



International Rivers and Lakes

A Newsletter issued by the Department of Technical Co-operation for Development
United Nations, New York

No. 16

May 1991

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Sixth report on the law of the non navigational uses of international watercourses 1/

The report contains draft articles on the management of international watercourses, security of hydraulic installations and settlement of disputes. It also contains a chapter on the implementation of the draft articles regarding the facilitation of private remedies to deal with actual or potential harm. Private redress is seen as a practical step towards the implementation of the obligations laid down in the draft articles.

Management of international watercourses

Management of international watercourses is a subject addressed by several previous rapporteurs, United Nations studies and reports. The pertinent principles include the consideration of river systems as indivisible physical units, which should be developed to render maximum service to human communities, whether or not they are divided into two or more political jurisdictions, whom the system serves. Accordingly, governments have a positive duty to cooperate in the development of river systems, although sacrifices and imperilments of vital interests should be compensated and security is required for vital interests.

Consequently, permanent international commissions should be set up to address the need for frequent consultations. In fact, the creation of river commissions is a well established practice in international law which can be traced far back in history. Boundary commissions have often been entrusted with the responsibility of international rivers or waters in frontier areas.

Many early treaties dealt with problems concerning fisheries and navigation. More recent agreements are concerned with problems of water allocation for irrigation, energy generation, flood control, pollution control, or multipurpose management for general integrated river basin development. In fact, joint institutional arrangements for the management of international rivers, although not legally compulsory, are essential to the optimal development and protection of international rivers and waters.

On the other hand, it is widely acknowledged that international watersheds offer unique opportunities for the promotion of international amity. Therefore, mounting pressures for development and conservation require the creation of new and imaginative arrangements for joint institutional management, development and conservation of international

1/ International Law Commission, Sixth Report on the Law of the Non-Navigational Uses of International Watercourses, A/CN.4/427, 23 February 1990.

waters. The United Nations and its regional economic commissions have been particularly active in the promotion of joint institutional arrangements. Agreements on such arrangements should include, at least, objectives, territorial jurisdiction, composition, authority and powers, decision-making procedures, financial provisions, procedures for the prevention and settlement of disputes and other specific topics relevant to particular cases.

Several activities were recommended to take place at the basin level, technical people and diplomats interact to address the different issues involved in developing and managing the waters of international rivers; decision-making assures the effectiveness of decisions taken; a systems approach to be implemented; governments to respect the principle of equitable allocation; consultations, interchange of data, and notifications to take place at the basin level; and riparians not to cause appreciable harm to each other.

Appropriate institutional arrangements might vary from formal commission and basin authorities to ad hoc working groups. Some writers have also pointed out the need for appropriate institutional arrangements, since international administration is essential for the fullest use of the waters of international rivers.

Consequently, and based upon the above precedents, the rapporteur has proposed a draft article 26 stating that 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. "Management" is meant to include, but not to be limited to, implementation of the obligations of the watercourse states under the convention; facilitation of regular communications and exchange of data and information; monitoring of international watercourses on a continuous basis; planning sustainable, multipurpose and integrated development of international watercourse systems; proposing and implementing decisions on the implementation of use and protection measures; and proposing and implementing warning and controlling systems related to pollution and other environmental effects, emergency situations or water-related hazards and dangers. Additional functions might include fact-finding missions and serving as a forum for consultations, negotiations and other such procedures for peaceful settlement of disputes.

The proposed article is based on existing treaties like the Indus, the Niger, and the Boundary Waters Treaty of 1909 between the United States of America and Canada.

Security of hydraulic installations

Security of hydraulic installations includes several topics which refer, inter alia, to a reasonable assurance of safety vis-a-vis design, maintenance and construction; prevention of poisoning; obligation not to

attack hydraulic installations in time of peace or armed conflict, unless utilized for military purposes; obligation not to use hydraulic installation to prepare or to conduct offensive military operations; obligation to consult, upon request, concerning safety and security measures against poisoning and terrorist acts; obligation, in times of armed conflict, established systems for warning about water-related hazards and emergencies; obligation, in times of peace or armed conflict, not to withhold water from a watercourse state, so as to jeopardize the survival of the civilian population or to imperil the viability of the environment; criteria to maintain and, if necessary, to improve the environmental conditions of a particular body of water.

