In the case concerning *Certain Phosphate Lands in Nauru* (*Nauru v. Australia*) brought before the ICJ (Application of 19 May 1989) Nauru claimed that

"Australia, through its failure to make any provision . . . for the rehabilitation\* of the phosphate lands worked out under Australian administration . . . , failed to comply with the international standards recognized as applicable in the implementation of the principle of self-determination." (Para. 45.)

In addition to self-determination, Nauru based its claim on the theories of abuse of rights (para. 47) and denial of justice (para. 46). Nauru claims, *inter alia*, that Australia is under a duty of restitution which "extends to the restoration\* of those parts of the island . . . to a reasonable condition\* for habitation by the Nauruan people as a sovereign nation". (Para. 49.)

### Comments

(1) Draft article 5 is designed to contribute to the implementation of the principles of non-discrimination and equal treatment. Without information, it will not be possible for actually or potentially affected persons in other States to identify, and seek relief from, the source of their injuries. The importance of access to information is recognized in, *inter alia*, the report on conclusions and recommendations of the Meeting on the Protection of the Environment of the Conference on Security and Co-operation in Europe, held at Sofia in November 1989.<sup>99</sup> According to that report:

The participating States reaffirm their respect for the right of individuals, groups and organizations concerned with environmental issues . . . to obtain, publish and distribute information on these issues, without legal and administrative impediments inconsistent with the CSCE provisions. . . .

The participating States further undertake to promote

. . . the reproduction, circulation and exchange of information and data, as well as of audiovisual and printed material, on environmental issues, and encourage public access to such information, data and material.

A similar right of access by the public to environmental information has been recognized by the European Community.<sup>100</sup> Access to information by individuals is also provided for in a set of preliminary draft rules on compensation for damage resulting from dangerous activities that has been prepared under the auspices of the European Committee on Legal Co-operation of the Council of Europe.<sup>101</sup> These rules provide for access by "any person" to information held by public authorities or by any operator of a dangerous activity, *inter alia* where such information is necessary to the establishment of a claim for compensation under the rules.<sup>102</sup> Certain

<sup>99</sup> Document CSCE/SEM.36/Rev.1, Sofia, 3 November 1989. See also the report of the Economic Commission for Europe on the Bergen Conference (8-16 May 1990), submitted to the Preparatory Committee for the United Nations Conference on Environment and Development at its first session (Nairobi, August 1990) (A/CONF.151/PC/10). Annex I to that report contains the "Bergen Ministerial Declaration on sustainable development in the ECE region", section V of which deals with "Awareness raising and public participation".

<sup>100</sup> The Council of the European Communities adopted on 7 June 1990 a directive on the freedom of access to information on the environment. The directive is designed to ensure freedom of access to, and dissemination of, information on the environment held by public authorities and to set out the basic conditions under which such information should be made available (para. 1). Subject to certain reservations, the public authorities are to allow any natural or legal person access to information on the environment on request, with no obligation to prove an interest (art. 3). (*Official Journal of the European Communities* (Luxembourg), No. L 158, 23 June 1990, p. 56.)

The municipal law of a number of States also requires the provision of information to the public on activities that pose a significant risk of causing appreciable harm. An example of such a statute is the Emergency Planning and Community Right-to-know Law of 17 October 1986 of the United States of America (*United States Code*, 1988 Edition, vol. 17, title 42, sects. 11001-11050).

<sup>101</sup> The draft rules and the accompanying commentary were prepared by the Committee of Experts on Compensation for Damage caused to the Environment. See Council of Europe, Secretariat memorandum prepared by the Directorate of Legal Affairs (CDCJ (89) 60), Strasbourg, 8 September 1989.

<sup>102</sup> Rule 11 (Access to information held by public authorities) and rule 12 (Access to information held by operators) (*ibid.*, pp. 29-30). These two draft rules, especially rule 12, are characterized in the report as "a first attempt to reconcile various ideas put forward within the committee and the working group" (*ibid.*, p. 15, para. 46).

restrictions apply in the case of both public authorities and operators. The rationale for affording injured persons access to information held by public authorities and operators was stated by the Committee of Experts in part as follows:

Persons who have suffered a damage would be in a better position to assess the extent of such damage and to ascertain a causal link if they had access to the information on the environment held by public authorities. . . .<sup>103</sup>

(2) *Paragraph 1* of draft article 5 is based on the principles concerning transfrontier pollution annexed to recommendation C(77)28 adopted by the OECD Council on 17 May 1977, which provide in paragraph 9 (a) as follows:

9. (a) Countries of origin should take any appropriate measures to provide persons exposed to a significant risk of transfrontier pollution with sufficient information to enable them to exercise in a timely manner the rights referred to in this Recommendation. As far as possible, such information should be equivalent to that provided in the country of origin in cases of comparable domestic pollution.<sup>104</sup>

The expression "persons in other States" is used in the same sense as in previous articles of the present annex.

(3) *Paragraph 2* is also based on the above-mentioned principles concerning transfrontier pollution, paragraph 9 (b) of which provides as follows:

(b) Exposed countries<sup>105</sup> should designate one or more authorities which will have the duty to receive and the responsibility to disseminate such information within limits of time compatible with the exercise of existing procedures in the country of origin.

### Article 6. Jurisdictional immunity

1. A watercourse State of origin shall enjoy jurisdictional immunity in respect of proceedings brought in that State by persons injured in other States only in so far as it enjoys such immunity in respect of proceedings brought by its own nationals and habitual residents.

2. Watercourse States shall ensure, by the adoption of appropriate measures, that their agencies and instrumentalities act in a manner consistent with these articles.

### Comments

(1) Draft article 6 is based on the principle of non-discrimination. It would ensure that those harmed by State-owned or State-operated activities have the same rights to redress from those entities whether they live, or operate, in the watercourse State of origin or in another State. *Paragraph 1* lays down this general rule. The term "proceedings" includes those in which the plaintiff or petitioner seeks "measures of constraint", as that expression is used in part IV of the Commission's draft articles

<sup>103</sup> *Ibid.*, p. 15, para. 46. On the other hand,

"... some experts considered it more appropriate to entrust an 'environment protection agency' with the task of collecting any information relevant to the establishment of the facts of a case and of placing such information at the disposal of the courts and of the parties concerned." (*Ibid.*)

While such a proposal may be a sound one, not all watercourse States will have established such an agency, and it would go beyond the scope of the present draft articles to require the establishment of one.

<sup>104</sup> OECD, *op. cit.* (footnote 85 above), p. 153.

<sup>105</sup> The expression "exposed country" is defined as "any country affected by transfrontier pollution or exposed to a significant risk of transfrontier pollution" (*ibid.*, p. 151).



on jurisdictional immunities of States and their property.<sup>106</sup>

(2) As used in this article, the expression "watercourse State of origin" includes not only the organs of that State but also its agencies, companies and other instrumentalities. It is used in the same sense as the term "State" in the draft articles on jurisdictional immunities of States and their property.<sup>107</sup> The expression "other States" is used in the same sense as in previous draft articles of the present annex.

(3) The expression "nationals and habitual residents" refers to natural and legal persons residing or doing business in the watercourse State of origin. The expression "habitual residence" is used in the Hague Conventions on Private International Law to harmonize the meaning of the concept of "domicile" in the various civil-law and common-law countries that are parties to those conventions.<sup>108</sup>

(4) Paragraph 2 is based on article 236 of the 1982 United Nations Convention on the Law of the Sea, which provides:

*Article 236. Sovereign immunity*

The provisions of this Convention regarding the protection and preservation of the marine environment do not apply to any warship, naval auxiliary, other vessels or aircraft owned or operated by a State used, for the time being, only on government non-commercial service. However, each State shall ensure, by the adoption of appropriate measures not impairing operations or operational capabilities of such vessels or aircraft owned or operated by it, that such vessels or aircraft act in a manner consistent, so far as is reasonable and practicable, with this Convention.

While the purpose of paragraph 2 is not identical with that of article 236 of the Convention, both provisions emphasize the importance of efforts by States to ensure that their agencies and instrumentalities comply with the obligations in question. Unlike article 236, however, paragraph 2 applies even where the agency or instrumentality involved would enjoy jurisdictional immunity. While the need for such a provision is perhaps greater where jurisdictional immunity exists, it does not necessarily follow from the lack of such immunity that State entities will act consistently with their obligations or that persons injured in other States will obtain relief. There are a number of potential obstacles to obtaining relief even in the absence of immunity—such as the cost of bringing

proceedings, the gathering of evidence and the establishment of causation<sup>109</sup>—which may have the same ultimate effect as a rule of immunity itself. This points up the importance of prevention, which is the province of the watercourse State of origin. For these reasons, it does not seem necessary or desirable to confine the obligation set forth in paragraph 2 to situations in which immunity exists.

(5) As used in paragraph 2, the expression "agencies or instrumentalities" includes companies owned or operated by the watercourse State of origin. The reader is also referred in this connection to paragraph (2) of the comments on the present draft article.

(6) It is perhaps appropriate to address briefly the relationship between the present draft article 6 and article 13 (Personal injuries and damage to property) of the draft articles on jurisdictional immunities of States and their property, adopted on first reading.<sup>110</sup> Article 13 provides in relevant part that:

"... the immunity of a State cannot be invoked before a court of another State ... in a proceeding which relates to compensation for death or injury to the person or damage to or loss of tangible property if the act or omission which is alleged to be attributable to the State and which caused the death, injury or damage occurred in whole or in part in the territory of the State of the forum and if the author of the act or omission was present in that territory at the time of the act or omission.

The draft articles on jurisdictional immunities, of course, deal only with the immunity of a State from the jurisdiction of the courts of another State. Their provisions are thus not applicable to the present annex, under which any proceeding involving the watercourse State of origin that was initiated by persons injured outside that State would be brought before the State's own courts or administrative bodies. The proposition might be advanced, however, that the same policy that supports non-immunity in cases covered by draft article 13 would also support it in cases under the present annex. That policy seems to be that injured individuals should not be left "without recourse to justice" by reason of the jurisdictional immunity of the "author" State.<sup>111</sup> In the present context, this would

<sup>106</sup> *Yearbook* ... 1986, vol. II (Part Two), p. 11. Another approach would be to deal with measures of constraint in a separate paragraph, which might read as follows:

"A watercourse State of origin shall enjoy jurisdictional immunity in respect of proceedings brought in that State by persons injured in other States, in which those persons seek measures of constraint, only in so far as it enjoys such immunity when such measures are sought by nationals or habitual residents of the State that owns or operates them."

The Special Rapporteur considers this approach somewhat cumbersome and therefore decided simply to make clear in the comments that the term "proceedings" includes those in which measures of constraint are sought against the watercourse State of origin.

<sup>107</sup> See the interpretative provision concerning the term "State" in article 3, para. 1, of those draft articles, which were adopted on first reading in 1986 (*Yearbook* ... 1986, vol. II (Part Two), p. 9).

<sup>108</sup> See, for example, article 5 of the Convention concerning Settlement of Conflicts between the Law of Nationality and the Law of Domicile (The Hague, 15 June 1955).

<sup>109</sup> See generally McCaffrey, "Expediting the provision of compensation to accident victims", in G. Handl and R. E. Lutz, eds., *Transferring Hazardous Technologies and Substances: The International Legal Challenge* (London, Graham & Trotman, 1990), pp. 199 *et seq.*; and "Accidents do happen: Hazardous technology and international tort litigation", *The Transnational Lawyer* (Sacramento, Calif.), vol. 1 (1988), p. 41.

These kinds of problems—together, in some cases, with the spectre of sovereign immunity—probably explain the tendency of aggrieved individuals in recent cases to bring claims against their own governmental authorities for relief from foreign-source pollution. See, for example, the decision of 31 May 1989 of the Court of Appeal of the Canton of Bern in the *Rey und Leimgruber v. Schweizerische Eidgenossenschaft* case, upholding the liability of the Federal Government of Switzerland for damage to the plaintiff's vegetable business due to radiation from the Chernobyl nuclear incident (see *Recueil officiel des arrêts du Tribunal fédéral suisse* (Lausanne, 1991), vol. 116, part II, p. 483); and a case brought by an individual and the city of Lübeck in the Federal Republic of Germany against the competent Federal Republic authorities in Federal Republic courts, seeking relief from apprehended contamination of drinking water by transfrontier groundwater pollution emanating from the Schoenberg waste dump in the German Democratic Republic. The latter case is discussed in M. Núñez-Müller, "The Schoenberg case: Transfrontier movements of hazardous waste", *Natural Resources Journal* (Albuquerque, N.M.), vol. 30 (1990), p. 153.

<sup>110</sup> *Yearbook* ... 1986, vol. II (Part Two), p. 10.

<sup>111</sup> See paragraph (3) of the commentary to article 14 (which later became article 13) of the draft articles on jurisdictional immunity, in *Yearbook* ... 1984, vol. II (Part Two), p. 66.



suggest that if a citizen of State B were injured in that State by, for example, pollutants deposited into an international watercourse in State A by a company of State A, that person should be able to bring proceedings against State A in his own courts or tribunals to recover for the injury. Draft article 6 does not go this far, however. It requires only that any recourse against the organs, companies or other entities of the watercourse State of origin that is available to its own citizens and habitual residents should also be available to persons injured outside that State. It may be that there is little distinction in principle between foreseeably causing an injury in State A by an act or omission in that State, and foreseeably causing an injury in State B by an act or omission in State A; but without the benefit of some direction from the Commission, the Special Rapporteur is reluctant to propose that watercourse States of origin be subject to the jurisdiction of their own courts and tribunals in proceedings brought by injured foreign persons, even if they would enjoy jurisdictional immunity in proceedings brought by their own citizens. This reluctance also stems from the decision of the Commission to exclude from the application of article 13 of the draft articles on jurisdictional immunities "cases of transboundary injuries or transfrontier torts or damage, such as letter-bombs or the export of explosives, fireworks or dangerous substances which could explode or cause damage".<sup>112</sup> However, the Commission recognizes that "a court foreign to the scene of the delict might be considered as a *forum non conveniens*" and that "the injured individual would have been without recourse to justice had the [author] State been entitled to invoke its jurisdictional immunity".<sup>113</sup> Thus it is possible that the only recourse of a person in State B injured by an act or omission of watercourse State of origin A would be to attempt to convince State B to espouse his or her claim against State A. As explained above (para. 39), it is precisely this kind of politicization of disputes that the procedures under the annex are designed to avoid. The Special Rapporteur would welcome the views of members of the Commission on this point, in particular.

