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Zambezi River

The first meeting of the Committee on River and Lake Basins (CORLAB) of the African Ministerial Conference on the Environment was held in Harare, Zimbabwe in March 1987 at the invitation of the Zimbabwe Ministry of Natural Resources and Tourism. The objectives of the meeting were to:

- (a) Adopt specific terms of reference for CORLAB;
- (b) Adopt a work plan and budget for CORLAB (1987/1988);
- (c) Establish the all-African network in water resources;
- (d) Provide information on the preparation of the Zambezi Action Plan;
- (e) Select priority subregional activities and projects to be implemented in the next few years.

A summary of the meeting is given below.

The Draft Agreement on the Action Plan for the Environmental Management of the Common Zambezi River System was submitted to the participants 1/. The Secretariat informed CORLAB of the objectives of the subregional co-operation programme, its preparation and its main technical, institutional and financial arrangements. CORLAB was further informed that the Agreement would be adopted by the Zambezi countries at the Conference of Plenipotentiaries on the Environmental Management of the Common Zambezi River System being held in Harare.

At the meeting, CORLAB acknowledged the efforts of the Zambezi countries, the United Nations Environment Programme (UNEP) and other participating United Nations agencies to foster subregional co-operation. It was noted that this activity was one of the first actions in the implementation of the Cairo Action Plan. The Committee expressed the hope that the agreement would be adopted shortly. The Secretariat was requested to inform CORLAB at its next meeting on the progress made in the implementation of the Zambezi Action Plan. It was suggested that African countries and subregions consider the approach applied to the development of the Zambezi Action Plan as a possible way to promote sustainable development in international and national river and lake basins and aquifers 2/. The Draft Agreement was adopted as the Agreement on the Action Plan for the Environmentally Sound Management of the Common Zambezi River System on 28 May 1987.

A. Contents of the Agreement 3/

1. Regional scope

The Zambezi River Basin lies within Angola, Botswana, Malawi, Mozambique, United Republic of Tanzania, Zambia, Zimbabwe and Namibia (article 1.3).

2. Implementation

The Agreement is to be carried out through various projects developed according to the guidelines of the Action Plan (article 1.4).

3. Obligations of the parties

The parties shall individually and/or jointly, as a regional activity of the Southern African Development Co-ordination Conference, take the necessary measures for the implementation of the Plan, including a convention for the environmentally sound management of the Common Zambezi River System (article 1.5).

B. Organization

There are two options for the implementation of the Plan. One is to utilize the institutional framework of the Southern African Development Co-ordination Conference (SADCC); the other is to follow the lines of the Draft Agreement. If the latter is the case, the Zambezi Intergovernmental Monitoring and Co-ordination Committee will be the policy organ of the Plan. It will co-ordinate the activities of the Plan and provide operational and policy guidance for its implementation, follow up on the implementation and evaluate the results. The Committee will consist of representatives of the Basin countries, the United Nations Council for Namibia and the SADCC (article 2 and annex II to the Agreement).

1. Diagnostic study

The diagnostic study has identified several main problems, including degradation of the resource base, inadequate water services, lack of planning and human resources and deficiencies in information, participation and co-ordination. The objective of ZACPLAN is to overcome those problems and thereby promote the development and implementation of environmentally sound water resources management for the river system as a whole (annex I, articles 14, 15 and 16 to the Agreement).

2. Elements of the Action Plan

The main elements of the Action Plan are environmental assessment, management and legislation, together with supporting measures. Negative environmental impacts can be minimized by concerted planning and effective environmental legislation. Planning and legislation should be supported by such measures as education, training and harmonization of technologies (annex I, articles 20, 21, 22, 23, 24, 25, 26 and 27 to the Agreement).

3. Institutional aspects

Institutional arrangements include reliance on national institutions and international co-ordination through the Zambezi Intergovernmental Monitoring and Co-ordination Committee and the Zambezi Co-ordinating Unit (article 2 and annex II to the Agreement).

4. Financial arrangements

The costs of the plan are divided into common costs and project costs. Common costs include Co-ordination Unit expenses, meetings servicing and the financial management of projects under the Action Plan. Financial support is provided by regular contributions from participating countries, earmarked

contributions, donations, the Environment Fund, the United Nations, regional organizations and other sources. A Trust Fund, to be established, will provide the main portion of the operating costs (article 2 and annex II to the Agreement).