The topic, however important, presents some legal hurdles because it might be deemed to be a modification or an amendment to the two protocols of the Geneva Conventions. Therefore, reference to armed conflict was excluded from the draft proposal of one previous rapporteur, Mr. Evensen. The present rapporteur agrees with this view. Special municipal legislation on the subject has been prepared by countries such as Germany, Switzerland, and Sweden.

The Emosson agreement, in the same vein, establishes that designs and general plans for the works to be carried out by a concessionaire can only be carried out if approved by the parties involved. Additional obligations refer to drainage, spillways, minimum flows to safeguard general interests, etc. There are also references to a permanent supervisory commission. Security of waterworks is referred to the legislation of the country where they are built.

Ever since the times of Grotius, publicists have condemned the poisoning of water supplies as an act of war. The subject has been addressed by the Regulations to the 1907 Hague Convention on the laws and customs of water. According to art. 23 e) of the Regulations annexed to Convention IV, water supplies must not be poisoned. United States field regulations agree with this view. Similar provisions are to be found in British war manuals.

The International Law Association at its 1974 New Delhi meeting recognized that only in the last decades has concern for the human environment turned to concern for the protection of water and water installations in times of armed conflicts. At the 1976 Madrid Conference the International Law Association enjoined the poisoning of water supplies, the cutting off or destruction of water supply installations, the diversion of water to destroy the environment, terrorize the populations, or damage their basic conditions of survival etc. Similar principles were endorsed to prevent the destruction of water installations, flooding, destruction of hydrological balance, and also to protect water supplies, hydrological balances and water installations in occupied areas.

Moreover, wars should only suspend and not terminate the effects of treaties. Peace treaties must not deprive a people of its water resources in such a manner as to imperil their physical or economic survival, or to threaten their health. Should there be a separation between water supplies and sources of supply, as a result of fixing a new border, water deliveries to satisfy the vital needs of the people should be safeguarded. The principles tend to apply to other types of conducts intended to damage or destroy the water resources of an area or state.

The Geneva Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law in Armed Conflict adopted two protocols additional to the Geneva Conventions of 1949, relating to the victims of international armed conflicts (Prot. I) and non-international armed conflicts (Prot. II). Article 54 of Protocol I, in dealing with the protection of objects indispensable to the survival of the civilian population prohibits to attack, destroy, remove or render useless drinking water installations and supplies and irrigation works. Article 56 of the same protocol provides for works and installations containing dangerous forces, requesting they do not become objects of attack if they can release dangerous forces causing severe losses to the civilian population. A necessary corollary is that the parties in conflict shall try to avoid locating military objectives in the vicinity of works and installations. There is also a request for additional protection of installations containing dangerous forces. Special distinctive signs are also suggested.

Article 14 of Protocol II prohibits attacks on drinking water supplies, installations and irrigation works; while article 15 establishes that works and installations containing dangerous forces, like dams and dikes shall not be attacked, even if they are military objects, when the attack can cause the release of dangerous forces, and severe losses among the civilian population. In light of these provisions the rapporteur has drafted the principles on security of water installations in such a manner that they cannot be seen as modifications or additions to the Geneva Protocols.

Articles 27 and 28 proposed by the rapporteur provide that watercourse states shall employ their best efforts to maintain and protect watercourses and related installations. Consultations shall be entered into in order to agree upon general conditions for the establishment, operation, and maintenance of installations, facilities and works, as well as on specifications thereof.

Consultations must also include measures and standards for security and protection of watercourses, installations and works and facilities from hazards and dangers. States are obligated to exchange data and information concerning the protection of water resources and installations, in particular concerning the conditions, specifications, standards and measures for their safe and secure management. Provisions

on the status of international watercourses provide that they and their related installations, facilities and works shall be used only for peaceful purposes consonant with the principles or the Charter of the United Nations and shall be inviolable at times of international as well as internal armed conflict.

Implementation of draft articles

This section provides a set of principles aimed at facilitating the implementation of the draft articles, make redress more readily available to private parties and help in the avoidance of disputes between watercourse states. The principle of non-discrimination is proposed, whereby states must give the same weight to territorial and extraterritorial effects of activities prone to affect the watercourse system.