#### *Article 7. Conference of the Parties*

1. Not later than two years after the entry into force of the present articles, the Parties to the articles shall convene a meeting of the Conference of the Parties. Thereafter, the Parties shall hold regular meetings at least once every two years, unless the Conference decides otherwise, and extraordinary meetings at any time upon the written request of at least one third of the Parties.

2. At the meetings provided for in paragraph 1, the Parties shall review the implementation of the present articles. In addition, they may:

(a) consider and adopt amendments to the present articles in accordance with article 8 of this annex;

(b) receive and consider any reports presented by any Party or by any panel, commission or other body

<sup>112</sup> Paragraph (7) of the commentary to article 14 (*ibid.*, p. 67). While the text of article 13 does not require that the injury must have been sustained in the forum State, paragraph (7) of the commentary to that article leaves no doubt on the question.

<sup>113</sup> *Ibid.*, p. 66, paragraph (3) of the commentary.

established pursuant to annex II to the present articles; and

(c) where appropriate, make recommendations for improving the effectiveness of the present articles.

3. At each regular meeting, the Parties may determine the time and venue of the next regular meeting to be held in accordance with the provisions of paragraph 1 of this article.

4. At any meeting, the Parties may determine and adopt rules of procedure for the meeting.

5. The United Nations, its specialized agencies and the International Atomic Energy Agency, as well as any State not a Party to the present articles, may be represented at meetings of the Conference by observers, who shall have the right to participate but not to vote.

6. Any of the following categories of bodies or agencies which is technically qualified with regard to the non-navigational uses of international watercourses, including the protection, conservation and management thereof, and which has informed the Parties of its desire to be represented at meetings of the Conference by observers, shall be admitted unless at least one third of the Parties present object:

(a) international agencies or bodies, either governmental or non-governmental, and national governmental agencies and bodies; and

(b) national non-governmental agencies or bodies which have been approved for this purpose by the State in which they are located.

Once admitted, observers representing these agencies and bodies shall have the right to participate but not to vote.

#### *Comments*

(1) Several recent conventions relating to the environment or transboundary harm contain provisions for regular meetings of a "conference of the parties".<sup>114</sup> In general, these agreements provide for institutionalized and regular collective action by the contracting parties. This technique permits the parties to review, on a regular basis, the effectiveness of the convention in question and to monitor its implementation. Other multilateral agreements have made effective use of similar devices as an element of their dispute-settlement mechanisms.<sup>115</sup>

(2) Draft article 7 is based on article XI of the Convention on International Trade in Endangered Species of Wild Fauna and Flora of 2 March 1973, which provides as follows:

<sup>114</sup> See, for example, the Convention on International Liability for Damage Caused by Space Objects of 29 March 1972, art. XXVI; the Convention on Long-range Transboundary Air Pollution of 13 November 1979, art. 10 (concerning the "Executive Body"); the Vienna Convention for the Protection of the Ozone Layer of 22 March 1985, art. 6; and the Montreal Protocol on Substances that Deplete the Ozone Layer of 16 September 1987, art. 11 (providing for ordinary meetings to be held in conjunction with the conference of the parties to the underlying Vienna Convention, previously cited, and extraordinary meetings to be held at the request of at least one third of the parties).

<sup>115</sup> See especially the General Agreement on Tariffs and Trade (GATT), art. XXIII. Relevant GATT procedures are discussed in chapter IV below, on the settlement of disputes.

*Article XI. Conference of the Parties*

1. The Secretariat shall call a meeting of the Conference of the Parties not later than two years after the entry into force of the present Convention.

2. Thereafter the Secretariat shall convene regular meetings at least once every two years, unless the Conference decides otherwise, and extraordinary meetings at any time on the written request of at least one third of the Parties.

3. At meetings, whether regular or extraordinary, the Parties shall review the implementation of the present Convention and may:

(a) make such provision as may be necessary to enable the Secretariat to carry out its duties;

(b) consider and adopt amendments to appendices I and II in accordance with article XV;

(c) review the progress made towards the restoration and conservation of the species included in appendices I, II and III;

(d) receive and consider any reports presented by the Secretariat or by any Party; and

(e) where appropriate, make recommendations for improving the effectiveness of the present Convention.

4. At each regular meeting, the Parties may determine the time and venue of the next regular meeting to be held in accordance with the provisions of paragraph 2 of this article.

5. At any meeting, the Parties may determine and adopt rules of procedure for the meeting.

6. The United Nations, its specialized agencies and the International Atomic Energy Agency, as well as any State not a Party to the present Convention, may be represented at meetings of the Conference by observers, who shall have the right to participate but not to vote.

7. Any body or agency technically qualified in protection, conservation or management of wild fauna and flora, in the following categories, which has informed the Secretariat of its desire to be represented at meetings of the Conference by observers, shall be admitted unless at least one third of the Parties present object:

(a) international agencies or bodies, either governmental or non-governmental, and national governmental agencies and bodies; and

(b) national non-governmental agencies or bodies which have been approved for this purpose by the State in which they are located.

Once admitted, these observers shall have the right to participate but not to vote.

(3) Article XII of the same Convention provides that "a Secretariat shall be provided by the Executive Director of the United Nations Environment Programme" upon the entry into force of the Convention. While it would clearly be useful to have a secretariat to perform such functions as convening and servicing meetings of the conference of the parties and conducting studies and research at the request of the parties to the present articles, the Special Rapporteur is hesitant to propose the establishment of a permanent institution in connection with what is envisaged as a framework agreement. If a convention is eventually concluded on the basis of the present draft articles, the parties may certainly establish such an institution if they so desire.

*Article 8. Amendment of the articles*

1. An extraordinary meeting of the Conference of the Parties shall be held on the written request of at least one third of the Parties to consider and adopt amendments to the present articles. Such amendments shall be adopted by a two-thirds majority of the Parties present and voting. For the purposes of this article, "Parties present and voting"

means Parties present and casting an affirmative or negative vote. Parties abstaining from voting shall not be counted among the two thirds required for adopting an amendment.

2. The text of any proposed amendment shall be communicated by the Party or Parties proposing it to all Parties at least 90 days before the meeting.

3. An amendment shall enter into force for the Parties that have accepted it 60 days after two thirds of the Parties have deposited an instrument of acceptance of the amendment with the [Depositary Government] [Secretary-General of the United Nations]. Thereafter, the amendment shall enter into force for any other Party 60 days after that Party deposits its instrument of acceptance of the amendment.

*Comments*

(1) The Special Rapporteur believes that it is important to provide for the amendment of the articles in order to enable the parties to take into account changing developments. For example, rapid increases in the pollution of fresh water and the intensification of such problems as drought and desertification might prompt the parties to update the provisions of the articles concerning those subjects.

(2) Draft article 8 is based on article XVII of the 1973 Convention on International Trade in Endangered Species of Wild Fauna and Flora. That article provides as follows:

*Article XVII. Amendment of the Convention*

1. An extraordinary meeting of the Conference of the Parties shall be convened by the Secretariat on the written request of at least one third of the Parties to consider and adopt amendments to the present Convention. Such amendments shall be adopted by a two-thirds majority of Parties present and voting. For these purposes "Parties present and voting" means Parties present and casting an affirmative or negative vote. Parties abstaining from voting shall not be counted among the two thirds required for adopting an amendment.

2. The text of any proposed amendment shall be communicated by the Secretariat to all Parties at least 90 days before the meeting.

3. An amendment shall enter into force for the Parties which have accepted it 60 days after two thirds of the Parties have deposited an instrument of acceptance of the amendment with the Depositary Government. Thereafter, the amendment shall enter into force for any other Party 60 days after that Party deposits its instrument of acceptance of the amendment.

(3) The only material respects in which draft article 8 departs from article XVII are the provisions concerning the secretariat in paragraphs 1 and 2 of the latter and the depositary in paragraph 3. The matter of a secretariat is addressed in the comments on draft article 7 of the present annex. As to the depositary, it could be a Government, the Secretary-General of the United Nations, or the head of another appropriate body such as UNEP or FAO. The remaining provisions of article XVII were considered appropriate by the Special Rapporteur for use in the context of the present draft articles. He would welcome comment, in particular, with regard to the provisions of paragraph 3 concerning entry into force of amendments.

## CHAPTER IV

## Settlement of disputes

## A. Introduction

40. The subject of settlement of disputes has been treated by the previous two Special Rapporteurs, both of whom have proposed articles on this subtopic (see below, paras. 86 *et seq.*). It is indeed an integral part of a set of draft articles on the law of the non-navigational uses of international watercourses, but for reasons somewhat different from those that would apply in most of the other fields of international law. Chief among these reasons is the general and flexible nature of some of the most fundamental provisions of the draft articles (such as article 6, "Equitable and reasonable utilization and participation"). The very same generality and flexibility of these provisions that make them so well suited to a framework instrument on international watercourses may also make them difficult to apply with precision in some cases. Furthermore, the operation of many of the provisions of the draft articles depends upon certain key facts. To the extent that the watercourse States concerned do not know or agree upon these facts, their legal obligations will not be clear. Some means of objectively establishing the operative facts will therefore be necessary in such cases.

41. It has been seen in this and previous reports that watercourse States frequently entrust the gathering of data and information concerning international watercourses to technical experts, who often operate within the context of a joint commission or other institutional arrangement. As indicated in chapter I above, where such joint commissions have been established they are often in the best position to engage in fact-finding and to resolve any questions that may arise with regard to the respective obligations of the watercourse States concerned. Even where such bodies have not been formed, State practice and the works of experts who have studied the question<sup>116</sup> indicate that, wherever possible, it is advisable to attempt resolution of any differences at the technical level before proceeding to invoke more formal dispute-resolution procedures.

42. In the light of these considerations, the Special Rapporteur proposes in the present chapter a process for

the avoidance and settlement of watercourse disputes that consists of a graduated series of stages. The proposals are based on several propositions: first, that it will often be necessary in this field to rely heavily on technical expertise; secondly, that a non-binding expert report, possibly accompanied with a recommended course of action, will frequently result in resolution of an actual or potential dispute without the need to have recourse to a procedure that results in a binding settlement; and thirdly, that procedures of the latter kind should be resorted to only after attempts to settle differences at the technical level have failed.

43. It will be evident from the foregoing discussion that, notwithstanding the title of the present chapter, the proposals it contains are not confined to the "settlement of disputes" as that expression is generally understood. The expression "international water law dispute" has been defined as

... an international dispute between two or more than two international drainage basin states . . . , with respect to

- (i) the conservation, use, sharing (including sharing of benefits), control, development or management of the water resources of an international drainage basin, [or]
- (ii) the interpretation of the terms of any agreement relating to the conservation, use, sharing (including sharing of benefits), control, development and management of such water resources or the implementation of such an agreement including all matters rising out of the implementation of such an agreement.<sup>117</sup>

This definition focuses on the usual subject-matter of disputes relating to international watercourses. While it does not refer expressly to factual questions, they are often at the root of the matters mentioned. However, procedures such as fact-finding also concern implementation of the articles (and to this extent could have been dealt with in the preceding chapter) and avoidance of disputes. It is only when questions have not been resolved in earlier stages of the process that the proposed procedures for the settlement of disputes become applicable.

44. In section B of this chapter, the Special Rapporteur will review briefly the principal means of international dispute settlement and cite examples of their use by States in the context of disputes involving international watercourses. In section C he will illustrate the use by States and international organizations of experts to assist in the avoidance and resolution of watercourse and other disputes. In section D he will survey the work of international organizations concerning the settlement of such disputes, and in section E the proposals of previous Special Rapporteurs relating to this subtopic will be recalled. Finally, in section F the Special Rapporteur will submit for the Commission's consideration a set of draft articles on fact-finding and the settlement of disputes.

<sup>116</sup> See in particular *Management of international water resources* . . . (footnote 4 (c) above), chap. V, "Accommodation procedures and dispute settlement", especially paras. 455 and 457-458. See also, for example, Smith, *op. cit.* (footnote 7 above), p. 152 (principles 6 and 7); F. J. Berber, *Rivers in International Law* (London, Stevens, 1959), p. 271; and C. B. Bourne, "Mediation, conciliation and adjudication in the settlement of international drainage basin disputes", *The Canadian Yearbook of International Law*, 1971 (Vancouver), vol. IX, p. 114. See generally Bourne, "Procedure in the development of international drainage basins: The duty to consult and to negotiate", *The Canadian Yearbook of International Law*, 1972, vol. X, p. 212; R. B. Bilder, *The Settlement of International Environmental Disputes* (Madison, Wisc., University of Wisconsin, 1976); UNITAR, *Protecting the Human Environment: Procedures and Principles for Preventing and Resolving International Controversies*, by A. L. Levin (United Nations publication, Sales No. E.77.XV.PS/9); R. E. Stein, "The settlement of environmental disputes: Towards a system of flexible dispute settlement", *Syracuse Journal of International Law and Commerce* (Syracuse, N.Y.), vol. 12 (1985), p. 283; and the sources cited in the third report of Mr. Schwebel, document A/CN.4/348 (see footnote 2 above), footnotes 776 and 778.

<sup>117</sup> B. R. Chauhan, *Settlement of International Water Law Disputes in International Drainage Basins* (Berlin, Erich Schmidt, 1981), pp. 96-97. Chauhan includes in this definition disputes between a "drainage basin state" and a political subdivision of a State (such as the German Länder), since the latter have on occasion entered into agreements concerning international watercourses (*ibid.*, p. 97 and footnote 45).