5. Projects

Two categories of projects are envisaged to achieve the objectives of the Plan. Category I projects will have short-term goals that can be achieved by the end of 1989 and should include:

- (a) An up-to-date compilation of all projects in the Zambezi basin that relate to ZACPLAN;
- (b) An inventory of existing national and international legislation, assistance in the drafting of national legislation for environmentally sound water resources management and a draft regional convention on the subject;
- (c) An assessment and strengthening of the capabilities of scientific and administrative institutions, including their human resources, to implement ZACPLAN;
- (d) Development of a basin-wide unified monitoring system for water resources and the environment;
- (e) Development of an integrated water management plan for the basin;
- (f) Promotion of campaigns aimed at self-help in drinking water supply and sanitation, soil conservation and forest conservation;
- (g) Development of unified criteria for the planning and design of water supply and sanitation schemes (appendix I to annex I of the Agreement)

Category II will focus on projects on environment, energy, watershed management, water-borne diseases, lake studies, vector control, interbasin transfer, conservation of living resources and eradication of noxious flora, and will be undertaken when financial resources become available. The projects should be formulated at the subregional level, involve intergovernmental co-operation, include training demonstration and information components, improve environmental health conditions and provide a sustainable basis for socio-economic development (appendix I to annex I of the Agreement).

A Large International River: the Danube - Summary of Hydrological Conditions and Water Management Problems in the Danube Basin (International Institute for Applied Systems Analysis) 4/

The Danube basin was selected as the first case study to be analyzed within the framework of the International Institute for Applied Systems Analysis (IIASA) project whose aim is to develop a decision support system for the management of large international rivers.

Water pollution, originating from agricultural, urban or industrial sources, is the major obstacle hindering the utilization of water resources in the basin.

Non-point pollution adds to the difficulties of water management. Some qualitative parameters indicate that even the quality of bank filtered water - which provides the largest amount of water for community water supply - is endangered by the increasing deterioration of the river.

A regional United Nations Development Programme/World Health Organization (UNDP/WHO) project, aimed at determining and improving water quality conditions in the Danube basin, will be undertaken in 1987.

Awareness and concern about the problems of the basin prompted the riparian countries to sign the Declaration on the Co-operation of the Danube Countries on Water Management and especially water pollution control issues of the River Danube, signed at Bucharest on 13 December 1985. Representatives of the eight riparian countries involved expressed their willingness to work together to solve the problems of water management. It was recognized that the obstacles hindering the reasonable utilization of water resources could be removed only through joint efforts. A decision was also reached concerning the institutional framework required to implement the programmes defined in the Declaration dealing with water quality control, flood protection and general water management. The decision support system of large international rivers and the results of the Danube case study were offered to the relevant authorities of the eight countries as tools to achieve the objectives of the Declaration.

The representatives stressed the need for rational management of the Danube waters to control pollution and thereby improve the quality of the water resources of the basin. The Declaration includes measures and programmes for the rational utilization of water resources, the prevention and control of water pollution and environmental protection. A system to monitor the disposal of water into the Danube, to be enforced by national norms and to observe and measure changes in water quality, will be implemented as well. International co-operation at the bilateral and multilateral levels will be required.

One activity that will require co-operation is the systematic monitoring of water quality, based on comparable data. Programmes and methods are to be agreed upon within two years of the signing of the Declaration. Observation and data collection will take place at cross-sections or frontier areas, before or after the river crosses the frontier between countries or at other relevant locations. Data collection utilizing an agreed-upon methodology will begin within six months of the signing of the Declaration. Water quality reports are to be produced, utilizing data processing methods.

To facilitate the exchange of data and to expedite the adoption and implementation of the Declaration's measures and programmes, the governments will inform each other about their water pollution monitoring activities, including the monitoring of recurrent and accidental pollution for which remedial measures should be communicated. Observation and monitoring systems should, if possible, be automatized. The results should be made available on a regular basis, at least every two years, and at other times when necessary, and the information should include protection measures and agreements and achievements. Data on sewage treatment, water tests and research, and national regulations for quality protection should also be exchanged. Meetings to

facilitate the exchange of information should be held every two years and as required by particular situations.

Special importance is attached to information on water balances, the standardization of methods for the collection and processing of data and the production of comparable results. To this end, governments will gradually identify and rank relevant water quality issues. Exchange of information extends to floods and flood-causing phenomena.

A general duty to preserve and protect the environment is set forth in the Declaration, including the enforcement of responsibility for water pollution. The countries will take co-ordinated measures for the execution of the Declaration, including the selection of a leading country on a rotating basis. Such co-ordination will extend to co-operation with United Nations organizations.

Nile River 5/

A workshop for the Nile Basin countries was organized by UNDP with the co-operation of the Economic and Social Commission for Asia and the Pacific (ESCAP). The workshop, which took place in Bangkok, Thailand from 20 to 27 January 1986, was attended by representatives of Burundi, Egypt, Ethiopia, Rwanda, Sudan, Tanzania, Uganda and Zaire. Several regional and international organizations were also represented, including the Permanent Joint Commission for Nile Waters (Sudan-Egypt), the Organisation pour la mise en valeur du fleuve Sénégal, the Organisation pour la mise en valeur du fleuve Gambia, the Kagera Basin Organization, ESCAP, UNDP, the Mekong Committee and the Mekong Secretariat.