States must allow recourses under their domestic law to those injured in other states. States must also allow equal rights of access to their administrative and judicial fora when the affected or injured parties are in a country other than the country of origin of actual or potential harm. Therefore, potentially affected parties shall be provided with enough information to exercise their rights. Finally, a state that has caused damage to persons in other countries shall not enjoy greater jurisdictional immunity than the one it has with regards to its own citizens. It is understood that by facilitating private access to the courts (or administrative fora) of watercourse states, redress would be easier, and more effective, than if problems had to be taken up at the official or diplomatic level.

Settlement of disputes

Objective assessment and identification of facts is essential to the settlement of water-related disputes. However, the very same flexibility of the principle of equitable use and apportionment of the waters of international watercourses might present obstacles to the settlement of disputes, which requires that facts be precisely identified, properly assessed, and well understood.

Fact-finding is therefore a crucial first step towards conflict resolution. The procedure for the avoidance of disputes consists of stages; field-level technical expertise is essential and non-binding technical reports identifying a recommended course of action may solve disputes informally. Formal procedures must then be considered only after settlement of differences at the technical level has failed.

An international water-law dispute involves two or more states of an international drainage basin and can refer to the conservation, use, sharing, control, development or management of the waters of an international basin; or to the interpretation of the terms of any

agreement on the waters of an international river basin. However, fact-finding and avoidance of disputes may prevent the development of full-scale settlement procedures, within the ordinary understanding of dispute settlement. Thus, the rapporteur is endorsing fact-finding and conflict-avoidance mechanisms as a useful step, and perhaps an alternative to full settlement procedures, in the process of conflict resolution.

Under the United Nations Charter disputes must be solved by peaceful means in such a manner as not to endanger international peace, justice, and security. Means of dispute settlement include negotiation, inquiry, mediation, conciliation, arbitration, judicial settlement, resort to regional arrangements or agencies, or other peaceful means of one's own choice. Parties must endeavour to first solve disputes by all these means.

Another means for peaceful settlement of disputes is to resort to expert advice for investigation and reporting. The rapporteur supports this alternative for conflict solving and avoidance and provides examples, (e.g. the Canada-United States Joint Commission and its procedures to solve several disputes), and the alternatives under the Indus Water Treaty. Examples other than water are quoted (e.g. International Plant Protection Convention of 1951).

The General Agreement on Tariffs and Trade is also mentioned, noting that it resorts to consultations among or between the parties having differing views and also by jointly consulting with any contracting parties or party, at the request of any of the parties involved in the difference. It also allows for conciliation. In practice matters are referred to a panel of experts for investigation and reporting. The panel must make an objective assessment of the matters before it, the facts of the case, the applicability of and conformity with the General Agreement, consult with the parties regularly, and give them adequate opportunity to develop a mutually satisfactory solution. The cases analysed rely heavily on experts and their recommendations. However, in the case of the General Agreement on Tariffs and Trade, the contracting parties acting jointly can approve panel reports, make recommendations or rulings, and authorize enforcement measures.

The 1923 Geneva Convention on Development of Hydraulic Power Affecting More than One State of 1923, which is a general convention related to the use of international rivers, provides for referral of disputes to a technical body established by the League of Nations. All these examples constitute cases of submission of disputes to a group of experts for an objective, non-binding opinion. The rapporteur also mentions the rules of the World Bank for projects in international waterways, which allows the Bank to resort to the opinion of independent experts in the case of objections to a project seeking Bank financing.

The United Nations Panel of Experts on the Legal and International Water Resources Development has supported the usefulness of initially

addressing differences concerning the utilization of international watercourses at the technical level. The Institute of International Law has also endorsed and resorted to negotiations, recourse to technical expertise, commissions and agencies, and eventually, judicial settlement and arbitration. It has also endorsed the creation of permanent organs for planning the development of, and the settlement of disputes on international river basins. Further examples from international organizations are mentioned in the report, which also analyses the opinions of previous rapporteurs.