## B. Means of dispute settlement and their application by States in their relations concerning international watercourses

45. It would far exceed the scope and purpose of this chapter to essay an in-depth examination of the subject of the pacific settlement of disputes, especially in view of the fact that the general principles of international dispute settlement are well known to the members of the Commission.<sup>118</sup> This section has a much more limited purpose, namely to provide a backdrop against which to consider the material that follows.

46. Mr. Evensen has characterized as the "obvious starting-point" for any treatment of the settlement of disputes the principles formulated in the Charter of the United Nations, and specifically in Article 2,<sup>119</sup> paragraph 3 of which lays down the obligation of Member States to settle "international disputes by peaceful means in such a manner that international peace and security, and justice, are not endangered". The first article in Chapter VI of the Charter, on the pacific settlement of disputes, is Article 33, paragraph 1 of which lists the following peaceful means of dispute settlement: "negotiation, enquiry, mediation, conciliation, arbitration, judicial settlement, resort to regional agencies or arrangements, or other peaceful means of [the parties'] own choice". Article 33 requires the "parties to any dispute, the continuance of which is likely to endanger the maintenance of international peace and security", to seek a solution of the dispute, "first of all", by those means.

47. While some of the means of peaceful settlement listed in Article 33 will be relied upon in the procedures proposed in the present chapter, the latter procedures are intended to apply even if the continuance of a dispute concerning an international watercourse would *not* "endanger the maintenance of international peace and security". Indeed, Article 2, paragraph 3, of the Charter requires Member States to settle international disputes by peaceful means so that, *inter alia*, "justice" is not endangered. This could presumably be the case even if there were no threat to "international peace and security".<sup>120</sup>

<sup>118</sup> In fact, such an examination is currently being conducted in the context of the work of the Special Committee on the Charter of the United Nations and on the Strengthening of the Role of the Organization. Specifically, the Secretariat is preparing a draft handbook on the peaceful settlement of disputes between States. See, for example, the report of the Secretary-General on the progress of work on the draft handbook (A/AC.182/L.61), and generally the report of the Special Committee (*Official Records of the General Assembly, Forty-fourth Session, Supplement No. 33* (A/44/33)), especially chap. V, "Peaceful settlement of disputes between States".

For a more detailed treatment of the different means of dispute settlement discussed in this section, with particular reference to international watercourses, see Chauhan, *op. cit.* (footnote 117 above), pp. 321-367.

<sup>119</sup> See Mr. Evensen's first report, document A/CN.4/367 (see footnote 3 above), para. 200.

<sup>120</sup> According to a commentary on the Charter: "It is not enough that peace and security should be safeguarded; the principles of justice must also be respected." (L. M. Goodrich and E. Hambro, *Charter of the United Nations: Commentary and Documents*, 2nd ed. (Boston, World Peace Foundation, 1949), p. 102.) See also the third edition of this work, by L. M. Goodrich, E. Hambro and A. P. Simons (New York, Columbia University Press, 1969), p. 41. For a discussion of the circumstances in which international peace and security might be endangered by a dispute between watercourse States, see Bourne, "Mediation, conciliation . . .", *loc. cit.* (footnote 116 above), p. 157. Water disputes have given rise to charges of aggression, for example the

48. According to William Bishop, direct *negotiation* between the parties is the "simplest" of the means of peaceful settlement,

. . . although probably the one by which the larger number of day-to-day differences are adjusted . . . Through an exchange of views, usually via diplomatic channels, agreement is reached in a mutual process of give-and-take.<sup>121</sup>

Manfred Lachs has written that

. . . States resort to negotiations very frequently, probably owing to the fact that they are rather anxious to retain control to the very end over the decisions arising out of differences which divide them. There are of course many international disputes and problems which cannot be solved otherwise . . .<sup>122</sup>

While recognizing that "diplomacy . . . has its limits", Lachs notes that "the obligation to negotiate . . . does not imply an obligation actually to reach agreement. The obligation is only to try one's best."<sup>123</sup> Or, as the ICJ put it in the *North Sea Continental Shelf* cases:

. . . the parties are under an obligation to enter into negotiations with a view to arriving at an agreement . . .; they are under an obligation so to conduct themselves that the negotiations are meaningful, which will not be the case when either of them insists upon its own position without contemplating any modification of it.<sup>124</sup>

49. Although it is probable that the great majority of disputes concerning international watercourses have been either avoided or settled through negotiation, very few of

dispute between Bolivia and Chile concerning the River Lauca (see L. M. Lecaros, "International rivers: the Lauca case", *The Indian Journal of International Law* (New Delhi), vol. 3 (1963), pp. 148-149; and the second report of the Special Rapporteur (*Yearbook . . . 1986*, vol. II (Part One), p. 112, document A/CN.4/399 and Add.1 and 2, para. 94). Further, Israel and its neighbouring Arab countries have each declared that they would consider unilateral diversion of the Jordan as an act of aggression (see K. B. Doherty, "Jordan waters conflict", *International Conciliation* (New York), No. 553 (May 1965), pp. 35 and 65; and the second report of the Special Rapporteur, document A/CN.4/399 and Add.1 and 2, para. 96). See generally the sources cited in the third report of Mr. Schwebel, document A/CN.4/348 (see footnote 2 above), footnote 778; and the article by Bourne referred to above, "Mediation, conciliation . . .", *loc. cit.*, pp. 154-155.

<sup>121</sup> W. W. Bishop, *International Law: Cases and Materials*, 2nd ed. (Boston, Little, Brown, 1962), p. 58. The Manila Declaration on the Peaceful Settlement of International Disputes describes negotiations as "a flexible and effective means" of dispute settlement (General Assembly resolution 37/10 of 15 November 1982, annex, sect. I, para. 10).

<sup>122</sup> M. Lachs, "The law and the settlement of international disputes", in K. V. Raman, ed., *Dispute Settlement Through the United Nations* (Dobbs Ferry, N.Y., Oceana Publications, 1977), p. 288.

<sup>123</sup> *Ibid.*, p. 289.

<sup>124</sup> Federal Republic of Germany v. Denmark and Federal Republic of Germany v. the Netherlands, Judgment of 20 February 1969 (*I.C.J. Reports* 1969, p. 47, para. 85 (a)). Attention should be drawn to the fact that the ICJ, in its judgment on those cases (*ibid.*, pp. 47-48, para. 87), referred to the advisory opinion of the PCIJ of 15 October 1931 in the case of *Railway Traffic between Lithuania and Poland* (P.C.I.J., *Series A/B*, No. 42, p. 116). The *North Sea Continental Shelf* cases and other cases concerning the obligation of States to resolve their differences through good-faith negotiations aimed at reaching an equitable result are discussed in the Special Rapporteur's third report (*Yearbook . . . 1987*, vol. II (Part One), pp. 25-26 and 37-38, document A/CN.4/406 and Add.1 and 2, paras. 48-50 and chap. III, sect. B.5, comments on draft article 12, paras. (3)-(7)). And finally, the Manila Declaration (see footnote 121 above) contains language to the same effect as that of the ICJ in the *North Sea Continental Shelf* cases: "When they choose to resort to direct negotiations, States should negotiate meaningfully, in order to arrive at an early settlement acceptable to the parties." (Sect. I, para. 10.)

these cases have been reported.<sup>125</sup> In this study on the subject, Chauhan lists 25 treaties containing express provisions for utilizing negotiation as a method of settlement of water disputes<sup>126</sup> and refers to an additional 47 agreements that call for the resolution of water-related controversies through diplomatic channels.<sup>127</sup>

50. According to the 1907 Hague Convention (I) for the Pacific Settlement of International Disputes, *inquiry* is a process for settling "disputes . . . arising from a difference of opinion on points of fact . . . elucidating the facts by means of an impartial and conscientious investigation" (art. 9). The Convention calls for the parties to such a dispute to form a commission of inquiry, whose task it would be to investigate and report on the facts. The commission's report was to have "in no way the character of an award", and the parties were to be free to decide what effect, if any, they would give it (art. 35).<sup>128</sup>

51. In the context of the work of the Special Committee on the Charter of the United Nations and on the Strengthening of the Role of the Organization, attention has been focused anew on the potential of *fact-finding* as a procedure for avoiding and resolving disputes. In a working paper submitted to the Special Committee at its 1990 session, it is stated that "fact-finding means any activity designed to ascertain facts which the competent United Nations organs need to exercise effectively their functions in the field of the maintenance of international peace and security" (para. 2) and that "fact-finding should be comprehensive, objective and impartial" (para. 3).<sup>129</sup> Fact-finding as envisaged in the draft articles

<sup>125</sup> One does encounter occasional reports of diplomatic exchanges concerning international watercourse questions. While, strictly speaking, these cases fall into the category of settlement through diplomatic channels, the Special Rapporteur will, for present purposes, treat them as being cases of settlement by negotiation *lato sensu*. See, for example, the cases discussed in his second report, document A/CN.4/399 and Add.1 and 2 (see footnote 120 above), paras. 78-99; and in his fifth report (*Yearbook . . . 1989*, vol. II (Part One), pp. 16-18, document A/CN.4/421 and Add.1 and 2, paras. 54-65).

<sup>126</sup> Chauhan, *op. cit.* (footnote 117 above), pp. 377-380.

<sup>127</sup> *Ibid.*, pp. 381-386. See also the draft American Declaration on the Environment prepared in 1989 by the Inter-American Juridical Committee (OAS, document, CJI/RES.II-10/89), in which the Committee proposes an interesting procedure, combining bilateral discussions with the utilization of technical experts. The draft Declaration also provides for the formation of a joint commission consisting of two delegates from each State involved (para. 12).

<sup>128</sup> See also Brierly, *op. cit.* (footnote 39 above), p. 374. The *Dogger Bank* case of 1904 between Great Britain and Russia is an instance in which such a commission was used effectively (see J. B. Scott, ed., *The Hague Court Reports* (New York, Oxford University Press, 1916), p. 403).

<sup>129</sup> A/AC.182/L.66, reproduced in *Official Records of the General Assembly, Forty-fifth Session, Supplement No. 33* (A/45/33), para. 68; as subsequently revised, this text formed the basis of a draft declaration on "Fact-finding by the United Nations in the field of the maintenance of international peace and security". See the discussion of this working paper in the comments on article 1 of annex II, below.

On fact-finding as a form of "investigation" by the Security Council under Article 34 of the Charter, Raman writes:

"If broadly conceived, investigatory functions can facilitate the establishment of disputed questions of fact (fact-finding in a narrow sense), and also enable the parties to establish an objective basis for their future relationships. . . ." ("The ways of the peace-maker: A study of the procedural concepts of United Nations intermediary assistance in the peaceful settlement of disputes", in Raman, ed., *op. cit.* (footnote 122 above), p. 412.)

See also the report of the Secretary-General on methods of fact-finding (A/5694) of 1 May 1964, examining "international inquiry as a peaceful means of settling disputes or adjusting situations" (para. 5).

of annex II, below, could come into play well before any threat to international peace and security arose, and indeed prior to the emergence of a "dispute".<sup>130</sup> In the context of international watercourses, fact-finding is often undertaken by joint commissions. State practice in this regard is referred to below in connection with the discussion of conciliation.

52. According to Brierly, in the case of *good offices, mediation and conciliation*,

. . . the intervention of a third party aims, not at *deciding* the quarrel for the disputing parties, but at inducing them to decide it for themselves. The difference between [good offices and mediation] is not important; strictly a state is said to offer "good offices" when it tries to induce the parties to negotiate between themselves, and to "mediate" when it takes a part in the negotiations itself, but clearly the one process merges into the other. . . .<sup>131</sup>

Conciliation is similar to the process of inquiry, except that the commission has the task not only of finding the facts but of making "a report containing proposals for a settlement, but which does not have the binding character of an award or judgment".<sup>132</sup> The procedure had its genesis in a series of "treaties for the advancement of peace which embodied the so-called 'Bryan peace plan'", concluded by the United States of America in 1913 and 1914.<sup>133</sup> These "Bryan treaties", 48 of which were eventually concluded, called for the establishment of international commissions of inquiry and permanent commissions. Brierly explains that

The method of the "Bryan treaties" was extensively adopted in later developments of international organization, and as it is essentially different from the method of arbitration on the one hand, and not precisely the same as that of mediation on the other, it is convenient to refer to it as "conciliation".<sup>134</sup>

53. According to Chauhan:

The use of good offices and mediation of the World Bank which stretched over a period of more than nine years in [the] case of [the] Indus Waters Dispute between India and Pakistan and which were wound up successfully through the conclusion of the Indus Waters

<sup>130</sup> The PCIJ and the ICJ have had several occasions to consider the meaning of the term "dispute" and to determine whether a "dispute" existed between parties to a case that had been brought before them. See, for example, the following cases: *The Mavrommatis Palestine Concessions*, Judgment of 30 August 1924 (P.C.I.J., Series A, No. 2), pp. 11-12; *The Electricity Company of Sofia and Bulgaria*, Judgment of 4 April 1939 (P.C.I.J., Series A/B, No. 77), pp. 64, 83; *Northern Cameroons*, Judgment of 2 December 1963 (I.C.J. Reports 1963), pp. 33-34; *Nuclear Tests*, Judgment of 20 December 1974 (I.C.J. Reports 1974), pp. 260, 270-271. That question will not be pursued further in the present report.

<sup>131</sup> Brierly, *op. cit.* (footnote 39 above), p. 373.

<sup>132</sup> Oppenheim, *op. cit.* (footnote 60 above), p. 12. According to Bishop, conciliation

" . . . involves the reference of a dispute to a commission of persons whose task is to find the facts and make a report containing recommendations for a settlement, which each party to the dispute remains free to accept or reject as it chooses, without legal obligation and without obloquy for failure to comply with the recommendations." (*Op. cit.* (footnote 121 above), p. 59.)

<sup>133</sup> G. H. Hackworth, *Digest of International Law* (Washington, D.C.), vol. VI (1943), p. 5. See also the discussion of the Bryan treaties in the 1964 report of the Secretary-General (footnote 129 above *in fine*), paras. 62-78.

