International Rivers and Lakes

A Newsletter issued by the Department of Economic and Social Development
United Nations, New York

No. 19 December 1992

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Review of the Draft Rules (ILC) on the non navigational uses of international watercourses 1/

In 1991 the ILC submitted a Draft on the Law the Non Navigational Uses of International Watercourses. The Draft was summarized in Newsletter No 17. While comments of Member States are not yet available, the following paragraphs summarize the discussion of the Draft at the Doman Colloquium on the Law of International Watercourses. A copy of the Draft is annexed to the Newsletter for easy reference.

The Colloquium was held at the University of Colorado on October 18, 1991. The Colloquium consisted of four panels that discussed the articles of the Draft. Panel I examined the Introductory Articles (arts. 1-4). Panel II examined General Principles and Planned Measures (arts 5-19). Panel III examined Protection and Preservation, Harmful Conditions and Emergency Situations, and also Protection of Water Installations (arts. 20-25 and 29). Panel IV examined implementation: Joint Institutional Management and Remedies in Domestic Tribunals. Attendance to the Colloquium was based on broad representation of regions and spatial location vis-a-vis river basins.

Summary of Contents

Prof. Stephen McCaffrey, the Special Rapporteur of the ILC, discussed the background of the Draft and made a summary of contents. He noted that two additional parts proposed to the Commission were not included in the draft articles as finally approved. Thus, private remedies, provision of information to the public, jurisdictional immunity, a conference of the parties, and amendments to the original articles are not part of the Draft as submitted for comments. The part on "Fact Finding and Settlement of Disputes", with fact finding provisions and articles on obligation to settle disputes by peaceful means, consultations and negotiations, conciliation, and arbitration, was not included either. One article (32), entitled "Non-Discrimination" by the Draft, remained. The Special Rapporteur suggested four specially relevant issues for future consideration and discussion. They were: Which rule should prevail if the principle of equitable utilization conflicts with the obligation not to cause harm? What is the standard of responsibility for breaching the draft articles, for example art. 7? Is the framework agreement a viable approach for international watercourses? Is the systems approach, as presently defined by the draft articles, the soundest way to define the physical scope of applicability of the draft articles? Should the common terminus concept be retained, and if so, should connections between basins be taken into account?

1/ Colorado Journal of International Environmental Law and Policy, Vol. 3, No. 1, University Press of Colorado.

Prof. McCaffrey paid a special tribute to Professor Robert Hayton. Prof. Hayton has been a main force and influence in the work of the International Law Commission. Later on Prof. Hayton commented on the first four articles of the Draft emphazing that, despite some deficiencies, they must be commended.

General Principles and Planned Measures

Professor Charles Bourne, when discussing principles and planned measures (arts. 5 to 10 and 11 to 19), remarked that there is a lack of balance in the treatment of notifying and notified states for failure to comply with required procedures when dealing with planned measures. This is so because in the absence of reply the notifying State can proceed with the planned measures, but subject to the requirements of arts. 5 and 7. The solution is criticized on the grounds that it does not provide any incentive for the notified State to engage in the process that offers the best chance to find equitable and reasonable solutions to the problems posed by the use of international watercourses. According to Prof. Bourne, a State failing to respond to a notice of planned measures should be stopped from raising claims under arts. 5 and 7 of the Draft (equitable and reasonable utilization and participation and prohibition of appreciable harm).

According to Prof. Bourne the measures under art. 12, those that may have an appreciable adverse effect upon other watercourse states, refer to measures with a potential to affect present, but not future uses. In addition, the ILC has made the prohibition of appreciable harm doctrine the primary rule in the law of the use of international watercourses. The law is slanted in favour of the earliest developer. Focusing his comment on the relative preeminence between arts. 5 (equitable utilization) and 7 (prohibition of appreciable harm) of the Draft, Prof. Bourne notices that it has endorsed the proposal made by Prof. Evensen, a former rapporteur, now a member of the International Court of Justice, by making the prohibition of appreciable harm the dominant criterion. Additionally, appreciable harm caused by pollution is also prohibited, and not qualified by the principle of equitable and reasonable utilization. In turn, "appreciable" refers to a harm that is significant, non-trivial, but is less than substantial. The term "harm" is used in a factual sense, causing an actual impairment to use, injury to health and property, or detrimental effect on the ecology of the watercourse. The standard of liability is not, according to the comment of Prof. McCaffrey cited by Prof. Bourne, strict liability, but fault. The obligations under the prohibition not to cause appreciable harm are obligations of due diligence.