The UNDP Regional Bureau for Africa, Arab States and Asia and the Pacific co-operated in the effort. The objective of the workshop was to examine the development experience of several river basin authorities to illustrate alternatives for co-operation in the development of the Nile. The major topics of discussion were institutional development, planning and co-operation at the regional and international levels. The Mekong, Gambia, Senegal, Kagera and Rhine basins were cited as examples.

The participants acknowledged the usefulness of the workshop, the relevance of the experiences discussed and the importance of co-riparian co-operation in securing international assistance. Noted in particular were the catalytic role of UNDP and the technical character of the work of the Mekong Committee.

The findings of the participants were as follows:

- (a) The political will to co-operate in sharing water resources for the benefit of all on an equitable and mutually beneficial basis was deemed as essential for successful co-operation among riparian countries of an international river basin;
- (b) ESCAP had played a leading role in organizing the deliberations that had led to the formation of the Mekong Committee. It was desirable that ECA play a more active role in supporting river basin development programmes, in particular those of the Nile basin countries;

- (c) The role of UNDP had been instrumental in organizing the bilateral and multilateral assistance for the development of various international river basin organizations. It was desirable that UNDP now play an equally active and catalytic role in the development of the Nile basin;
- (d) The representatives of the Nile basin countries unanimously expressed their willingness to co-operate fully in the development of the Nile basin for the benefit of all inhabitants of the basin;
- (e) The comprehensive development of a large river basin, such as the Nile would depend on goodwill, mutual trust and regional co-operation among the riparian countries as well as strengthened international co-operation;
- (f) The financial resources required for pre-investment studies and the enormous capital investments needed for effective development were beyond the means of any one riparian state or donor. Therefore, donor assistance was essential for the implementation of a comprehensive development programme.

The workshop approved the following recommendations:

- (a) The riparian countries should co-operate in sharing water resources on an equitable and mutually beneficial basis for the effective development of the Nile basin and for the benefit of all;
- (b) The approach to be adopted for the comprehensive development of the water resources of the basin should be suited to the specific needs of the Nile riparian countries;
- (c) Action to establish and promote effective regional co-operation among the Nile riparian countries should be undertaken at the earliest possible opportunity;
- (d) The representatives of the Nile riparian countries invited UNDP to extend the necessary assistance to study, propose and establish the appropriate machinery for effective co-operation among the Nile countries for harnessing the water resources of the Nile;
- (e) The representatives of the Nile riparian countries also invited UNDP to help mobilize and organize assistance from the bilateral and international donor community in support of the Nile development effort;
- (f) The representatives of the Nile riparian countries requested UNDP to extend its assistance to the data collection programme in the Nile basin in Ethiopia;
- (g) The Nile riparian countries should meet periodically at the appropriate ministerial level in an effort to strengthen the existing co-operation among riparian states and to ensure effective planning and implementation of the Nile basin development programme. To that effect, UNDP was requested to organize a meeting among the Nile riparian countries as soon as possible to examine concrete proposals for the setting up of co-ordinating technical

machinery to assist the riparian countries in the planning and implementation of the Nile basin development programme.

The representative of Ethiopia, along with representatives of other riparian countries, endorsed the findings of the workshop. He, however, indicated that he was not in a position to fully endorse the recommendations of the workshop before submitting them to his Government for approval.

The participants recognized that the concrete and positive results achieved by the workshop had laid a solid foundation for regional co-operation in the development of water resources of the Nile basin. They expressed the hope that UNDP would take the appropriate follow-up action to implement the recommendations on an urgent basis.

Aboriginal water rights

The issue of aboriginal land and water rights is relevant to developing countries that must deal with demands for greater socio-economic development while at the same time respect local and tribal autonomy; and is of national and international concern.

The accommodation of conflicting interests requires a harmonization of development aims and local and tribal rights. In Africa, there are multinational basin authorities that are in the process of determining the rules and procedures for the allocation, management and control of water rights. In doing so, they must deal with different autochthonal groups and local practices, the adequate understanding and management of which might eventually decide the success or failure of costly structural developments. The present article brings to the attention of readers the experience of the United States and Canada on the subject as presented at the Workshop on Aboriginal Water Rights (University of Saskatchewan, Saskatoon, Canada, October 1986).

Canada acknowledges both the original land and water ownership of aboriginal peoples and the need to ensure that they are properly protected. Precedents in the United States are similarly oriented, and it is already clear that the concept of aboriginal title to traditional lands and water in Canada commands as much legal respect as in the United States. The Supreme Court of Canada has clearly recognized aboriginal title at common law. The title extends to the water of the traditional territory of aboriginal people. Aboriginal rights and titles depend upon the terms of the treaties, the assurances given and the intent with which the lands were set apart. Such intents contemplated the traditional uses of the lands set apart as well as agricultural and other economic developments.