<sup>134</sup> Brierly, *op. cit.* (footnote 39 above), pp. 374-375; see also Bishop, *op. cit.* (footnote 121 above), p. 59. The numerous agreements concluded between the two world wars that provided for conciliation are reviewed in *Systematic Survey of Treaties for the Pacific Settlement of International Disputes, 1928-1948* (United Nations publication, Sales No. 1949.V.3), and M. Habicht, *Post-War Treaties for the Pacific Settlement of International Disputes* (Cambridge, Mass., 1931).

Treaty [1960] . . . represents the most striking recent illustration of the utilization of these methods specifically for settlement of an international water law dispute.<sup>135</sup>

The same author identifies five treaties in which States "have expressly accepted 'good offices' and 'mediation' as methods of settlement of water law disputes"<sup>136</sup> and an additional 68 agreements that entrust joint commissions with functions of conciliation.<sup>137</sup>

54. *Arbitration* contrasts with the foregoing methods in that it involves the application of rules of international law to the facts of the case and leads to a binding settlement of a dispute. The 1907 Hague Convention (I) provides:

*Article 37*

International arbitration has for its object the settlement of disputes between States by judges of their own choice and on the basis of respect for law.

Recourse to arbitration implies an engagement to submit in good faith to the award.

International arbitration has a long history, which can be traced as far back as ancient Greece.<sup>138</sup> It differs from *adjudication* chiefly in that the parties to an arbitration "must agree upon the constitution of the tribunal and the procedure which it will employ", while adjudication entails bringing a dispute "before an existing tribunal operating under an established procedure".<sup>139</sup>

55. Most of the widely reported cases involving international watercourse disputes have been arbitrations. Perhaps the best known of these is the 1957 *Lake Lanoux* arbitration (France-Spain),<sup>140</sup> but the 1968 *Gut Dam* arbitration (Canada-United States)<sup>141</sup> has also received

significant attention.<sup>142</sup> Also noteworthy are the arbitral awards of 1872 and 1905 in the *Helmand River delta* case (Afghanistan-Persia), the award of 1888 in the *San Juan River* case (Costa Rica-Nicaragua), the award of 1893 in the *Kushk River* case (Great Britain-Russia) and the award of 1903 in the *Faber* case (Germany-Venezuela).<sup>143</sup> The two judgments of the PCIJ involving watercourse disputes are the case concerning the *Territorial Jurisdiction of the International Commission of the River Oder*<sup>144</sup> and the case concerning *The Diversion of Water from the Meuse*,<sup>145</sup> both of which were handed down in the first half of the present century. Chauhan lists 116 agreements in which the parties have expressly agreed to resolve water-related disputes by recourse to arbitration<sup>146</sup> and 46 that contain provisions concerning judicial settlement.<sup>147</sup>

56. The modest objective of the foregoing survey has merely been to recall that there is a variety of procedures available to States wishing to clarify facts, to adjust their relations, or to avoid or settle disputes. Examples of the use of certain of these procedures in State practice relating to the avoidance and settlement of international watercourse and other disputes are reviewed in section C below.

### C. Recourse to expert advice

57. As indicated at the beginning of this chapter (paras. 41-42), the Special Rapporteur has concluded on the basis of his study of State practice in this field that international watercourse disputes can often be most effectively avoided or resolved by referring questions to experts for investigation and report. In the present section, the Special Rapporteur will offer selected illustra-

<sup>135</sup> Chauhan, *op. cit.* (footnote 117 above), p. 325. Other such efforts have met with varying success. The President of the United States was able to achieve positive results in the Tacna-Arica dispute between Chile and Peru (*Supplement to the American Journal of International Law* (Washington, D.C.), vol. 23 (1929), p. 183), as was ECAFE in the case of the lower Mekong River (W. R. D. Sewell and G. F. White, "The lower Mekong", *International Conciliation* (New York), No. 558 (May 1966)). However, the efforts of a United States mediator, Eric Johnston, to achieve agreement among Syria, Lebanon, Jordan and Israel on the use of the Jordan River ultimately came to naught (Doherty, *loc. cit.* (footnote 120 above)).

<sup>136</sup> Chauhan, *op. cit.*, p. 326.

<sup>137</sup> *Ibid.*, pp. 331-339.

<sup>138</sup> See, for example, J. H. Ralston, *International Arbitration from Athens to Locarno* (Stanford University Press, 1929), pp. 153-189; and L. Henkin and others, *International Law: Cases and Materials*, 2nd ed. (St. Paul, Minn., West Publishing Co., 1987), pp. 589 *et seq.*

<sup>139</sup> Bishop, *op. cit.* (footnote 121 above), pp. 60-61.

<sup>140</sup> United Nations, *Reports of International Arbitral Awards*, vol. XII (Sales No. 63.V.3), pp. 281 *et seq.* This case is discussed in the Special Rapporteur's second report, document A/CN.4/399 and Add.1 and 2 (see footnote 120 above), paras. 111-124, and fourth report, document A/CN.4/412 and Add.1 and 2 (see footnote 1 above), para. 84.

<sup>141</sup> This case, which was brought by Canada and the United States of America before the Lake Ontario Claims Tribunal, concerned claims by United States citizens for flooding and erosion damage allegedly caused by the Gut Dam. The report of the Agent of the United States before the Claims Tribunal, containing excerpts of the decisions of 15 January, 12 February and 27 September 1968, is reprinted in *International Legal Materials* (Washington, D.C.), vol. VIII (1969), pp. 118 *et seq.* See the discussion of this case in the Special Rapporteur's fourth report, document A/CN.4/412 and Add.1 and 2 (see footnote 1 above), para. 86, and fifth report, document A/CN.4/421 and Add.1 and 2 (see footnote 125 above), paras. 94-101.

<sup>142</sup> See the discussion of this case in G. Handl, "State liability for accidental transnational environmental damage by private persons", *American Journal of International Law* (Washington, D.C.), vol. 74 (1980), p. 538; and J. Schneider, *World Public Order of the Environment: Towards an International Ecological Law and Organization* (Toronto, University of Toronto Press, 1979), p. 165.

<sup>143</sup> On these four cases, see *Yearbook . . . 1974*, vol. II (Part Two), pp. 188 *et seq.*, document A/5409, paras. 1034-1048.

<sup>144</sup> Judgment of 10 September 1929, *P.C.I.J., Series A, No. 23*. The parties to the case were, on the one hand, Poland and, on the other, the rest of the members of the International Commission (Czechoslovakia, Denmark, France, Germany, Great Britain and Sweden). The case is discussed in the Special Rapporteur's second report, document A/CN.4/399 and Add.1 and 2 (see footnote 120 above), paras. 102-105.

<sup>145</sup> Judgment of 28 June 1937, *P.C.I.J., Series A/B, No. 70*. This case is summarized in *Yearbook . . . 1974*, vol. II (Part Two), document A/5409, paras. 1022 *et seq.*, and discussed in the Special Rapporteur's second report, document A/CN.4/399 and Add.1 and 2, paras. 106-107.

<sup>146</sup> Chauhan, *op. cit.* (footnote 117 above), pp. 344-355. See also B. M. Clagett, "Survey of agreements providing for third-party resolution of international waters disputes", *The American Journal of International Law* (Washington, D.C.), vol. 55 (1961), p. 645; this survey covers both watercourse agreements and general dispute-settlement treaties concluded up to 1961. According to Clagett:

"The survey shows that disputes regarding the regulation and use of a very high proportion of the international (boundary and successive) watercourses of the world are covered by formal agreements providing for compulsory adjudication or other third-party determination. . . . at least sixty-six states have made such commitments with one or more co-riparian states. . . ." (P. 646.)

<sup>147</sup> Chauhan, *op. cit.*, pp. 361-366, and Clagett, as quoted in footnote 146 above.

tions of the practice of States and international organizations in this regard. With a view to providing the Commission with a broad range of possible models, the Special Rapporteur has not confined the following brief survey to practice under agreements concerning international watercourses.

58. As noted in chapter I, a technique for the resolution of international watercourse-related questions that has proved successful is the reference of such matters to joint institutions established by the parties. Provisions for referrals of this kind may be found in a number of international watercourse agreements,<sup>148</sup> such as the 1909 Boundary Waters Treaty between Great Britain and the United States of America<sup>149</sup> and the Indus Waters Treaty 1960 between India and Pakistan.<sup>150</sup> Practice under such arrangements has demonstrated the value of attempting in the first instance to resolve questions at the technical level.

59. The use of joint institutions to assist watercourse States in resolving questions concerning international watercourses has proved particularly successful under the 1909 Boundary Waters Treaty.<sup>151</sup> When the parties refer a question to the International Joint Commission (IJC) under article IX of that agreement, IJC generally establishes a board of experts to undertake a technical assessment of the situation.<sup>152</sup> These boards may, in turn, set up technical committees to assist them in their work.

60. This practice was followed, for example, in the case of a proposed coal-mine at Cabin Creek, on a tributary of the Flathead River. The Flathead flows from the Canadian province of British Columbia into the state of Montana in the United States, where it forms the western boundary of Glacier National Park. That park is considered an important wilderness recreation and natural heritage area, subject to several "special" designations, such as UNESCO International Biosphere Reserve status and nomination as a "world heritage site".<sup>153</sup> In 1984 and 1985, IJC was requested by the United States and Canada to examine and report on the water quality and quantity

of the Flathead River, with respect to the transboundary water quality and quantity implications of the proposed coal-mine at Cabin Creek.

61. In order to respond to this request, IJC established a study board, the Flathead River International Study Board, to undertake a technical assessment as a basis for its deliberations. The Board included experts of various disciplines and consisted of an equal number of members from the United States and from Canada. After more than three years of determined work and consensus building, the Board forwarded to IJC a number of reports, which formed an important technical basis for the assessment of the matter.<sup>154</sup> Relying upon the findings of the Study Board, IJC recommended, in order that Governments might ensure that the provisions of article IV of the 1909 Boundary Waters Treaty<sup>155</sup> were honoured in the matter of the proposed coal-mine at Cabin Creek in British Columbia, that:

(1) The mine proposal as currently defined and understood not be approved;

(2) The mine proposal not receive regulatory approval in the future unless and until it could be demonstrated that:

(a) The potential transboundary impacts identified in the report of the Flathead River International Study Board had been determined with reasonable certainty and would constitute a level of risk acceptable to both Governments;

(b) The potential impacts on the sport-fish populations and habitat in the Flathead River system would not occur or could be fully mitigated in an effective and assured manner; and

(3) The Governments consider, with the appropriate jurisdictions, opportunities for defining and implementing compatible, equitable and sustainable development activities and management strategies in the upper Flathead River basin.

62. IJC has followed similar procedures in other cases.<sup>156</sup> This practice of Canada and the United States illustrates clearly the value of initially referring questions to experts for fact-finding and reporting on technical matters. As in the Flathead River case, a consensus as to such questions may be reached more readily by experts

<sup>148</sup> See Chauhan, cited above in paragraph 53 and footnote 137.

<sup>149</sup> See especially articles VIII-X of the Treaty, quoted above (chap. I, sect. E) in the comments on draft article 26, para. (3) (c).

<sup>150</sup> See especially article 8, para. 4, of the Treaty, *idem*, para. (3) (b).

<sup>151</sup> Mr. J. Blair Seaborn, former Canadian Chairman of the International Joint Commission, stressed the importance of fact-finding and the value of the work of technical experts in avoiding and resolving international watercourse disputes, in remarks made at a panel discussion on transfrontier environmental damage held during the annual meeting of the American Society of International Law, on 28 March 1990.

<sup>152</sup> It is noted in its activities report for 1983-1984 that:

"The Commission does not maintain a large technical staff but depends largely on its boards and committees to carry out its functions. Governments have empowered it to select and use the most experienced and competent people in both countries on its boards. Engineers, scientists, and others, usually from government agencies, are organized into international boards to carry out the required technical studies and field work in connection with study References, and in the case of Orders of Approval to monitor compliance with the Orders.

"The Commission is assisted in its work by a variety of advisory boards, study boards, and control boards." (IJC, 1983-1984 *Activities Report*, p. 8.)

<sup>153</sup> See IJC, *Impacts of a Proposed Coal Mine in the Flathead River Basin*, December 1988 (hereinafter, the "Flathead Report").

<sup>154</sup> These reports are summarized in a report of the Board included in the Flathead Report as appendix B.

<sup>155</sup> Article IV of the Treaty provides that boundary waters "shall not be polluted on either side to the injury of health or property on the other".

<sup>156</sup> See, for example, the procedures followed by IJC with regard to questions referred to it concerning the following boundary waters: the Skagit River (Ross Dam) (IJC, 1983-1984 *Activities Report*, p. 10); the Poplar River (IJC, *Report to December 1982*, p. 17, and fourth report of the Special Rapporteur, document A/CN.4/412 and Add.1 and 2 (see footnote 1 above), para. 87); Richelieu River-Lake Champlain (IJC, *Report to December 1982*, p. 18); Osoyoos Lake (*ibid.*, p. 19); the St. Croix River (*ibid.*, p. 20, IJC, *Activities Report 1985*, p. 16, IJC, *Activities Report 1986*, p. 13, and IJC, *Activities 1987-1988*, p. 24); St. Mary's Rapids (IJC, *Activities Report 1985*, p. 13); Lake of the Woods and Rainy Lake (IJC, *Activities Report 1986*, p. 13, and IJC, *Activities 1987-1988*, p. 24); and, of course, the Great Lakes, which are addressed in virtually every report prepared by IJC. See also the discussion of the role played by IJC with regard to the Columbia River dispute in Bourne, "Mediation . . .", *loc. cit.* (footnote 116 above), pp. 119-122.



than would have been the case had the same questions been taken up initially at the diplomatic level. The report of the expert group may then form the basis of an agreed resolution of the question between the watercourse States involved. These considerations may also have inspired the framers of the Indus Waters Treaty 1960, which establishes institutions and procedures akin to those provided for in the 1909 Boundary Waters Treaty.