The annex on fact-finding and settlement proposed by the present rapporteur includes the following:

(a) Fact-finding

- Fact-finding shall be undertaken at the request of any of the watercourse states for the purpose of establishing facts necessary to the fulfilment of the obligations of the watercourse states;

- Fact-finding can be carried out by either a competent joint organization or by an ad hoc commission of experts;

- A commission of inquiry can be used to overcome the absence of a competent joint organization if the watercourse states are unable to agree on the establishment of an ad hoc expert commission, within six months of the initial request for fact-finding;

- The commission of inquiry shall set its own administrative rules, procedures and venues;

- Fact-finding bodies shall be granted the means and facilities required by their investigations and report, including free access to the territories of watercourse states for purposes connected to the carrying on of their tasks.

The annex also includes procedures to set up a commission of inquiry.

(b) Settlement of disputes

- Disputes should be settled by peaceful means, not endangering international peace, security and justice;

- In the absence of specific norms and agreements, the disputes are to be solved through the following mechanisms:

- Disputes on the interpretation and application of the draft articles shall be resolved through consultations and negotiations; such consultations and negotiations might be direct between the watercourse

states concerned, through competent joint organizations they have jointly established, or through other regional or international organizations agreed upon by them;

- To assist in the negotiations and consultations, the watercourse states might establish a commission of inquiry;

- The mediation of a third party, either a state, an organization, or one or more individuals can be requested and agreed upon by the concerned watercourse states in order to assist them in the consultations and negotiations;

- If no solutions have been reached within six months, the watercourse states shall have recourse to other procedures;

- Conciliation commissions can remedy lack of agreement through consultations and negotiations;

- Reports by conciliation commissions shall indicate the findings of the commission concerning questions of fact and law, recording the agreements reached among the parties or, failing agreement, the recommendations of the commission;

- Reports of conciliation commissions are not binding upon the parties unless otherwise agreed; however, lack of agreement on the report of the conciliation commission compels the parties to renew negotiations on the basis of the commission's report;

- Arbitration will be used if the parties are not able to reach an agreement on the basis of the renewed negotiations, and such arbitration shall be binding upon the parties. It can be carried out by any permanent or ad hoc arbitral tribunal accepted by the parties.

Interim Committee for the Coordination of
Investigations of the Lower Mekong Basin 2/

A workshop on the Lower Mekong Basin International Legal Framework was held in Bangkok, Thailand, from 20 to 25 March 1991 with participants from the Lao People's Democratic Republic, Thailand, Socialist Republic of Viet Nam, the United Nations Department of Technical Cooperation for Development (DTCD), and the Mekong Secretariat.

The workshop was part of the programme on preparatory, organizational and legal studies, currently undertaken by the Secretariat, under a

2/ Interim Committee for Coordination of Investigations of the Lower Mekong Basin, Workshop on Lower Mekong Basin - International Legal Framework, Bangkok, Thailand, 20 - 25 March 1991.

proposal originally prepared with the assistance of the interregional services on water legislation and institutional arrangements of the Water Resources Branch of DTCD, approved after revision and modifications, by the Mekong Committee at its 31st session in April 1990. The project is funded by the Commission of the European Communities.

The studies have three objectives:

- a) to study criteria for, and legal implications of, the equitable allocation, use, conservation and development of the water resources of the international Lower Mekong River Basin; and for the equitable sharing of the relevant costs and benefits resulting from their development;
- b) to elaborate possible organizational and legal frameworks on the basis of samples of models in similar conditions elsewhere in the world;
- c) to provide riparian officers and Mekong Secretariat staff with training in legal and institutional aspects of water resources management.

The workshop reviewed pre- and post-1957 international agreements relevant to the Lower Mekong Basin. The subjects addressed included boundary demarcation, beneficial uses of the Mekong waters, order of priorities among uses, regime of the Port of Saigon, the international commissions of the Mekong and the settlement of disputes (pre-1957). The post-1957 subjects covered the statute of the Mekong Committee, the Joint Declaration of Principles, the Interim Mekong Committee and the settlement of disputes.

The participants also presented country reports for debates on the physical and economic conditions of their countries, the importance of the development of the Mekong river, and issues for further studies, including the organizational structure of the Committee, and the need for a more balanced approach to all the objectives of the Mekong Committee. The participants agreed that the current legal framework can be improved to meet the current and projected needs of within the Lower Mekong River Basin.