There is ample evidence that the principle of equitable utilization is a rule of customary international law. However, according to Prof. Bourne the cases on which (Corfu Channel,

Lake Lanoux, and the Trail Smelter Arbitration) the draft art. 7 of the ILC rests, do not support it. Neither is the "sic utere tuo alienum non laedas" maxim the proper legal basis for the "no appreciable harm" principle.

In concluding, Prof. Bourne notes that draft articles 11 to 19, on planned measures, are an elaboration of customary international law. The law has been progressively developed and the results should prove acceptable to States. However, in defining the principles of international law applicable to international watercourses the ILC has not been so successful. Equitable utilization (arts. 5 and 6), duty to cooperate (art.8), regular exchange of data and information (art. 9), and relationship between uses (art. 10), reflect current law. On the other hand draft art. 7 does, in the view of Prof. Bourne, reflect a retrogressive, not a progressive development of the Law of International Watercourses. Prof. Bourne was also critical of the use of the term "harm", instead of "injury".

For Ambassador Alberto Szekely arts. 5 to 10 represent the general principles at their minimum expression and consequently with the express exclusion of other principles that are equally valuable and applicable. The Draft has not acknowledged developments in international environmental and natural resources law. The author wonders if there is no room for the inclusion of the precautionary principle in the Draft. He also considers that the general principles of the Draft carry with them the seeds of their own weaknesses: article 5 is limited to reasonable utilization, rather than to optimum sustainable limits; art. 7 allows the causation of harm, as long as it is not appreciable; the obligation to cooperate of art. 8 is only a general one; the exchange of data of art. 9 is regular and restricted, rather than permanent and exhaustive; and the principle of non priority of one use over other uses of art. 10 is incompatible and thereby unacceptable. In addition, the determination of the appreciability of harm is left to the discretion of the State that causes the harm. The Draft does not provide for accumulation of non appreciable harms or adverse effects, neither for mechanisms to prevent them or at least to stop their recurrence. More stringent rules lessen the possibilities of conflict. The commentator also points out that no obligation of prior and timely notification, as it appeared in previous drafts, is found in the draft articles. The conditions and type of information to be provided under art. 9 is left to the unilateral interpretation of the informing State; art. 31 allows the unilateral exclusion of information vital to security and defence, and the circumstances of art. 12 are also of unilateral interpretation. The period of the moratorium of art. 17 is limited to six months, without considering if negotiations and consultations have been exhausted. A lower riparian is disadvantaged. Global warming has been ignored. The factors to be considered by art. 6 should be improved.

Prof. Johan G. Lammers commented on the papers by Prof. Bourne and Ambassador Szekely; for Prof. Lammers the infliction of appreciable harm to already existing uses need not be an equitable use of an international watercourse in all cases. He agrees with Prof. Bourne on the sic utere tuo non laedas maxim.

He also agrees with Prof. Bourne on the point that the Corfu Channel and the Lake Lanoux cases do not really provide support to the no appreciable harm rule. He does not, however, agree with Prof. Bourne on the lack of usefulness of the Trail Smelter Arbitration in supporting the no appreciable harm principle. For Prof. Lammers the Trail Smelter did not reflect nor intend to reflect the principle of equitable utilization. Transboundary air pollution is not permissible under international law when the case is of serious consequence and the injury is established by serious and convincing evidence. The difference with the principle of non appreciable harm is only of degree. In addition the principle of equitable utilization was devised to deal with conflicts not involving pollution. Equitable utilization was developed in relation to diversion cases; the Trail Smelter was based on pollution cases, and not on diversion conflicts. They required serious magnitude, and clear and convincing evidence. In addition, the terms "harm", "injury" and "damage" are very often used interchangeably.

Furthermore, the principle of equitable utilization applies to the use of transboundary resources, but not to environmental interferences. The latter are any impairments of human health, living resources, ecosystems, material property, amenities, or other legitimate uses of a natural resource or the environment caused by man through polluting substances, ionizing radiation, noise, explosions, vibration or other forms of energy, plants, animals, diseases, flooding, sand-drift or other similar means. Accordingly (Legal Experts Group of the World Commission on Environment and Development in their Legal Principles for Environmental Protection and Sustainable Development) conflicts of use and conflicts of environmental interference are subject to different rules of law. Use is regulated by equitable utilization while interference is controlled by the no substantial harm -i.e. harm which is not minor or insignificant- rule. Several additional sources are quoted to sustain this position. Art. 7 should have been made subject to the principle of equitable utilization of art. 5, for cases like diversions, but should continue to be applied without qualification to pollution of the water of an international watercourse.