63. The Indus Waters Treaty 1960 between India and Pakistan<sup>157</sup> calls, in article VIII, for the establishment of a Permanent Indus Commission<sup>158</sup> consisting of one Commissioner from each State. Article VIII provides that the Commissioners are to be "high-ranking engineer[s] competent in the field of hydrology and water-use" (para. 1). The Commission is much more than a forum for the settlement of disputes; the Commissioners represent their respective Governments with regard to all matters arising out of the Treaty and "serve as the regular channel of communication on all matters relating to the implementation of the Treaty" (para. 1).

64. Article IX of the Treaty is entitled "Settlement of differences and disputes". It provides that the Permanent Indus Commission shall endeavour to resolve "[a]ny question which arises between the Parties concerning the interpretation or application of this Treaty or the existence of any fact which, if established, might constitute a breach of this Treaty" (para. 1). If the Commission cannot resolve the question, a "difference" is deemed to have arisen (para. 2). Either Commissioner may then refer the matter to a "Neutral Expert" under the provisions of annexure F of the Treaty, providing that the issue, in the opinion of the Commissioner making the referral, falls within one of the 23 categories set forth in that annexure. The neutral expert is to be a highly qualified engineer (annexure F, part 2, para. 4).

65. Under article IX, a "dispute" is deemed to have arisen only if the question does not pertain to one of the 23 categories set forth in annexure F or if the neutral expert decides that the "difference" should be treated as a "dispute" (para. 2(b)). "Disputes" are to be dealt with in accordance with paragraphs 3, 4 and 5 of article IX. Paragraph 4 provides for the parties to enter into negotiations on the basis of a report submitted to them by the Commission and, if they so agree, to appoint mediators to assist them. Under paragraph 5, the dispute may be referred to a court of arbitration, established in accordance with annexure G of the Treaty, if the parties agree to do so, or at the request of either party on the ground that the dispute is not likely to be resolved by negotiation or mediation or that the other party is unduly delaying the negotiations.

66. The procedures envisaged under the Indus Waters Treaty 1960 thus consist of a series of stages, beginning—as is the case under the 1909 Boundary Waters Treaty—with efforts to resolve questions within its Commission, a

body composed of experts in the field. The next phase of the process also involves an expert, in this case a neutral one. Negotiations, and ultimately arbitration, are envisaged only as a last resort.

67. A third agreement which is of interest for the present study, though it does not concern international watercourses, is the International Plant Protection Convention of 6 December 1951. It also relies heavily upon experts to resolve questions concerning its interpretation or application, and it contains provisions concerning dispute settlement that are worthy of consideration by the members of the Commission. The purpose of the Convention, according to article I, is to secure "common and effective action to prevent the introduction and spread of pests and diseases of plants and plant products and to promote measures for their control" (para. 1). Article IX of the Convention provides as follows:

#### *Article IX. Settlement of disputes*

1. If there is any dispute regarding the interpretation or application of this Convention, or if a contracting Government considers that any action by another contracting Government is in conflict with the obligations of the latter under [certain articles] of this Convention, . . . the Government or Governments concerned may request the Director-General of FAO to appoint a committee to consider the question in dispute.

2. The Director-General of FAO shall thereupon, after consultation with the Governments concerned, appoint a committee of experts which shall include representatives of those Governments. This committee shall consider the question in dispute, taking into account all documents and other forms of evidence submitted by the Governments concerned. This committee shall submit a report to the Director-General of FAO who shall transmit it to the Governments concerned, and to other contracting Governments.

3. The contracting Governments agree that the recommendations of such a committee, while not binding in character, will become the basis for renewed consideration by the Governments concerned of the matter out of which the disagreement arose.

4. The Governments concerned shall share equally the expenses of the experts.

68. In this case it is a third party, the Director-General of FAO, rather than a standing commission, who is to appoint the group of experts. Such an approach is also conceivable in the context of international watercourses and might be given consideration by the Commission. In the case of the present draft articles, the third party could be the Director-General of FAO (who could draw upon his experience under the International Plant Protection Convention), the Director-General of UNEP, the Secretary-General of the United Nations or another neutral individual or organization.

69. A second point worthy of note is that article IX of the International Plant Protection Convention, which embodies the entire dispute-resolution process, does not envisage ultimate recourse to binding arbitration or adjudication. Instead, a non-binding report containing recommendations is transmitted to the parties concerned, and to the other parties to the Convention. The parties to the dispute are then to give "renewed consideration" to the matter giving rise to the disagreement on the basis of the recommendations of the expert committee. This approach could encourage States to have recourse to the procedure, since it does not result in a binding decision. At the same time, it could provide some incentive to the States involved to resolve their differences on the basis of the committee's recommendations. The incentive would de-

<sup>157</sup> See the provisions of this Treaty, especially article VIII, para. 4, quoted above (chap. I, sect. E) in the comments on draft article 26. See also the discussion of the Treaty and, in particular, its provisions of present interest, in R. R. Baxter, "The Indus Basin", in Garretson, Hayton and Olmstead, eds., *op. cit.* (footnote 14 above), pp. 471 *et seq.*

<sup>158</sup> The late Richard R. Baxter has surmised that "the Indus Commission was inspired by the International Joint Commission, United States-Canada" (*ibid.*, p. 471).



rive not only from the parties' undertakings in paragraph 3, but also from the fact that the committee's recommendations would have been brought to the attention of the Director-General and the other contracting parties. A similar system is employed by the parties to the General Agreement on Tariffs and Trade.

70. In the General Agreement on Tariffs and Trade, dispute settlement is dealt with in articles XXII and XXIII. The procedures contained in these articles have been "improved and refined" in an understanding adopted by the Contracting Parties to the General Agreement in November 1979.<sup>159</sup>

71. Under article XXII (Consultation) of the General Agreement, the parties are required to "accord sympathetic consideration to, and . . . afford adequate opportunity for consultation regarding, such representations as may be made by another contracting party with respect to any matter affecting the operation of this Agreement" (para. 1). The article also provides that if it has not been possible to find a satisfactory solution to any matter through consultation, a party may request that the parties to the General Agreement, acting jointly, "consult with any contracting party or parties" with regard to such matter (para. 2).

72. Article XXIII (Nullification or impairment) provides, in paragraph 2, for conciliation of any differences between the parties that have not been settled bilaterally. Specifically, a party may refer the question to the Contracting Parties, which are to investigate it and "make appropriate recommendations to the contracting parties which they consider to be concerned, or give a ruling on the matter, as appropriate". In practice, parties to a dispute have generally requested that a panel of experts be established to investigate and report on the matter. GATT panels are composed of three to five individuals who are selected by the Director-General of GATT<sup>160</sup> and who serve in their individual capacities.<sup>161</sup> The 1979 Understanding provides that "the members of a panel would preferably be governmental", but that they should not be citizens of countries parties to the dispute.<sup>162</sup> However, experts who are not government representatives are increasingly being called upon to serve on panels, owing in part to the increase in recourse to GATT dispute-settlement procedures and the resulting need to enlarge the pool of experts.

73. According to the 1979 Understanding,

. . . a panel should make an objective assessment of the matters before it, including an objective assessment of the facts of the case and the applicability of and conformity with the General Agreement and . . . should consult regularly with the parties to the dispute and give them adequate opportunity to develop a mutually satisfactory solution.<sup>163</sup>

Indeed, encouraging the parties to develop a mutually satisfactory solution is the basic object of the GATT dispute-settlement procedures. The panel is to submit its report first to the parties concerned and then to the Contracting Parties. The latter, acting through the GATT Council, normally adopt the report of the panel, making recommendations or rulings as appropriate. The Contracting Parties then "keep under surveillance any matter on which they have made recommendations or given rulings".<sup>164</sup>

74. Article XXIII further provides, in paragraph 2, that where the Contracting Parties

. . . consider that the circumstances are serious enough to justify such action, they may authorize a contracting party or parties to suspend the application to any other contracting party or parties of such concessions or other obligations under this Agreement as they determine to be appropriate in the circumstances. . . .<sup>165</sup>

Such "retaliatory" measures have, however, been authorized only once in the history of GATT.<sup>166</sup> Panel reports are generally accepted by the parties to the dispute or serve as the basis for a negotiated settlement.

75. Like the agreements reviewed previously in this section, the GATT dispute-settlement procedures consist of a series of stages, or echelons, and rely heavily on expert reports and recommendations. A feature of the GATT process that is unique among the instruments reviewed is the provision for the Contracting Parties, acting jointly, to approve panel reports, make recommendations or rulings, and authorize enforcement measures. This use of what amounts to a conference-of-the-parties procedure<sup>167</sup> lends added authority to the otherwise non-binding panel reports. While it does not go as far, the 1951 International Plant Protection Convention also strengthens the incentive to comply with expert committee reports through the means of keeping all the parties to the Convention informed of them.

76. Another agreement that should be mentioned here is the Convention relating to the Development of Hydraulic Power Affecting More than One State of 9 December 1923.<sup>168</sup> The Convention provides in essence, in art-

<sup>159</sup> "Understanding regarding notification, consultation, dispute settlement and surveillance", decision of 28 November 1979 (GATT, *Basic Instruments and Selected Documents, Twenty-sixth Supplement* (Sales No. GATT/1980-3), pp. 210 *et seq.*).

<sup>160</sup> The 1979 Understanding provides in its paragraph 13:

"13. In order to facilitate the constitution of panels, the Director-General should maintain an informal indicative list of governmental and non-governmental persons qualified in the fields of trade relations, economic development, and other matters covered by the General Agreement, and who could be available for serving on panels. . . ." (*Ibid.*, p. 212.)

<sup>161</sup> See paragraph 14 of the 1979 Understanding, which provides that:

" . . . Panel members should be selected with a view to ensuring the independence of the members, a sufficiently diverse background and a wide spectrum of experience." (*Ibid.*, p. 213.)

<sup>162</sup> The 1979 Understanding, para. 11 (*ibid.*, p. 212).

<sup>163</sup> The 1979 Understanding, para. 16 (*ibid.*, p. 213).

<sup>164</sup> The 1979 Understanding, para. 22 (*ibid.*, p. 214).

<sup>165</sup> Paragraph 2 goes on to provide that a party that is the object of responsive measures shall be free to withdraw from the General Agreement on 60 days' notice.

<sup>166</sup> See the resolution on United States import restrictions on dairy products, adopted by the Contracting Parties on 8 November 1952 (GATT, *Basic Instruments and Selected Documents, First Supplement* (Sales No. GATT/1953-1), p. 31).

<sup>167</sup> Such a procedure is provided for in draft article 7 of annex I (see chap. III, sect. B, above).

<sup>168</sup> In the 1963 report of the Secretary-General on "Legal problems relating to the utilization and use of international rivers", this Convention was the only one listed in the category of "General conventions concerned exclusively with the utilization and use of international rivers" (*Yearbook . . . 1974*, vol. II (Part Two), p. 57, document A/5409, para. 68).

icle 12, for referral of disputes to a technical body established by the League of Nations for an advisory opinion:

*Article 12*

If a dispute should arise between Contracting States as to the application or interpretation of the Convention, and if such dispute cannot be settled either directly between the parties or by some other amicable method of procedure, the Parties to the dispute may submit it for an advisory opinion to the body established by the League of Nations as the advisory and technical organization of the Members of the League in matters of communications and transit, unless they have decided or shall decide by mutual agreement to have recourse to some other advisory, arbitral or judicial procedure.

Thus, like other agreements reviewed in the present section, this 1923 Convention provides for the submission of disputes to a group of experts for an objective, non-binding opinion. This confirms that even relatively early in this century, States recognized the importance of involving experts in the process of avoiding and resolving disputes concerning international watercourses.

77. A final item of interest in the present context, although it does not involve the practice of States *per se*, is the procedure followed by the World Bank in its consideration of proposed projects on international waterways. After notification of the proposal is provided to other riparian States by the State proposing the project or by the Bank, the other States are given a reasonable period of time within which to respond.<sup>169</sup> If these other States raise objections to the proposed project, the Bank may seek an opinion from independent experts in appropriate cases. The experts do not have any decision-making role with regard to the processing of the project but if their advice is sought the staff of the Bank must review their report and conclusions before making a decision on whether to proceed further.<sup>170</sup>

78. Since many of the most significant international watercourse projects will involve World Bank financing, these procedures constitute a particularly effective means of avoiding disputes between watercourse States with regard to proposed projects or, in the language employed in the present draft articles, planned measures. For the purposes of the present survey, it is therefore of interest to note that the procedures followed by the Bank in deciding on project proposals provide for the possibility of expert advice, presumably in recognition of the usefulness of the assistance of technical experts in structuring a solution to actual or potential conflicts over uses of international watercourses.

79. The particular value of standing, rather than *ad hoc*, expert bodies should not be lost sight of, however. Permanent joint commissions can form working relationships over time, build trust, establish effective lines of communication and acquire more perspective and a more detailed knowledge of the characteristics and circumstances of the international watercourse system concerned

than is possible in the case of an *ad hoc* body. This may mean the difference between success and failure in an individual case. For example, Bourne notes that the non-acceptance by Afghanistan and Iran of the report of the Helmand River Delta Commission may have been attributable in part to the composition of that commission (engineers from disinterested countries) and the short time it had taken to produce its report.<sup>171</sup>

... Was the Commission, doubtless very efficient and sound from the engineering viewpoint, the sort of body with the training, the inclination and particularly the time to reconcile deepseated political differences? ... The experience of the Helmand River Delta Commission suggests that a permanent joint commission composed of nationals of the co-basin states concerned may be a more effective instrument in reconciling differences.<sup>172</sup>

Further support for this conclusion may be found in the materials presented in chapter I of the present report concerning joint institutional management.<sup>173</sup>

80. The foregoing review of the practice of certain States and international organizations provides illustrations of methods for avoiding and resolving disputes which, in the judgment of the Special Rapporteur, are particularly well suited to questions concerning the utilization and protection of international watercourses. This is so because the answers to such questions often depend on the establishment of facts and the application of science and technology, and these processes can usually be carried out most effectively by experts. Some of the procedures employed in the agreements reviewed in this section will accordingly be adapted for use in the draft articles of annex II (see sect. F below). Those draft articles also draw upon the work of international organizations in this field, which will be reviewed briefly in the following section.