The major issues resulting from the workshop were,

- the continued validity of pre-1957 agreements to the riparian governments;
- the alternatives and mechanisms to be found for the allocation of water and associated benefits and costs among the member countries;
- the importance of boundary delimitation to project development, and the need to set it through appropriate mechanisms prior to project implementation;

- the regulatory functions of the Mekong Committee in relation to mainstream navigation, aquatic life and maintenance of migratory patterns, multipurpose dams in the mainstream and the major tributaries, water quality control and prevention of harmful effects from water, environmental management and sustainable development - including the assessment of long-term environmental conditions with and without water development projects, and their expected outputs and benefits, enforcement provisions, definition of "average daily flow during the previous dry period", resettlement criteria for mainstream projects, consideration of primary principles of international water law and Mekong agreements in planning and implementing projects in the mainstream - for example navigation, determination of bridge spans and clearance in relation to present and future navigation needs in the mainstream, settlement of disputes, identity cards for Mekong personnel, terms of reference for the Executive Agent, duty to inform on development plans, timely provision of data, and needs and justification for the development of permanent legal expertise within the Mekong Secretariat.

The participants concluded that further studies are needed on several legal and institutional issues including the assessment of potential modifications to the Statute, Joint Declaration, and other instruments for consideration by the Committee and the member governments.

In concluding the workshop, the participants expressed their appreciation for the support provided by the Commission of the European Communities, the Mekong Secretariat, the United Nations Department of Technical Cooperation for Development, and for the hospitality of the Government of Thailand.

Proceedings of the Interregional Seminar on the Mobilization of
Resources for optimal water development, allocation and conservation

There are important ways, other than keeping costs of projects down and requiring fees for water-related services, to promote social investment in water resources development. Identifying some of these ways was a main purpose of the Interregional Seminar on the Mobilization of Resources for Optimal Water Development, Allocation and Conservation, held in Merida, Venezuela, from 3 through 7 December 1990.

The seminar brought together 20 participants from Spanish- and Portuguese-speaking developing countries, and four consultants provided background papers. A main focus was on the optimal use of water in relation to services such as drinking water, irrigation and sanitation. Successful cases of water resources development and conservation were reviewed, and participants shared a wide range of their national experiences in this regard.

The seminar recommended that developing countries move away from segmented, interest-related management of water resources and set up unified water resources agencies to plan and manage surface and groundwater quality and quantity. For such a system to work, the seminar called for accurate registration and recording of water supplies and rights, taking into account the decentralized character of water management at the operational level. Under such a management system, planning should result from a consensus between the administration and water users.

The seminar also recommended that governments formulate explicit criteria and standards for the evaluation of the economic, environmental and social impact of water programmes and projects. The need to grant adequate executive powers to water management agencies was acknowledged, as well as the need to grant stable water rights. Private as well as public participation in water quality control was urged. Finally, the seminar recommended that all countries formulate comprehensive water legislation and adequate norms for water quality control.

A technical publication containing the meeting proceedings and recommendations is being prepared.

The dynamics of water in the Middle East 3/

Economic security, environmental issues, and safe water supplies are intertwined in the concerns of the Middle East. Water supplies seem inadequate for the actual and potential needs of several of the countries of the region: populations are growing faster than aquifer replenishment, rivers cross borders between states that put self-interest before sharing, and in many places rainfall is scarce and erratic.

Countries in the Persian Gulf depend on desalting plants to produce high-cost water which is not affordable throughout the region. Groundwater supplies become more expensive as they are depleted. Salt-water intrusion and soil salinization compound the problem, and populations keep growing and demanding more supplies.

Surface water supplies from the Litani, Yarmuk, and Jordan rivers are limited and not easily shared. Therefore, territorial disputes are linked with water security.

Only Egypt and Turkey have plentiful water - albeit not always when and where needed. The World Bank and the United Nations Development Programme, together with the President of Turkey and the Global Water Summit Initiative will sponsor a regional conference on the subject in the hope of encouraging cooperation.