The Canadian supreme courts have declared that treaties and statutes must be given a fair, large and liberal interpretation in favour of the Indians. Similarly American courts have decided that Indian water rights inter alia extend to the irrigation of all practicable acreage. The right includes consumptive and non-consumptive uses and quantitative and qualitative aspects. Thus, aboriginal water rights are prior and paramount to other uses.

In recognition of this issue, Canada, Manitoba, the Manitoba Hydroelectric Board and the Northern Flood Committee, Inc., the latter representing five aboriginal groups, signed the Northern Flood Agreement. It has been used as a model for subsequent agreements relating to conflicts between resource development and native rights. It includes substantive rights independent of project development rights in principle whose application depends upon the unfolding of the project, an intergovernmental planning process linked to community-based plans and a continuous arbitration process to resolve all related disputes.

The Indian water rights issues described in the Agreement are particular to Canada and the United States. However, the considerations justifying the protection of aboriginal interests are common to many developmental processes. Moreover, in societies with strong traditional components, the protection and respect of such interests might be essential for the success of the developmental effort.

Therefore, the implementation of water and land rights resulting from the operation of multinational programmes in Africa must take into account the interests of the different ethnic groups existing within the boundaries of national states. 6/

Niger River Basin: A Proposal for the Reorganization of
the Niger Basin Authority (NBA)

An extraordinary session of the Council of Ministers of the Niger Basin Authority (NBA) took place in Niamey from 21 to 23 October, 1986. It was attended by representatives of all member states (Benin, Burkina Faso, Cameroon, Cote d'Ivoire, Guinea, Mali, Niger, Nigeria and Chad). 7/

The recommendations of the Council addressed the following issues: reformulation of the objectives of the NBA, restructuring and reorganization of the NBA Executive Secretariat, improvement in the monitoring and control of the activities of the Secretariat and improvements in the collection of member contributions for the operative and administrative budgets of the NBA.

The Council also made recommendations concerning the streamlining of the structure of the Secretariat, the personalization of the national entities dealing with issues of the basin, the creation of a consulting committee of donors and the creation of a forum for the co-ordination of activities with the intergovernmental organizations that are within the geographical scope of the NBA.

The Council requested member states to settle their outstanding financial obligations in order for the NBA to reinstate its activities. In addition, the Council requested its president to inform the member countries' chiefs of state of the recommended measures and the difficult financial situation of the NBA which includes arrears in member contributions amounting to several hundred million CFA francs, the growth of institutional debts and interruption of the main projects of the Authority due to lack of financing.

International River Basin Conflicts

Representatives from different river basin authorities, international organizations and academic centres met at Laxenburg, Austria to discuss the issues posed by the management of international river basin conflicts. 8/

The meeting summarized the functions of an appropriate conflict management and resolution system as follows:

- (a) To improve environmental scanning, that is, to expand the factual basis, the monitoring of trends and the forecasting of social and technical developments;
- (b) To facilitate organizational mobilization by encouraging innovative administrative units of personnel, facilities and procedures that are sensitive and responsive to transnational collaboration;
- (c) To promote decision support systems and the hardware and software that would improve decision-making;
- (d) To shift from a current crisis to a risk management style that emphasizes both anticipatory and participatory planning and work commitment.

Economic Commission for Europe: Report of the Eighteenth Session of the Committee on Water Problems. 9/

The Committee on Water Problems of the Economic Commission for Europe (ECE) discussed the revised draft on principles of co-operation in the field of transboundary waters, as elaborated by the Group of Experts on Aspects of Water Quality and Quantity at its fourteenth session (a summary of the report was presented in issue No. 8; p.12 of this Newsletter. Certain amendments and modifications were proposed. After lengthy discussion, the Committee decided to recommend the principles, as amended, for endorsement by the Economic Commission for Europe.

The principles acknowledge that transboundary waters require co-operation among co-riparian countries. They should take measures such that the activities carried out within their territories do not cause damage to the environment of other states or to areas beyond the limits of their territorial jurisdiction.

The Committee also decided to include in its programme of work a new item on liability in cases of transboundary water pollution and flood management in transboundary waters. In so doing, the Committee coincides with the Report of the Symposium on Improved Efficiency in the Management of Water Resources: Follow Up to the Mar del Plata Action Plan.