#### D. The work of international organizations

81. As in the case of the other issues dealt with in the present draft articles, international organizations have made a valuable contribution to the codification and progressive development of the law and institutions in the field of the settlement of watercourse disputes. The Panel of Experts on the Legal and Institutional Aspects of International Water Resources Development emphasized in its report the importance of examining questions concerning the utilization of international watercourses initially at the technical level and pointed out that the use of existing joint institutions for this purpose is particularly advantageous,

... because professionally qualified and experienced officers who are dealing on a day-to-day basis with international water resources problems and with their professional counterparts are in the best position to marshal and evaluate the extensive and complex factual data and to weigh the scientific, engineering and management considerations. ... Moreover, the influence of extraneous considerations, including political considerations where these are unrelated to the problem at hand, can best be minimized when substantial decision-making author-

<sup>169</sup> This notification and response procedure is strikingly similar to that which is embodied in part III of the present draft articles, entitled "Planned measures" (*Yearbook* ... 1988, vol. II (Part Two), pp. 45 *et seq.*).

<sup>170</sup> World Bank, *Operational Manual*, "Operational directive 7.50: Projects on international waterways" (Washington, D.C., April 1990).

<sup>171</sup> The Commission, which was established by an agreement between Afghanistan and Iran signed on 7 September 1950, published its report in February 1951 (see *Yearbook* ... 1974, vol. II (Part Two), p. 190, document A/5409, paras. 1036-1037).

<sup>172</sup> Bourne, "Mediation ...", *loc. cit.* (see footnote 116 above), p. 122.

<sup>173</sup> See also the conclusions of the Panel of Experts on the Legal and Institutional Aspects of International Water Resources Development, quoted in paragraph 81 below.

ity is delegated, at least in the first instance, to the experts directly involved. . . . In this way, work on international water resources projects or programmes is least likely to be delayed or disrupted and the merits of the matter least likely to be distorted or misconstrued. . . .<sup>174</sup>

This points to the importance of building "into the institutional relationships between or among system States the opportunity and procedures for avoidance of conflict".<sup>175</sup>

82. In its resolution on "Utilization of non-maritime international waters (except for navigation)", which it adopted at Salzburg in 1961,<sup>176</sup> the Institute of International Law addressed dispute settlement principally in the context of new works or uses. According to article 3 of that resolution, disagreements over the scope of rights of utilization are to be settled by States "on the basis of equity, taking particular account of their respective needs, as well as of other pertinent circumstances". Article 6 provides that, in the event of an objection to a work or utilization, "the States will enter into negotiations with a view to reaching an agreement within a reasonable time" and that, for this purpose, "it is desirable that the States in disagreement should have recourse to technical experts and, should occasion arise, to commissions and appropriate agencies in order to arrive at solutions assuring the greatest advantage to all concerned". In article 8, the Institute recommends that States failing to reach agreement within a reasonable time submit the question to judicial settlement or arbitration. Finally, article 9 of the resolution provides as follows:

*Article 9*

It is recommended that States interested in particular hydrographic basins investigate the desirability of creating common organs for establishing plans of utilization designed to facilitate their economic development as well as to prevent and settle disputes which might arise.

Thus the Institute recognizes in this resolution the value both of having recourse to expert advice and of establishing joint institutions for the management of international watercourses as well as for the avoidance and settlement of disputes.

83. The International Law Association addressed the subject of "Procedures for the prevention and settlement of disputes" in chapter 6 of the Helsinki Rules on the Uses of the Waters of International Rivers.<sup>177</sup> The

<sup>174</sup> *Management of international water resources* . . . (see footnote 4 (c) above), para. 457. The following observations of Bourne concerning the Columbia River dispute involving Canada and the United States of America bear out the Panel's conclusions:

". . . the history of the Columbia River dispute suggests that one of the valuable aspects of a joint commission is that it provides a forum where co-basin states may dispute each other's claims vigorously without involving their governments at a high level. There was in fact no serious controversy about the Columbia River between the governments of Canada and of the United States . . . The issues were hammered out in the [International Joint] Commission and agreement was ultimately reached there on the principles that became the foundation of the 1961 Treaty." ("Mediation . . .", *loc. cit.* (footnote 116 above), p. 122.)

<sup>175</sup> Third report of Mr. Schwebel, document A/CN.4/348 (see footnote 2 above), para. 474.

<sup>176</sup> See *Annuaire de l'Institut de droit international*, 1961 (Basel), vol. 49, part II, pp. 381-384; reproduced in *Yearbook* . . . 1974, vol. II (Part Two), p. 202, document A/5409, para. 1076.

<sup>177</sup> ILA, *Report of the Fifty-second Conference* . . . , *op. cit.* (footnote 38 above), pp. 478 *et seq.*; reprinted in *Yearbook* . . . 1974, vol. II (Part Two), p. 357, document A/CN.4/274, para. 405.

chapter, which contains 12 articles (arts. XXVI-XXXVII), applies to "all uses including navigation, timber-floating, and consumptive uses, of the waters of international drainage basins and to the pollution of such waters."<sup>178</sup> It is supplemented by an annex entitled "Model rules for the constitution of the conciliation commission for the settlement of a dispute", which implements article XXXIII.<sup>179</sup> Since these articles have been set forth *in extenso* in Mr. Schwebel's third report,<sup>180</sup> they will merely be summarized here.

84. After recalling the obligation of Article 2, paragraph 3, of the Charter of the United Nations, the articles note the "primary obligation" of States to resort to means of dispute resolution contained in the applicable treaties (art. XXVIII). There follows a set of recommended procedures designed to prevent disputes (art. XXIX) which, except for their non-binding nature, are very similar to the procedures contained in part III of the draft articles on the present topic adopted by the Commission at its fortieth session. The ensuing six articles establish a graduated series of means of dispute resolution that are recommended to the parties. ILA recommends that the States concerned first seek a solution by negotiation (art. XXX) or by referring the question to a joint agency (art. XXXI). If the dispute persists, it is recommended that the parties seek the good offices or mediation of a third State, a qualified international organization or a qualified person (art. XXXII). If these methods fail to resolve the dispute, it is recommended that the States concerned form a commission of inquiry or an *ad hoc* conciliation commission, the latter to be constituted as provided in the annex mentioned above (art. XXXIII). Finally, it is recommended that the parties submit the dispute to an *ad hoc* or permanent arbitral tribunal or to the ICJ in any of the following cases: if the parties are unable to form a commission; if a commission is formed but is not able to find a solution; if a recommended solution is not accepted by the parties; or if an agreement is not otherwise reached (art. XXXIV).

85. The value of a procedural system involving several "echelons" for the resolution of watercourse disputes, as recommended in the Helsinki Rules, has been emphasized by experts<sup>181</sup> and previous special rapporteurs.<sup>182</sup> But it has been suggested that before they resort to third-party assistance, States should make every effort to resolve questions bilaterally.<sup>183</sup> Specifically, they should provide for the possibility of "review" within joint institutions, or at least by professionals, of conclusions reached at lower levels. There is precedent in State treaty practice for

<sup>178</sup> First paragraph of the comments on article XXVI (ILA, *Report of the Fifty-second Conference* . . . , p. 517).

<sup>179</sup> *Ibid.*, p. 531.

<sup>180</sup> Document A/CN.4/348 (see footnote 2 above), para. 494.

<sup>181</sup> See generally *Management of international water resources* . . . (footnote 4 (c) above), chap. V, "Accommodation procedures and dispute settlement", especially para. 455.

<sup>182</sup> See Mr. Schwebel's third report, document A/CN.4/348 (footnote 2 above), paras. 478-479.

<sup>183</sup> See Mr. Schwebel's third report, paras. 478-479; *Management of international water resources* . . . , chap. V; and the discussion of the Helmand River Delta Commission case in paragraph 79 above.

such use of various echelons in the bilateral context.<sup>184</sup> These considerations probably led two previous special rapporteurs to propose dispute-settlement procedures that entail a series of stages. Their proposals will be summarized in the following section.

### E. Proposals of previous Special Rapporteurs

86. Draft article 16 submitted by Mr. Schwebel in his third report is entitled "Principles and procedures for the avoidance and settlement of disputes".<sup>185</sup> The article begins by stating the obligation of States to settle disputes peacefully (para. 1) and proceeds to set forth a number of substantive principles that are to govern the resolution of differences and disputes (para. 2). The States concerned are then called upon to use their best efforts to adjust their differences with a view to avoiding the emergence of disputes (para. 3). If consultations and negotiations fail to produce a solution within a reasonable period, any of the States concerned may "call for the creation of an international commission of inquiry to investigate and report upon the facts relevant to the unresolved difference" (para. 4(a)). However, another State may delay the establishment of such a commission by up to six months by "convok[ing] a special period of intensified negotiations" (para. 4(b)).

87. Draft article 16 then provides that if an international commission of inquiry is constituted, its report is to form the basis of renewed negotiations between the States concerned, which are to "endeavour to arrive at a just and equitable resolution of the difference" (para. 4(d)). In the event that the States are unable to resolve the difference through these negotiations within six months, the matter may be referred to conciliation (para. 4(e)). Finally, if conciliation fails to resolve the difference, and unless there is an applicable and binding agreement to arbitrate or adjudicate disputes between the States concerned, any of the States concerned may "declare the matter to be an international dispute and call for arbitration or adjudication of the dispute in accordance with the optional procedures annexed to these articles" (para. 4(f)).

88. Chapter V of the draft articles submitted by Mr. Evensen in his first report is entitled "Settlement of disputes" and comprises eight articles (arts. 31-38).<sup>186</sup> Article 31 enjoins States to settle disputes by peaceful means and to "seek solutions by the means indicated in Article 33, paragraph 1, of the Charter" (para. 1). It goes on to preserve the effect of any separate agreement for

the settlement of disputes (para. 2). Article 32 provides, as the first stage of dispute settlement, for consultations and negotiations aimed at "arriving at a fair and equitable solution to the dispute" (para. 1); the States concerned may conduct consultations and negotiations directly, or through any pre-existing joint management commission, or through "other regional or international organs or agencies agreed upon between the parties" (para. 2). Under article 33 the States concerned may "establish a board of inquiry of qualified experts for the purpose of establishing the relevant facts . . . in order to facilitate the consultations and negotiations" (para. 1); they may also by agreement request mediation by a third party to assist them in their consultations and negotiations (para. 2).

89. Article 34 deals with the next stage, that of conciliation, to which the parties may agree to submit the dispute (para. 1), and sets forth procedures for composing a conciliation commission (paras. 2-4). Article 35 lays down the functions and tasks of the commission, and article 36 the effects of the commission's report and the manner in which the relevant costs are to be apportioned. Article 37 deals with the final stage of dispute resolution, which is "adjudication by the International Court of Justice, another international court or a permanent or *ad hoc* arbitral tribunal", provided that the parties to the dispute agree to the procedure. Article 38 provides that a decision of one of the named bodies is binding and final.

90. The Special Rapporteur believes that the Commission could profitably consider either of the systems of dispute resolution proposed by Mr. Schwebel and Mr. Evensen. However, he would be inclined not to include in the provisions on dispute resolution themselves either substantive principles and rules<sup>187</sup> or procedures for establishing commissions or other bodies and rules governing their functions.<sup>188</sup> In the view of the Special Rapporteur, the latter are matters of detail that are best left to any conference at which the present draft articles may be considered. The proposals of Mr. Evensen in this regard will, of course, provide a valuable basis from which to proceed. The basic approaches of the two sets of provisions are believed to be sound, however, and the Special Rapporteur will accordingly draw upon them heavily in the draft articles he proposes in the following section.

## F. The proposed annex

### ANNEX II

## FACT-FINDING AND SETTLEMENT OF DISPUTES

### A. Fact-finding

#### Article 1. Fact-finding

**1. Fact-finding shall be undertaken at the request of any watercourse State for the purpose of establishing facts necessary to the fulfilment of the obligations of watercourse States under the present articles.**

<sup>184</sup> The practice of the Canada-United States International Joint Commission (see paras. 59-62 above) in effect permits this kind of review: reports of technical "boards" are forwarded to the Commission for its action. See also the Convention of 17 September 1955 between Italy and Switzerland concerning the regulation of Lake Lugano, which provides in article VI for the establishment of a joint supervisory commission; and the review authority granted the Supreme Frontier Water Commission in respect of decisions of the Frontier Water Commission in the Agreement of 10 April 1922 between Denmark and Germany for the settlement of questions relating to watercourses and dikes on the German-Danish frontier (arts. 2 and 3). (Interestingly, under the latter agreement, decisions on regulations for the upkeep of frontier waters adopted unanimously by the Frontier Water Commission are not subject to appeal (art. 6).)

<sup>185</sup> Document A/CN.4/348 (see footnote 2 above), para. 497.

<sup>186</sup> Document A/CN.4/367 (see footnote 3 above), paras. 207-231.

<sup>187</sup> Cf. article 16, para. 2, proposed by Mr. Schwebel.

<sup>188</sup> Cf. articles 34 and 35 proposed by Mr. Evensen.

2. The fact-finding referred to in paragraph 1 may be conducted by a competent joint organization established by the watercourse States or, in the absence thereof, by an *ad hoc* expert commission established by agreement of the watercourse States concerned.

3. In the absence of a joint organization competent to conduct fact-finding, and if the watercourse States concerned are unable to agree upon the establishment of an *ad hoc* expert commission within six months of the initial request for fact-finding, they shall establish a commission of inquiry at the request of any of them [in accordance with the procedures contained in the appendix].

4. The commission of inquiry shall determine its own procedure, the place or places where it shall sit and all other administrative matters.

5. Watercourse States shall furnish any body conducting fact-finding pursuant to the present article with all the means and facilities required for its investigation and report. In particular, they shall grant it free access to their territories for the purpose of carrying out its task.