3/ The New York Times, "Water Crisis is Feared in the Middle East" by Alan Cowell, 17 March 1991.

It appears that the minimum necessary foundation for this sort of cooperation includes the need, at the regional level, to recognize the basic principles of international law on the use and allocation of the waters of international rivers, lakes and aquifers; equitable allocation, and prohibition of substantial (or appreciable under the rules of the World Bank) harm, when using the waters of international rivers. Cooperation also involves a basic consensus on the procedural aspects of dispute settlement, and eventually the selection of a third party for the adjudication of such disputes.

A map, which is part of the original article, is to be found on page 14. It does not reflect any official United Nations position on the boundaries of the region nor the ownership of resources. It is only attached for the reader's information.

Thirty-second session of the Interim Mekong Committee,
support for mainstream projects 4/

The thirty-second session of the Interim Mekong Committee strongly endorsed the Secretariat's efforts to return to its main objective, the development of multipurpose projects on the mainstream. The Committee also approved the inclusion of an environmental component in all its studies and welcomed a special fund set up for this purpose.

The new Executive Agent remarked that the hydropower potential of the Mekong represents a new and renewable source of energy. The need for the return of Cambodia to the Committee, as well as for data collection in Cambodia, China and Myanmar was stressed. The role of the Committee in regional development was noted by the representative of the Executive Secretary of ESCAP, while the UNDP regional representative emphasized the importance of mainstream developments, regional projects and the need to focus on human and social issues.

Wahda dam 5/

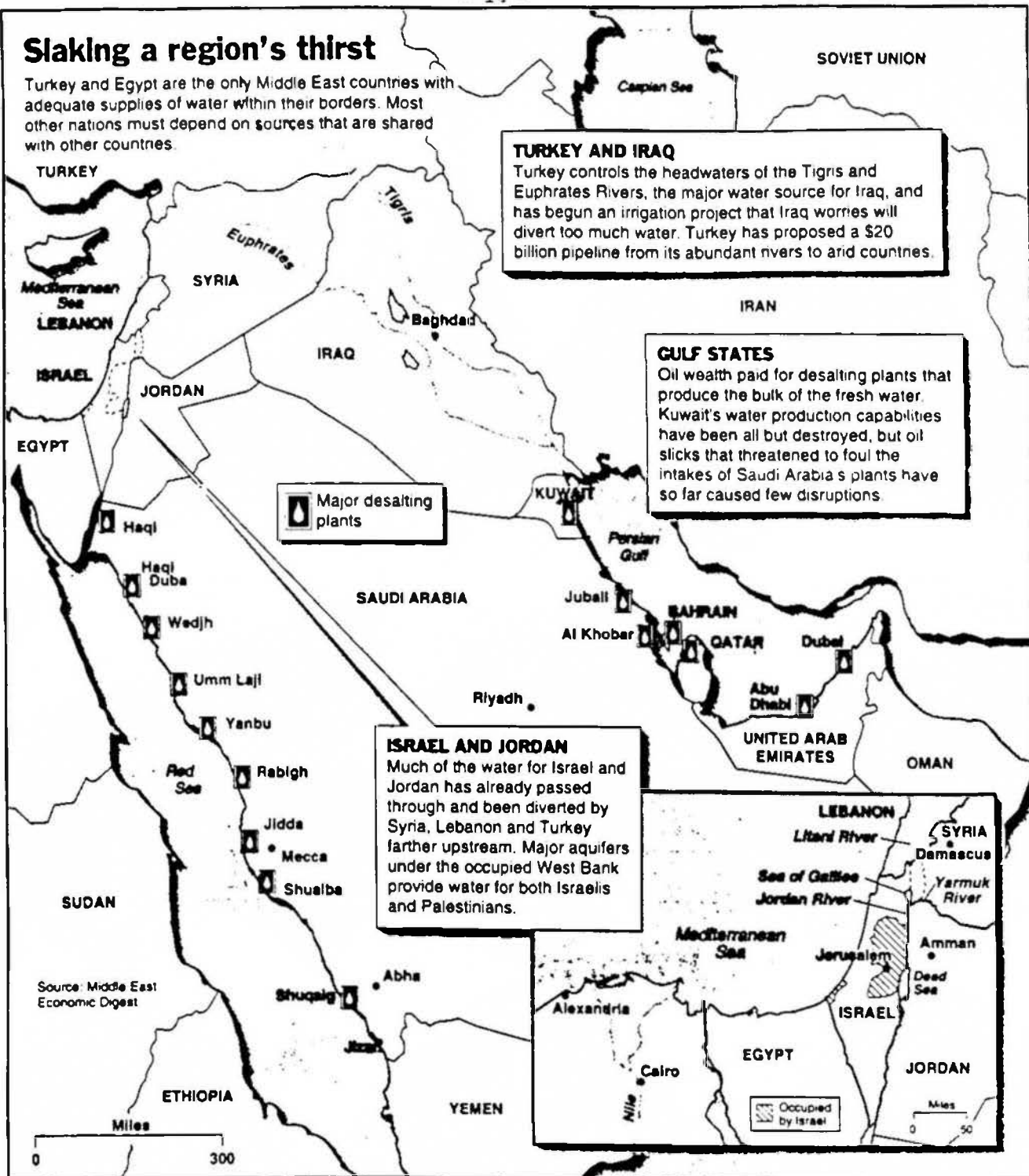
Work on the joint Syrian-Jordanian Wahda dam on the Yarmouk river has been temporarily halted because of funding shortfalls, despite the recent completion of the \$300 million diversion tunnel. Funding had been anticipated from the World Bank, the United States Agency for International Development (USAID), the Japanese Overseas Economic Co-operation Fund (OECF) and the Kuwait-based Arab Fund for Economic and Social Development (AFESD), but the agencies have hesitated about proceeding until disagreements over water supply aspects of the project are resolved.