Report of the Committee on International Water Resources Law -
International Law Association

The Committee submitted a final report dealing with the law of international groundwater resources and complementary rules applicable to international water resources, which is summarized below. The Committee also proposed new topics for future research and study. 10/

A. Law of international groundwater resources

Rules on the subject are based on the existence of numerous international aquifers, improved knowledge of their behaviour and the potential harm that might result from their unrestricted use and development. Consequently the committee approved the following articles:

1. The water of international aquifers

The waters of an aquifer that is intersected by the boundary between two or more states are international groundwaters, and such an aquifer with its waters forms an international basin or part thereof. Those states are basin states within the meaning of the Helsinki Rules on procedures for the prevention and settlement of disputes whether or not the aquifer and its waters form with surface waters part of a hydraulic system flowing into a common terminus.

2. Hydraulic interdependence

(a) An aquifer that contributes water to or receives water from surface waters of an international basin constitutes part of that international basin for the purposes of the Helsinki Rules;

(b) An aquifer intersected by the boundary between two or more states that does not contribute water to or receive water from surface waters of an international drainage basin constitutes an international drainage basin for the purpose of the Helsinki Rules;

(c) Basin states, in exercising their rights and performing their duties under international law, shall take into account any interdependence of the groundwater and other waters, including any interconnections between aquifers, and any leaching into aquifers caused by activities in areas under their jurisdiction.

3. Protection of groundwater

(a) Basin states shall prevent or abate the pollution of international groundwaters in accordance with international law applicable to existing, new, increased and highly dangerous pollution. Special consideration shall be given to the long-term effects of the pollution of groundwater:

(b) Basin states shall consult and exchange relevant available information and data at the request of any one of them;

(1) To preserve the groundwaters of the basin from degradation and protect the geological structure of the aquifers, including recharge areas:

(ii) To consider joint or parallel quality standards and environmental protection measures applicable to international groundwaters and their aquifers;

(c) Basin states shall co-operate, at the request of any one of them, in the collection and analysis of additional information and data pertinent to the international groundwaters of their aquifers.

4. Groundwater management and surface waters

Basin states should consider the integrated management, including conjunctive use with surface waters, of their international groundwaters at the request of any one of them.

B. Complementary rules applicable to international water resources

Rules on the subject are justified on the grounds of practicability, equity and procedural completeness. The articles on the matter read as follows:

1. Substantial injury

A basin state shall refrain from and prevent acts or omissions within its territory that will cause substantial injury to any co-basin state, provided that the application of the principle of equitable utilization as set forth in Article IV of the Helsinki Rules does not justify an exception in a particular case. Such an exception shall be determined in accordance with Article V of the Helsinki Rules.

The Committee on international water resources law prefers to use the word "substantial" when referring to injury. In so doing, it has rejected the word "appreciable" when qualifying the extent of injuries to other states. The selection of the word "substantial" is founded on reasons of practice and principle, the latter being that "the threshold between prohibited and permitted uses should not be higher than is indicated by the notion substantial injury".

Past and recent reports of the International Law Commission on the law of the non-navigational uses of international watercourses have endorsed the principle of "prohibition of appreciable harm". A similar stance has been taken by the Operational Manual Statement of the World Bank for Projects on International Waterways (see International Rivers and Lakes No. 8, page 4). Thus, the Committee has taken an approach which is more permissive than the position substantiated by other international bodies and organizations. At a time of increased pollution of international waters, when more stringent principles of international law are needed to protect not only co-riparians but also more general environmental interests, the position of the Committee might need to be reviewed.

So relevant are environmental interests at present that the problem of ecological damage was discussed at the fifteenth Conference of European Ministers of Justice. The need for suitable environmental protection measures was stressed, while it was further recommended that restoration or cleaning up of the damaged environment should be compulsory, especially where the general interest was affected. The Ministers asked the Council of Europe to give high priority to the problem of compensation for damage caused to the environment, with a view to preparing an appropriate document. These considerations might have a bearing on future sessions of the Committee. The other proposition of the article, namely that exceptions to the prohibition against "substantial injury" might be justified on the principle of "equitable utilization"; continues with the argument on the matter raised by the Schwebel Report of 1981. 11/ The matter has been debated in several forums during the past several years. The main difficulty seems to be how to explain the occurrence of a legally relevant injury when the right has been exercised within the limits of the legal standard regulating the situation. Legally relevant injuries and the exercise of a right within legal standards seem to exclude each other. It might be argued that if there is an injury the limits of the right have been trespassed. Conversely, no legally relevant injury would exist if the right had been exercised within the standard of behaviour set by the governing rule. In this connection it is useful to quote the third report of Mr. Stephen McCaffrey to the International Law Commission. Commenting on the duty to notify proposed new uses, McCaffrey states:

"While, technically speaking, a State suffers no legal injury unless it is deprived of its equitable share, the article is couched in terms of "appreciable harm" in order to facilitate a joint determination of whether any harm entailed by the new use would be wrongful (because the new use would exceed the notifying State's equitable share) or would have to be tolerated by potentially affected states (because the new use would not exceed the notifying state's equitable share)". 12/

2. Measures within the territory of other basin states

If an undertaking to be executed by a basin state requires works or installations within the territory of a co-basin state, or the utilization of water resources in that territory, all questions connected with these measures are to be determined by agreement. The states concerned shall use their best endeavours to reach a just and reasonable arrangement in accordance with the principle of equitable utilization.