When dealing with the procedural rules Prof. Lammers states his opinion that the notification, consultation, and negotiation provisions in the ILC Draft do not affect in any manner whatsoever the substantive legal position of the watercourse States. In this last regard Prof. Lammers compares the Draft of the ILC with the Espoo Convention (which is also summarized in

this issue of the Newsletter). The Espoo Convention lists a broad group (Appendix I) of activities to which the Convention applies when they are likely to have a significant adverse transboundary impact. They may, but need not, affect the conditions of an international watercourse. In addition, the activities covered by the Espoo Convention, are subject to a national impact assessment procedure which is submitted for consultations. The Convention does not set a time to respond to a notification, but it provides for the constitution of Commissions of Inquiry to deal with disagreement regarding transboundary impacts. At the same time the interests of the public to be affected are considered more in the Espoo Convention than in the ILC Draft.

In commenting on Ambassador Szekely's paper Prof. Lammers notes that most of the principles concerning transboundary natural resources proposed by the UNCED Legal Experts Group have been taken into account by the draft articles. Also, their acceptability depends on the balance between progressive development and codification, an area which constitutes an extremely sensitive part of international law. In his view the articles are not unfavourable to downstream riparian countries. This follows from, inter alia, the preeminence of art. 7, the procedures in case of lack of notification of art. 18, and the proposed provisions on protection and preservation of arts. 20-23. In addition, the principle of "no appreciable harm" is more stringent than the principle of "no substantial harm"; optimal utilization is required by art. 5 and also by arts. 8 and 26, which also refer to sustainable development. The factors to be added to art. 6, as per Ambassador Szkely's paper, may be considered already included in arts. 6 and 10 of the Draft. Further remarks refer to arts. 8 and 9, 11-19, 24, 25, 26, 27, 28 and 31.

Prof. Gunther Handl questions if the principles introduced in the "general principles and planned measures" provisions of the Draft are progressive development, or they reflect, at least in part, a retrogression. For Prof. Handl lack of response to a notification under arts. 12 to 16 should be subject to a sanction. Also, since the standard of responsibility is due diligence, failure to reply to a notification will affect the decision on liability. The scope of what transnational effects were reasonably foreseeable will likely be narrower due to the absence of any input by the notified State into the acting State decision. Still, failure to reply should carry a stronger sanction, like the exclusion of claims under art. 7, but not under art. 5. (The important question is therefore, if a lack of reply would eventually condone the causation of environmental harm. Might this be to reduce a potentially disastrous incident to the dimension of a private conflict? Newsletter query). Art. 12 brings a welcome progressive development, since it establishes a procedural threshold (appreciable adverse effects) that is

lower than the substantive one that circumscribes the affected State's entitlement (appreciable harm). However Prof. Handl is critical of art. 18 which requires "serious reason" to believe that another State's planned measures may have an appreciable effect on it, for a non notified State to be able to request a notification. Article 18 unduly favours new watercourses plans and activities. Present imbalances should be remedied.

Prof. Handl notes that the present drafting of arts. 5 and 7 has altered the traditional notion of balancing of interests, "intersection of harm and wrong". This interpretation, according to Prof. Handl does not change, even if the standard of art. 7 is one of due diligence and therefore of reasonableness. In addition the ILC breaks new ground by making the "no appreciable harm" rule the dominant principle in international watercourses law. In so doing the Draft breaks with the 1966 Helsinsky Rules, the Montreal Rules of 1982, and also with customary international water law for which the "ultimate criterion of permissible use", is equitable utilization. The reason for this change has surely been concern with pollution damage, but art. 7, as presently drafted, makes no distinctions. In its present drafting it is an across the board proposition. The supremacy of art. 7 should only be upheld in cases of environmental harm. Alternatives to redraft arts. 5 and 7 according to this view are proposed. Appreciable environmental harm is an inequitable use of an international watercourse. Environmental harm below the threshold can still be inequitable.

Several comments were made in the discussion following Prof. Handl's presentation. While it is impossible to refer to them all here, it is worthwhile to point out that Prof. Lammers mentioned that the ILC, when discussing the draft articles on State responsibility also took the view that no response cannot be taken as consent. For wrongfulness to be precluded, consent should be given "clearly and expressly". Prof. Magraw supported art. 10(2), which provides that special regard be given to the requirements of vital human needs. Accordingly, draft articles must take into account the need to alleviate poverty. One billion people live in absolute poverty - a condition of malnutrition, disease, exposure to the elements, and illiteracy that is below any reasonable standard of human decency.