#### Comments

(1) Article 1 of the present annex provides for fact-finding—that is, the establishment of factual information necessary to permit the watercourse States to fulfil their obligations under the draft articles. In contrast to the approaches followed by his predecessors, the Special Rapporteur has placed this article in a separate part of the annex because its applicability is not restricted to cases in which a “dispute”<sup>189</sup> has arisen. Indeed, it is envisaged that the availability to watercourse States of fact-finding machinery will often prevent disputes from arising by eliminating any questions as to the nature of the relevant facts.

(2) Fact-finding as a means of maintaining international peace and security has received considerable attention of late in the context of the work of the Special Committee on the Charter of the United Nations and on the Strengthening of the Role of the Organization.<sup>190</sup> In a working paper submitted to the Special Committee on “Fact-finding by the United Nations in the field of the maintenance of international peace and security”,<sup>191</sup> fact-

finding is defined, for the purpose of that paper, as “any activity designed to ascertain facts which the competent United Nations organs need to exercise effectively their functions in the field of the maintenance of international peace and security” (para. 2). It is stated in this paper that fact-finding “should be comprehensive, objective and impartial” (para. 3) and that “Fact-finding missions should perform their task in an impartial way. Their members shall not seek or receive instructions from any Government or from any authority other than the competent United Nations organ” (para. 25). According to the working paper, “the purpose of fact-finding missions should be to gain objective and detailed knowledge of the facts” (para. 5). Further, the decision “to undertake fact-finding should always contain a clear mandate and precise requirements for the report. The report should be limited to a statement of facts” (para. 12). It is recommended that fact-finding missions “enjoy all freedoms and facilities needed for discharging their mandate” (para. 22), as well as “the privileges and immunities specified in the Convention on the Privileges and Immunities of the United Nations” (para. 23). Finally, “The Secretary-General should be encouraged to prepare and update lists of experts in various fields so as to have them available at any time for fact-finding missions. He should also maintain and develop, within existing resources, capabilities for the event of emergency fact-finding missions” (para. 30).

(3) As indicated in paragraph (1) of these comments, article 1 is intended to be applicable even where no “dispute” has yet arisen between watercourse States; it follows that it would be applicable well before there was any threat to international peace and security. However, all the other features identified in the preceding paragraph are applicable, *mutatis mutandis*, in the case of fact-finding under the present draft articles.

(4) Paragraph 1 provides for the right of any watercourse State to request fact-finding. As noted earlier, this process may be necessary to establish factual foundations for the application of the legal rules contained in the draft articles.

(5) The watercourse States making the request for fact-finding under paragraph 1 could be restricted to those that are affected by the fact or facts sought to be established. But such a requirement could itself give rise to questions as to whether the requesting State was indeed “affected” by the facts involved. In order to avoid this problem, and since it would be unusual for non-affected watercourse States to make such requests in any event, the Special Rapporteur decided not to introduce such an additional requirement.

(6) Paragraphs 2 to 5 deal with the body that will undertake the fact-finding requested pursuant to paragraph 1. They provide that the inquiry may be performed by a joint organization that has been established by the watercourse States concerned (as envisaged under article 26, submitted above (chap. I, sect. E)), so long as this body is competent under its constituent instrument to carry out such functions. Failing such a competent joint organization, fact-finding is to be conducted by an *ad hoc* commission of experts established by agreement of the watercourse States concerned. As stated in the schematic outline being followed by the Commission in its work on international liability for injurious consequences arising

<sup>189</sup> The obligation of Members of the United Nations to settle their differences by peaceful means under Article 2, paragraph 3, of the Charter applies only to “disputes”; other kinds of disagreements or questions are not governed by this provision, though they may be subject to other rules of international law. In the *Mavrommatis Palestine Concessions* case the PCIJ, in determining whether it had jurisdiction under article 26 of the Mandate for Palestine, defined the term “dispute” as follows: “A dispute is a disagreement on a point of law or fact, a conflict of legal views or of interests between two persons” (Judgment of 30 August 1924, *P.C.I.J.*, Series A, No. 2, p. 11). For other cases concerning the concept of a “dispute”, see: *The Electricity Company of Sofia and Bulgaria*, Judgment of 4 April 1939, *P.C.I.J.*, Series A/B, No. 77, pp. 64 and 83; *Case concerning the Northern Cameroons*, Judgment of 2 December 1963, *I.C.J. Reports* 1963, pp. 33-34; and *Nuclear Tests*, Judgment of 20 December 1974, *I.C.J. Reports* 1974, pp. 260, 270-271.

<sup>190</sup> See the report of the Special Committee on its 1990 session (*Official Records of the General Assembly, Forty-fifth Session, Supplement No. 33 (A/45/33)*). See also the report of the Secretary-General on methods of fact-finding (A/5694) of 1 May 1964.

<sup>191</sup> Working paper submitted by Belgium, Czechoslovakia, the German Democratic Republic, the Federal Republic of Germany, Italy, Japan, New Zealand and Spain (A/AC.182/L.66), reproduced in the 1990 report of the Special Committee (see footnote 129 above), para. 68.

out of acts not prohibited by international law, the States concerned have "a duty to co-operate in good faith to reach agreement . . . upon the arrangements for and terms of reference of the inquiry, and upon the establishment of the fact-finding machinery. [The] States shall furnish the inquiry with all relevant and available information."<sup>192</sup> Under the present draft articles, the specific source of the duty of watercourse States to co-operate in fulfilling their obligations under the articles, including the establishment of relevant facts, is article 9 (General obligation to co-operate).

(7) *Paragraph 3* provides for the establishment of a commission of inquiry at the request of any watercourse State concerned. Such a commission is to be constituted only in the event that there is no competent joint organization and the parties are unable to agree upon the establishment of an *ad hoc* expert commission within six months of the initial request for fact-finding. The procedures for the establishment of the commission of inquiry are not included in the article for reasons explained earlier. Such procedures, however, could be envisaged along the following lines:

#### APPENDIX

##### PROCEDURES FOR ESTABLISHING COMMISSIONS OF INQUIRY

1. A commission of inquiry shall be composed of three members: one member appointed by the requesting watercourse State or States, one member appointed by the other watercourse State or States concerned and the third member, who shall serve as president, chosen by the parties jointly. The appointments shall be made within two months of the request for the establishment of the commission of inquiry.

2. If no agreement is reached on the choice of president within four months of the request for the establishment of the commission of inquiry, any party may request the Secretary-General of the United Nations to appoint the president.

3. If one of the appointments provided for in paragraph 1 is not made within the stimulated period, the president shall, at the request of any party, constitute a single-member commission of inquiry.

These provisions were inspired in part by articles XIV to XVI of the Convention on International Liability for Damage Caused by Space Objects of 29 March 1972. Article XVI of that Convention contains procedures for the filling of vacancies in the Claims Commission. Such procedures could be added to the present provisions if it were believed to be necessary.

(8) *Paragraph 4* reflects the usual principle that commissions of inquiry and conciliation commissions are to determine their own rules of procedure. The comments on

article 35 submitted by Mr. Evensen in his first report lend support to such a provision.<sup>193</sup>

(9) The first sentence of *paragraph 5* is based on a provision typically found in the Bryan treaties.<sup>194</sup> The second sentence is an application of that general obligation to the particular needs of a body conducting fact-finding in relation to international watercourses. Both obligations are also supported by the current work of the Special Committee on the Charter of the United Nations and on the Strengthening of the Role of the Organization, described in paragraph (2) of the present comments.<sup>195</sup>

(10) Fact-finding will entail expenses. If it is undertaken by a competent joint organization, associated expenses would presumably be paid from the budget of that organization. If fact-finding is not conducted by such an existing organization, some provision would have to be made for the expenses of the *ad hoc* expert commission or the commission of inquiry. The question of how these expenses should be defrayed is not an easy one to answer and may be beyond the scope of the present draft articles. After considering this question, however, the Special Rapporteur concluded that it might be helpful if he were at least to put forward some tentative proposals that could possibly be discussed and improved upon in the Commission. Depending upon the circumstances of the watercourse States concerned, the expenses of the *ad hoc* expert commission or the commission of inquiry could be defrayed by the States themselves, possibly with the assistance of a multilateral development bank. The schematic outline referred to in paragraph (6) of the present comments provides that the States concerned "shall contribute to the costs of the fact-finding machinery on an equitable basis".<sup>196</sup> This general principle would hold true in the present case as well. It would find support, in particular, in the obligation of "equitable participation" under article 6 of the present draft articles.

#### B. Settlement of disputes<sup>197</sup>

##### Article 2. *Obligation to settle disputes by peaceful means*

1. Watercourse States shall settle their disputes concerning international watercourse[s] [systems] by peaceful means in such a manner that international peace and security, and justice, are not endangered.

<sup>193</sup> In his comments (document A/CN.4/367 (see footnote 3 above), para. 217), Mr. Evensen cites article 11 of the 1949 Revised General Act for the Pacific Settlement of International Disputes, article 12 of the 1957 European Convention for the Peaceful Settlement of Disputes and article V of the "Model rules for the constitution of the conciliation commission" annexed to the Helsinki Rules. See also the Bryan treaties (para. 52 above), which typically contain a similar provision.

<sup>194</sup> See above, paragraph 52 and footnote 133.

<sup>195</sup> See especially paragraphs 22-23 of the working paper (A/AC.182/L.66) cited in these comments.

<sup>196</sup> Section 2, para. 7, of the schematic outline (see footnote 192 above).

<sup>197</sup> The articles proposed below are based on article 16 (Principles and procedures for the avoidance and settlement of disputes) submitted by Mr. Schwebel in his third report, document A/CN.4/348 (see footnote 2 above), para. 498, and on articles 31-36 of chapter V (Settlement of disputes) of the draft submitted by Mr. Evensen in his first report, document A/CN.4/367 (see footnote 3 above), paras. 207-223.

<sup>192</sup> Section 2, para. 5, of the schematic outline for the work on the topic of international liability for injurious consequences arising out of acts not prohibited by international law; see the fourth report of R. Q. Quentin-Baxter on the topic (*Yearbook* . . . 1983, vol. II (Part One), p. 224, document A/CN.4/373, annex).

2. In the absence of an applicable agreement between the watercourse States concerned for the settlement of disputes concerning an international watercourse [system], such disputes are to be settled in accordance with the following articles.

#### *Comments*

(1) *Paragraph 1* of draft article 2 is based on Article 2, paragraph 3, of the Charter of the United Nations. Similar provisions were proposed by Mr. Schwebel, in paragraph 1 of article 16, and by Mr. Evensen, in paragraph 1 of article 31.

(2) *Paragraph 2* preserves the effect of any applicable procedure for the settlement of disputes that is independent of the present draft articles and binding upon the watercourse States concerned. By "applicable" is meant that the agreement providing for the independent procedure covers, expressly or by implication, disputes concerning international watercourses. Similar provisions may be found in paragraph 2 of article 16 proposed by Mr. Schwebel and in paragraph 2 of article 31 proposed by Mr. Evensen.

#### *Article 3. Consultations and negotiations*

1. If a dispute arises between watercourse States concerning the interpretation or application of the present articles, the watercourse States concerned shall expeditiously enter into consultations and negotiations with a view to arriving at an equitable resolution of the dispute.

2. The consultations and negotiations provided for in paragraph 1 may be conducted directly between the watercourse States concerned, through a competent joint organization they have established, or through other regional or international organizations agreed upon by them.

3. To assist them with the consultations and negotiations provided for in paragraph 1, the watercourse States concerned may establish a commission of inquiry in accordance with article 1, paragraph 3, of the present annex.

4. The watercourse States concerned may by agreement request mediation by a third State, an organization or one or more individuals to assist them in the consultations and negotiations provided for in paragraph 1.

5. If the watercourse States concerned have not been able to arrive at a settlement of the dispute through consultations and negotiations within six months, they shall have recourse to the other procedures for the settlement of disputes provided for in the following articles.

#### *Comments*

(1) Draft article 3 is based on article 32 proposed by Mr. Evensen, entitled "Settlement of disputes by consultations and negotiations". The same idea is reflected in paragraph 4(a) of article 16 proposed by Mr. Schwebel. *Paragraph 1* is based on paragraph 1 of article 32 proposed by Mr. Evensen. The requirement that watercourse States "enter into consultations and negotiations with a view to arriving at an equitable resolution of the dispute" is inspired by similar language contained in

paragraph 1 of article 17 of the draft articles adopted by the Commission on first reading in 1988.<sup>198</sup>

(2) *Paragraph 2* is based on paragraph 2 of article 32 proposed by Mr. Evensen. As noted above (chap. IV, sect. C), joint organizations are often granted the authority to settle disputes or resolve questions arising between watercourse States. Paragraph 2 also takes into account the need in some cases for indirect procedures, recognized in article 21 of the draft articles adopted by the Commission on first reading in 1988.<sup>199</sup>

(3) *Paragraph 3* is based on paragraph 1 of article 33 proposed by Mr. Evensen. The establishment of relevant facts may be an integral part of any process of consultations and negotiations. The machinery set up under article 1 of the present annex would appear to be suitable for this purpose, even though it is envisaged as being applicable even if no "dispute" has yet arisen.

(4) *Paragraph 4* is based on paragraph 2 of article 33 proposed by Mr. Evensen. In the light of the major role that has been played by mediation in certain important cases concerning international watercourses,<sup>200</sup> this provision seemed worth including in the present draft article, if only as a reminder to the watercourse States concerned of the value of mediation in appropriate situations.

(5) *Paragraph 5* is based on paragraph 3 of article 32 proposed by Mr. Evensen. The "reasonable period" specified in that article has been replaced by a definite period of six months, since that was the period agreed to be a reasonable one in the context of the procedures concerning planned measures contained in part III of the draft articles. While in some cases six months may be too short a period for consultations and negotiations in the context of dispute settlement, the Special Rapporteur believes that a fixed period is necessary to make any subsequent requirement of recourse to compulsory procedures—such as those proposed in article 4 of the present annex—meaningful. Otherwise, resort to such procedures could be delayed, even after it had become clear that consultations and negotiations would not be fruitful, on the ground that a "reasonable" period of time had not elapsed. The Special Rapporteur would welcome the views of the Commission on this question, in particular.