3. Notification and objection

(a) When a basin state proposes to undertake or to permit the undertaking of a project that may substantially affect the interests of any co-basin state, it shall give such state or states notice of the project. The notice shall include information, data and specifications adequate for assessment of the effects of the project

(b) After having received the notice required by paragraph 1, a basin state shall have a reasonable period of time, which shall be not less than six months, to evaluate the project and to communicate its reasoned objection to the proposing state. During that period the proposing state shall not proceed with the project;

(c) If a basin state does not object to the project within the time permitted under paragraph 2, the proposing state may proceed with the project in accordance with the notice;

(d) If a basin state objects to the project, the state concerned shall make every effort expeditiously to settle the matter consistent with the procedures set forth in chapter 6 of the Helsinki Rules. The proposing state shall not proceed with the project while these efforts are continuing provided that they are not unduly protracted. If these efforts become unduly protracted, or an objecting state has refused to resort to third party procedures for settlement of the remaining differences, the proposing state may, on its own responsibility, proceed with the project in accordance with the notice;

(e) The notice and other communications referred to in this article shall be transmitted through appropriate official channels unless otherwise agreed.

C. Topics to be addressed at a future time

The proposals of the Committee on the matter of future topics were as follows:

1. Diversion of water out of and into the international basin

After preliminary study and discussion, the Committee could not decide whether or not all aspects of the question had been adequately covered by the Helsinki Rules, although there seemed to be general agreement that extra-basin diversion was not per se contrary to general international law.

2. Reconciliation of differences and prevention and settlement of water resources disputes

Because chapter 6 of the Helsinki Rules was prepared at a time when recommendations only could be put forward for most of its provisions, and because modern practice and doctrine in the field of water resources strongly emphasize fact-finding and the reconciliation of differences at technical levels, the Helsinki Rules may be deemed inadequate and out of date in that regard.

3. State responsibility for injurious acts and omissions

The problem of state responsibility in general has occupied the attention of the United Nations International Law Commission for many years. More recently, on the topic of the law on the non-navigational uses of international watercourses, the Commission's Special Rapporteurs have also endeavoured to deal with responsibility in that particular field. It might be worth considering whether the matter of state responsibility would also need studies made independently by the International Law Association.

4. Information and data exchange

Although the Committee's proposed article on notification and objection covers information, data and specifications of specific project proposals, a wider, more general need to share information and data concerning the hydrology, flow regime and uses of a basin's waters is widely recognized. It should be noted that the Helsinki Rules' provisions on the matter are recommendations only and couched in terms of "with a view to preventing disputes..." (article XXIX, paragraph 1) rather than as an aspect of affirmative co-operation for the optimum development, use, protection and control of the waters of the basin.

5. Consolidation of the Helsinki Rules with the subsequently adopted rules and, where appropriate, harmonizing them in view of technical and legal developments

Over the years the provisions of the subsequently adopted articles, which take new developments into account, have sometimes resulted in departures from the language of the Helsinki Rules. The Committee feels the need to harmonize and consolidate the texts adopted by the International Law Association in this field.

International Law Commission

In several recent meetings, international bodies have stressed the importance of adequate procedural arrangements to deal with international river basins. 13/

Procedural rules are also highlighted in the 1987 Report to the International Law Commission which stresses the need to complement substantive rules (equitable apportionment) with a set of procedural rules, because "without such a set of procedures a state would often discover the limits of its rights only by depriving another state of its equitable share - probably without intending to do so".

Consequently, the practice of states does attest to the existence of a procedural complement to substantive norms of equitable utilization. Therefore "procedural requirements should be regarded as essential to the equitable sharing of water resources. In the absence of hard and precise rules for allocation, there is a relatively higher need for specifying requirements for advanced notice, consultation and decision-making procedures. Such requirements are in fact commonly found in agreements by neighbouring states concerning common lakes and rivers". Such procedures open lines of communication that might eventually lead to integrated planning and management. Consequently, the following set of draft articles on procedural rules was offered for consideration by the Commission:

Draft article 10 - General Obligation to co-operate

States shall co-operate in good faith with other concerned states in their relations concerning international watercourses and in the fulfilment of their respective obligations under the present draft articles.

Draft article 11 - Notification concerning proposed uses

If a state contemplates a new use of an international watercourse which may cause appreciable harm to other states, it shall provide those states with timely notice thereof. Such notice shall be accompanied by available technical data and information that is sufficient to enable the other states to determine and evaluate the potential for harm posed by the proposed new use.