4/ Mekong News, Vo. 10, No.1, January 1991.

5/ Water Power & Dam Construction, August 1990.

Slaking a region's thirst

Turkey and Egypt are the only Middle East countries with adequate supplies of water within their borders. Most other nations must depend on sources that are shared with other countries.



The designation employed and the presentation of the material do not imply the expression of any opinion whatsoever on the part of the Secretariat of the United Nations concerning the legal status of any country, territory or area, or of their authorities, or concerning the delimitation of frontiers.

The Israeli Government has stated that Israel wants to negotiate an arrangement for the use of the Yarmouk's water for the benefit of both countries. Syria is thought to welcome joint negotiations for a regional arrangement on water use.

Yacyreta and Salto Grande to be privatized 6/

The Yacyreta and Salto Grande hydroelectric plants, which are joint ventures between Argentina and the Governments of Paraguay and Uruguay respectively, should be privatized following negotiations between Argentina and the two neighbouring states, according to a former minister of public works and services. This was disclosed at an announcement for the partial or total privatization of the Greater Buenos Aires Electrical Services Company (SEGBA) and a series of other state power companies, said to be essential to revive the national power supply system which is at present operating at only 30 per cent of capacity.

A special committee comprising representatives from the Economy Ministry and the Public Works and Services Ministry was studying the privatization programme and should present its report to the Argentine parliament.

First international meeting on legal protection of the environment

The Attorney General's office of the Republic of Cuba and the Cuban Society of Penal Sciences (National Unions of Lawyers of Cuba) are sponsoring the first international meeting on legal protection of the environment, Havana, 19 to 21 November 1991. The aim of this meeting is to promote a fruitful exchange of experiences and a comprehensive discussion of current problems: legal protection of the environment; environment, technological development and observance of the law; international cooperation and legal protection of the environment; peculiarities of the legal protection of the environment in big cities; environmental pollution as a non-conventional crime; the role of attorneys in the protection of the environment; and current problems and future developments in the legal protection of the environment.

This event will strengthen scientific, cultural and human relations among specialists and researchers working in this field, and will further the development of legal protection of the environment in their respective countries. The organizing committee has arranged an attractive programme, including interesting tours and other social activities for delegates and accompanying persons. For further information, please contact,

6/ Water Power & Dam Construction, November 1990.

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Call for documents and participation in information exchange

In view of the scope and purpose of the International Rivers and Lakes 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 name and address of offices and officials wishing to receive copies. All correspondence should be addressed to,

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