#### *Article 4. Conciliation*

1. Any dispute concerning the interpretation or application of the present articles that has not been settled in accordance with the provisions of article 3 of the present annex shall be submitted by the watercourse States concerned to conciliation as provided in the present article. Conciliation may be initiated by any of the watercourse States concerned by written notification to the other party or parties to the dispute, unless the parties otherwise agree.

2. The conciliation commission shall be constituted in accordance with the procedures set forth in the appendix to the present article. It shall determine its own procedure,

<sup>198</sup> See *Yearbook* . . . 1988, vol. II (Part II), p. 51.

<sup>199</sup> *Ibid.*, p. 54.

<sup>200</sup> See especially the discussion of the role of IBRD in the Indus waters controversy (para. 53 above).



the place or places where it shall sit and all other administrative matters.

3. The conciliation commission shall file its report with the parties within twelve months of its constitution unless the parties otherwise agree. The commission shall also transmit a copy of the report to the conference of the parties established in article 7 of annex I of the present articles. The report shall indicate the findings of the commission concerning questions of law and fact pertinent to the matter in dispute and shall record any agreement reached between the parties or, failing such agreement, the recommendations of the commission concerning the settlement of the dispute.

4. The report of the conciliation commission shall not be binding upon the parties to the dispute unless they otherwise agree.

5. The fees and costs of the conciliation commission shall be borne by the parties on an equitable basis.

6. If they have not been able to reach an agreed settlement of the dispute during the conciliation process, the parties shall, upon receipt of the report of the conciliation commission, renew their negotiations on the basis of the commission's report.

#### Comments

(1) Article 4 is based on articles 34 to 36 proposed by Mr. Evensen. Mr. Schwebel also provides for conciliation in paragraph 4(f) of his article 16. Unlike those provisions, however, *paragraph 1* of draft article 4 envisages compulsory conciliation—i.e. conciliation to which the parties to a dispute are required to resort, but whose outcome is not binding upon them. This approach was inspired in particular by the practice of GATT, described above (chap. IV, sect. C).

(2) As in the case of draft article 1 of the present annex on fact-finding, *paragraph 2* does not lay down the procedure for constituting the conciliation commission but instead refers to an appendix (to be drafted). An excellent model for such a procedure is contained in paragraphs 2 to 4 of article 34 proposed by Mr. Evensen. The second sentence of paragraph 2 is to the same effect as article 1, paragraph 4, of the present annex. Support for such a provision is noted in the commentary to article 35 proposed by Mr. Evensen.<sup>201</sup>

(3) *Paragraph 3* is based on paragraph 3 of article 35 proposed by Mr. Evensen and on relevant provisions of the Bryan treaties<sup>202</sup> and the 1982 United Nations Convention on the Law of the Sea.<sup>203</sup> However, it also includes a requirement that the report of the conciliation commission be transmitted to the conference of the parties. For the reasons already discussed (chap. IV, sect. C), it is believed that this procedure, while not

involving any binding effect of the report, will increase the incentive of the parties to follow the recommendation of the commission. The 1907 Hague Convention (I) for the Pacific Settlement of International Disputes provides that the report of the international commission of inquiry is to be "read at a public sitting" (art. 34), presumably for the same purpose—that of further encouraging the parties to accept the report.

(4) *Paragraph 4* reflects the normal characteristic of reports of conciliation commissions, namely that they are of a recommendatory nature only and are not binding upon the parties.

(5) *Paragraph 5* is based on paragraph 2 of article 36 proposed by Mr. Evensen. Also relevant in this connection is paragraph (10) of the comments on article 1 of the present annex.<sup>204</sup>

(6) *Paragraph 6* is based on provisions commonly found in the Bryan treaties,<sup>205</sup> on the 1951 International Plant Protection Convention<sup>206</sup> and on paragraph 4(d) of article 16 proposed by Mr. Schwebel. It is designed to encourage the parties to use the report of the conciliation commission to the best possible advantage prior to resorting to further means of dispute settlement.

#### Article 5. Arbitration

**If after the expiration of six months from the receipt of the report of the conciliation commission provided for in article 4 of the present annex the parties to a dispute have been unable to settle the dispute through negotiations, any of the parties may submit the dispute to binding arbitration by any permanent or *ad hoc* arbitral tribunal that has been accepted by all the parties to the dispute.**

#### Comments

(1) The first clause of article 5 is based on the sources indicated in paragraph (6) of the comments on article 4. The intent of this clause is thus to require the parties to engage in renewed negotiations for a period of at least six months before resorting to binding dispute settlement.

(2) Article 5 does not require the parties to submit their dispute to binding arbitration. The Special Rapporteur agrees with his two predecessors that recourse to previously accepted means of dispute settlement or to an *ad hoc* procedure agreed upon by the parties is more likely to be generally acceptable and to produce a result that will be accepted by the parties to the dispute. The corresponding provision proposed by Mr. Schwebel (art. 16, para. 4(f)) provides that the parties may "call for arbitration or adjudication of the dispute in accordance with the optional procedures annexed to these articles". This is an approach that the Commission may also wish to consider.

<sup>201</sup> See footnote 193 above.

<sup>202</sup> See, for example, article V of the Treaty to Avoid or Prevent Conflicts between the American States of 3 May 1923 (Gondra Treaty).

<sup>203</sup> See article 7, para. 1, of annex V to the Convention.

<sup>204</sup> See especially the excerpts from the schematic outline referred to in that paragraph.

<sup>205</sup> See, for example, article VII of the 1923 Treaty to Avoid or Prevent Conflicts between the American States.

<sup>206</sup> See the provisions of this Convention quoted in paragraph 67 above.



## ANNEX

## Treaties cited in the present report\*

## ABBREVIATIONS

- 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).
- 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.
- 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.

\* The instruments are listed in chronological order, by continent.

## AFRICA

## Multilateral treaties

## Source

- Cameroon, Chad, Niger and Nigeria*: Convention and Statutes relating to the development of the Chad Basin (Fort Lamy, Chad, 22 May 1964) United Nations, *Treaties concerning the Utilization of International Watercourses for Other Purposes than Navigation: Africa*, Natural Resources/Water Series No. 13 (Sales No. E/F.84.II.A.7), p. 8; summarized in A/CN.4/274, paras. 51-56.
- Mali, Mauritania and Senegal*: Convention establishing the Organization for the Development of the Senegal River (Nouakchott, Mauritania, 11 March 1972) United Nations, *Treaties concerning the Utilization of International Watercourses . . .*, p. 21.
- Cameroon, Chad, Niger and Nigeria*: Agreement establishing a development fund for the Chad Basin Commission (Yaoundé, Cameroon, 10 October 1973) *Ibid.*, p. 29.
- Gambia, Guinea and Senegal*: Convention relating to the Creation of the Gambia River Basin Development Organization (Kaolack, Senegal, 30 June 1978) *Ibid.*, p. 42.
- Benin, Cameroon, Chad, Ivory Coast, Guinea, Mali, Niger, Nigeria and Upper Volta*: Convention creating the Niger Basin Authority (Faranah, Guinea, 21 November 1980) *Ibid.*, p. 56; to appear in United Nations, *Treaty Series*, as No. 22675.

## Bilateral treaties

- United Arab Republic and Sudan*: Agreement for the full utilization of the Nile waters (Cairo, 8 November 1959) United Nations, *Treaty Series*, vol. 453, p. 51; summarized in A/5409, paras. 108-113.
- Protocol concerning the establishment of the Permanent Joint Technical Commission (Cairo, 17 January 1960) *Legislative Texts*, p. 148.

## AMERICA

## Multilateral treaties

- United States of America, Argentina, Brazil, Chile, Colombia, Cuba, Dominican Republic, Ecuador, Guatemala, Haiti, Honduras, Nicaragua, Panama, Paraguay, Uruguay and Venezuela*: Treaty to Avoid or Prevent Conflicts between the American States [Gondra Treaty] (Santiago, Chile, 3 May 1923) League of Nations, *Treaty Series*, vol. XXXIII, p. 25.

## Bilateral treaties

- Great Britain and United States of America*: Treaty relating to boundary waters and questions concerning the boundary between Canada and the United States (Washington, D.C., 11 January 1909) *British and Foreign State Papers, 1908-1909*, vol. 102, p. 137; *Legislative Texts*, p. 260; summarized in A/5409, paras. 154-167.

## ASIA

## Bilateral treaties

## Source

- India, Pakistan and IBRD: Indus Waters Treaty* 1960 (Karachi, 19 September 1960) United Nations, *Treaty Series*, vol. 419, p. 125; summarized in A/5409, paras. 356-361.
- Bangladesh and India: Agreement on sharing of the Ganges waters and on augmenting its flows* (Dacca, 5 November 1977) United Nations, *Treaty Series*, vol. 1066, p. 3.

## EUROPE

## Multilateral treaties

- Bulgaria, Czechoslovakia, Hungary, Romania, Ukrainian Soviet Socialist Republic, Union of Soviet Socialist Republics and Yugoslavia: Convention concerning the Regime of Navigation on the Danube* (Belgrade, 18 August 1948) United Nations, *Treaty Series*, vol. 33, p. 181; summarized in A/5409, paras. 470-473.
- European Convention for the Peaceful Settlement of Disputes (Strasbourg, 29 April 1957) United Nations, *Treaty Series*, vol. 320, p. 243.
- Federal Republic of Germany, France, Luxembourg, Netherlands and Switzerland: Agreement on the International Commission for the Protection of the Rhine against Pollution* (Berne, 29 April 1963) *Ibid.*, vol. 994, p. 3; summarized in A/CN.4/274, paras. 138-141.
- Denmark, Finland, Norway and Sweden: Convention on the Protection of the Environment [Nordic Convention]* (Stockholm, 19 February 1974) United Nations, *Treaty Series*, vol. 1092, p. 279.
- Federal Republic of Germany, France, Luxembourg, Netherlands, Switzerland and European Economic Community: Agreement for the Protection of the Rhine against Chemical Pollution* (Bonn, 3 December 1976) *Ibid.*, vol. 1124, p. 375.

## Bilateral treaties

- Austria-Hungary and Venice: Treaty for the Establishment of Limits* (Vaprio, 17 August 1754) C. Parry, ed., *The Consolidated Treaty Series* (Dobbs Ferry, N.Y., Oceana Publications, 1969), vol. 40, p. 215.
- Austria and Netherlands: Definitive Treaty* (Fontainebleau, 8 November 1785) *Ibid.*, vol. 49, p. 369.
- Denmark and Germany: Agreement for the settlement of questions relating to watercourses and dikes on the German-Danish frontier* (Copenhagen, 10 April 1922) League of Nations, *Treaty Series*, vol. X, p. 201; summarized in A/5409, paras. 556-563.
- Italy and Switzerland: Convention concerning the regulation of Lake Lugano* (Lugano, 17 September 1955) United Nations, *Treaty Series*, vol. 291, p. 213; summarized in A/5409, paras. 721-729.
- Switzerland and Italy: Convention concerning the use of the water power of the Spöl* (Berne, 27 May 1957) *Legislative Texts*, p. 859, No. 235; summarized in A/5409, paras. 849-854.
- France and Switzerland: Convention on the Emosson hydroelectric project* (Sion, 23 August 1963) *Revue générale de droit international public* (Paris), vol. LXIX (1965), p. 279; summarized in A/CN.4/274, paras. 228-236.

## General conventions

- Convention (I) for the Pacific Settlement of International Disputes (The Hague, 18 October 1907) J. B. Scott, ed., *The Hague Conventions and Declarations of 1899 and 1907* (New York, 1918), p. 41.
- Convention (IV) respecting the Laws and Customs of War on Land (The Hague, 18 October 1907), and Regulations respecting the Laws and Customs of War annexed to this Convention *Ibid.*, pp. 100 and 107 respectively.
- Convention relating to the Development of Hydraulic Power Affecting More than One State (Geneva, 9 December 1923) League of Nations, *Treaty Series*, vol. XXXVI, p. 75; summarized in A/5409, paras. 68-78.
- General Agreement on Tariffs and Trade (Geneva, 30 October 1947) GATT, *Basic Instruments and Selected Documents*, vol. IV, *Text of the General Agreement* (as in force on 1 March 1969) (Sales No. GATT/1969-1).

	Source
Revised General Act for the Pacific Settlement of International Disputes (Lake Success, New York, 28 April 1949)	United Nations, <i>Treaty Series</i> , vol. 71, p. 101.
International Plant Protection Convention (Rome, 6 December 1951)	<i>Ibid.</i> , vol. 150, p. 67.
Convention concerning Settlement of Conflicts between the Law of Nationality and the Law of Domicile (The Hague, 15 June 1955)	Hague Conference on Private International Law, <i>Collection of Conventions (1951-1980)</i> .
Convention on International Liability for Damage Caused by Space Objects (opened for signature at London, Moscow and Washington on 29 March 1972)	United Nations, <i>Treaty Series</i> , vol. 961, p. 187.
Convention on International Trade in Endangered Species of Wild Fauna and Flora (Washington, D.C., 3 March 1973)	<i>Ibid.</i> , vol. 993, p. 243.
Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I) (Geneva, 8 June 1977)	<i>Ibid.</i> , vol. 1125, p. 3.
Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II) (Geneva, 8 June 1977)	<i>Ibid.</i> , p. 609.
Convention on Long-range Transboundary Air Pollution (Geneva, 13 November 1979)	E/ECE/1010.
United Nations Convention on the Law of the Sea (Montego Bay, Jamaica, 10 December 1982)	<i>Official Records of the Third United Nations Conference on the Law of the Sea</i> , vol. XVII (United Nations publication, Sales No. E.84.V.3), p. 151, document A/CONF.62/122.
Vienna Convention for the Protection of the Ozone Layer (Vienna, 22 March 1985) and Montreal Protocol on Substances that Deplete the Ozone Layer (Montreal, 16 September 1987)	UNEP, Nairobi, 1985 and 1987.