The article refers to uses that are still in the preliminary planning stages. "Use" should be understood in a broad sense, encompassing not only new uses but also the alteration of existing ones. The appraisal of possibilities for "appreciable harm" should be done by the proposing state on the basis of objective, scientific and technical data. Notification should be done early enough to permit meaningful negotiations. The information to be provided is the one that is available and readily accessible.

Draft article 12 - Period for reply to notification

The article is drafted with two alternatives:

Alternative 1 A state providing notice of a contemplated new use under article 11 shall allow the notified states a reasonable period of time within which to study and evaluate the potential for harm entailed by the contemplated use and to communicate their determinations to the notifying state.

Alternative 2 Unless otherwise agreed, a state providing notice of a contemplated new use under article 11 shall allow the notified states a reasonable period of time, which shall not be less than six months, within which to study and evaluate the potential for harm entailed by the contemplated use and to communicate their determinations to the notifying state.

During the period referred to in paragraph 1 of this article, the notifying state shall co-operate with the notified states by providing them, on request, with any additional data and information that is available and necessary for an accurate evaluation, and shall not initiate, or permit the initiation of, the proposed new use without the consent of the notified state.

If the notifying state and the notified states do not agree on what constitutes, under the circumstances, a reasonable period of time for study and evaluation, they shall negotiate in good faith with a view to agreeing upon such a period, taking into consideration all relevant factors, including the urgency of the need for the new use and the difficulty of evaluating its potential effects. The process of study and evaluation by the notified state shall proceed concurrently with the negotiations provided for in this paragraph, and such negotiations shall not unduly delay the initiation of the contemplated use or the attainment of an

agreed resolution under paragraph 3 of article 13.

The two alternatives reflect different views on the period of time within which the notified state is required to reply. Alternative 1 refers to a reasonable period to reply. It gives neither the minimum nor the maximum duration of such reasonable period of time. According to the rapporteur, this alternative might best serve the interests of the parties by allowing them to establish a term according to the circumstances of the case.

Alternative 2 provides for a reasonable period of time to reply, but a minimum period of six months is proposed. No maximum period for reply is given.

Disagreements on what is a reasonable period of time under the circumstances should be negotiated in good faith.

Draft article 13 - Reply to notification: consultation and negotiation concerning proposed uses

If a state notified under article 11 of a contemplated use determines that such use would, or is likely to, cause it appreciable harm, and that it would, or is likely to, result in the notifying state's depriving the notified state of its equitable share of the uses and benefits of the international watercourse, the notified state shall so inform the notifying state within the period provided for in article 12.

The notifying state, upon being informed by the notified state as provided in paragraph 1 of this article, is under a duty to consult with the notified state to confirm or adjust the determinations referred to in that paragraph.

If under paragraph 2 of this article the states are unable to adjust satisfactorily the determinations through consultations, they shall promptly enter into negotiations to arrive at an agreement on an equitable resolution of the situation. Such a resolution may include modification of the contemplated use to eliminate the causes of harm, adjustment of other uses being made by either of the states and the provision by the proposing state of compensation, monetary or otherwise, acceptable to the notified state.

The negotiations provided for in paragraph 3 shall be conducted on the basis that such state must in good faith pay reasonable regard to the rights and interests of the other state.

If the notifying and notified states are unable to resolve any differences arising out of the application of this article through consultations or negotiations, they shall resolve such differences through the most expeditious procedures of pacific settlement available to and binding upon them or, in the absence thereof, in accordance with the dispute settlement provisions of these draft articles.

Draft article 14 - Effect of failure to comply with articles 11 to 13

If a state contemplating a new use fails to provide notice thereof to other states as required by article 11, any of those other states believing that the contemplated use may cause them appreciable harm may invoke the obligations of the former state under article 11. In the event that the states concerned do not agree upon whether the contemplated new use may cause appreciable harm to other states within the meaning of article 11, they shall promptly enter into negotiations in the manner required by paragraphs 3 and 4 of article 13, to resolve their differences. If the states concerned are unable to resolve their differences through negotiations, they shall resolve such differences through the most expeditious procedures of pacific settlement available to and binding upon them or, in the absence thereof, in accordance with the dispute settlement provisions of these draft articles.

If a notified state fails to reply to the notification within a reasonable period, as required by article 13, the notifying state may, subject to its obligations under article 9, proceed with the initiation of the contemplated use, in accordance with the notification and any other data and information communicated to the notified state, provided that the notifying state is in full compliance with articles 11 and 12.

If a state fails to provide notification of a contemplated use as required by article 11, or otherwise fails to comply with articles 11 to 13, it shall incur liability for any harm caused to other states by the new use, whether or not such harm is in violation of article 9.

Draft article 15 - Proposed uses of utmost urgency

Subject to paragraphs 2 and 3 of this article, a state providing notice of a contemplated use under article 11 may, notwithstanding affirmative determinations by a notified state under paragraph 1 of article 13, proceed with the initiation of the contemplated use if the notifying state determines in good faith that the contemplated use is of the utmost urgency, due to public health, safety or similar considerations and provided that the notifying state makes a formal declaration to the notified state of the urgency of the contemplated use and of its intention to proceed with the initiation of that use.

The right of the notifying state to proceed with a contemplated new use of utmost urgency, pursuant to paragraph 1 of this article, is subject to the obligation of that state to comply fully with the requirements of article 11 and to engage in consultations and negotiations with the notified state, in accordance with article 13, concurrently with the implementation of its plans.

The notifying state shall be liable for any appreciable harm caused to the notified state by the initiation of the contemplated use under paragraph 1 of this article except such as may be allowable under article 9.

Articles 13 through 15 are self-explanatory. The discussion of the draft articles by the International Law Commission will be summarized in Newsletter No.10.

Call for documents and participation in information exchange

In view of the scope and purpose of the Newsletter, the editor would like to encourage all those who are in a position to do so to contribute to the information exchange exercise with news items or documents. To date the response has been encouraging, and it is hoped that a growing network of interested readers will be willing to take an active part in the exercise.

Individual copies of the Newsletter are available on request. Requests should include the names and addresses of offices and officials wishing to receive copies.

All correspondence should be addressed to:

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Notes

- 1/ United Nations Environment Programme, "Draft Agreement on the Action Plan for the Environmental Management of the Common Zambezi River System (IG/78/3, 10 March 1987).
- 2/ As agreed upon by the Government-nominated experts at the third meeting of the Working Group of Experts on the Zambezi River, held at Gaborone, Botswana, 20-23 January 1987.
- 3/ Conference of the Plenipotentiaries on the Environmental Management of the Common Zambezi River System, Agreement on the Action Plan for the Environmentally Sound Management of the Common Zambezi River System, Final Act, Harare, 26-28 May 1987 (Nairobi, United Nations Environment Programme, 1987)
- 4/ B. Hock and G. Kovacs, A Large International River: The Danube Summary of Hydrological Conditions and Water Management Problems in the Danube Basin (Laxenburg, Austria, International Institute for Applied Systems Analysis, January 1987) (WP-87-11) Summary of a working paper. Published in the International Rivers and Lakes Newsletter for information purposes only. The views or opinions expressed in the working paper do not necessarily represent those of the International Institute for Applied Systems Analysis or its National Member Organizations.
- 5/ Secretariat Committee for Co-ordination of Investigations of the Lower Mekong Basin, Report of the UNDP Workshop for the Nile Basin Countries, Bangkok, Thailand, 20-27 January, 1986.
- 6/ This article is based on Richard H. Bartlett, "Prior and paramount aboriginal water rights in Canada"; John E. Echowak, "The current status of tribal water rights in Canada" and Collin J. Gillespie, "On public appropriation of Indian water rights", in Resources: the Newsletter of the Canadian Institute of Resources Law, Special Issue: Legal Issues in Aboriginal Water Rights, No. 18, Spring 1987.
- 7/ Marches Tropicaux et Mediterraneens, No. 2139, 7 Novembre 1986, p. 2808.
- 8/ The Management of International River Basin Conflicts, Proceedings of a Workshop held at the Headquarters of the International Institute for Applied Systems Analysis, Laxenburg, Austria, 22-25 September 1986 (Washington, D.C., Graduate Program in Science, Technology and Public Policy, The George Washington University, 1986).
- 9/ Economic Commission for Europe, Report of the eighteenth session of the Committee on Water Problems (ECE/WATER/47, 2 March 1987).
- 10/ Report of the Sixty-second Conference of the International Law Association held in Seoul, 1986.
- 11/ Third report of the International Law Commission United Nations on the law of the non-navigational uses of international watercourses, prepared by Stephen M. Schwebel, Special Rapporteur (A/CN.4/348, 11 December 1981).
- 12/ Third report of the International Law Commission United Nations on the law of the non-navigational uses of international watercourses, prepared by Stephen C. McCaffrey, Special Rapporteur (A/CN.4/406, 30 March 1987).

13/ See Miguel Solanes, "Non-navigational uses of international rivers: work of the International Law Commission", in Water Resources Policy for Asia, Ali, Radosevich and Khan, eds., (Bakema, Netherlands, 1987), p. 427; Ann B. Rodgers and Albert E. Utton, "The Ixtapa draft agreement relating to the use of transboundary groundwaters", Natural Resources Journal, Vol. 25 (July 1985), pp. 716-772; World Bank, Operational Manual Statement for Projects on International Waterways (April 1985) and Report of the Sixty-second Conference of the International Law Association held in Seoul, 1986.