Preservation and Protection, Harmful Conditions, Emergency Situations

Protection of Water Installations

Further comments referred to the draft articles on preservation and protection. Prof. Okidi Okidi emphasized the need to retain the concept of the drainage basin as defined and popularized in the Helsinski Rules. For him a narrow concept of international watercourses is manifestly inappropriate.

Prof. Ved P. Nanda analyzes the draft articles on Protection and Preservation of Ecosystems, Harmful Conditions, Emergency Situations and Protection of Water Installations. He makes a brief reference to historical use of the term "ecosystem". In the past the term was generally limited to agreements addressing wildlife and biodiversity issues, but not international watercourses. Art. 20 of the Draft is consistent with the present trend to increase the use of the ecosystem concept. It is important to define the limits of the ecosystem of an international watercourse. Prof. Nanda suggests that boundary of the ecosystem of an international watercourse may be related to the extent to which there may be appreciable harm under art. 7 of the Draft. The concept of ecosystem is not geographic, but functional. The focus therefore is on relationships. The concept includes interrelated components, where human beings are included, together with other populations, within larger units. The focus is on large ecological units, rather than on specific components of the unit, and on the processes taking place in them.

Art. 20 imposes an obligation to protect and preserve the ecosystems of international watercourses. Poverty and increased population are significant factors of environmental deterioration. Fluctuations in water quantity have significant consequences for the ecosystem of a watercourse. Prof. Nanda notes that, differing from other formulations, art. 21 does not include risk. He also comments on the term "appreciable harm", noting that it is a lower standard than substantial harm. However appreciable implies a tangible affectation, capable of being established by objective evidence, causing a real impairment. The harm need not be serious, but it shall not be insignificant. While previous documents, like the Helsinski Rules, referred to "injury", to signify prohibited state conduct, the Commission preferred the factual standard of harm, for its clarity, instead of the legal concept of injury. Further comments refer to the terms prevention, control and reduction of pollution; the obligation to act individually or jointly; the duty to consult; the obligation to prevent the introduction of alien or new species (art. 22); the protection of estuaries (art.23); the prevention and mitigation of harmful conditions by watercourse States (art.24); emergency situations (art. 25); and art. 29, which deals with watercourses, installations, facilities, and works at times of armed conflicts. Concluding, Prof. Nanda notes that the articles he has commented on should be considered part of the progressive development of international law. The use of an ecosystems approach, of the threshold of appreciable harm, and of the precautionary principle are commended.

Water Pollution

Prof. Albert Utton discusses arts. 21 and 22. The definition of pollution is a factual one, which may eventually apply to the removal of water that reduces diluting capabilities. Thus, pollution may take place by removing water rather than by adding pollutants. This latter interpretation of pollution is not very "felicitous", although the author acknowledges that the comment may be a quibble rather than a criticism. He then distinguishes between pollution (a human fact), and contamination (a phenomenon of nature). He wonders if the introduction of new species constitute pollution and suggests that art. 21(2) refers to water quality rather than to pollution. He proposes to use the words pollution, contamination, and contaminant instead of the word pollution (Newsletter Note: The relative meanings and interpretation of the words contamination and pollution are not universal, homogenous or standardized. For some prestigious publications "contamination" is the impairment of water quality by sewage, industrial waste, or other pollutants to a degree that creates a "hazard to public health", while "pollution" is contamination or other changes in the physical, chemical or biological properties of any substance, especially water, that impairs its quality for use by others, or creates a nuisance or makes the substance detrimental or injurious to public health safety or welfare, including changes in temperature, taste, colour or odour. Contamination would be a type of pollution. Pollution is not, in these definitions, contamination caused by man. Rather, the distinction relates to the effects. Contamination seems to be related to noxious effects on public health, while pollution is more comprehensive. [Waters and Water Rights, Vol. 7, Robert Emmet Clark, Ed. in Chief, Allen Smith Company, 1976, Glossary]).

Another commentator (Ms. Halvorssen) suggested the introduction of an article providing for technical and financial assistance, especially to developing countries.

Management and Domestic Remedies

Prof. Sergei V. Vinogradov commented on the articles on Management and Domestic Remedies. He referred to the general obligation to cooperate and to the objective of optimal utilization. The latter reflects a shift from the no harm doctrine, to the community of interests applied in the Oder River. Integrated management can help to reconcile the principles of equitable utilization and no appreciable harm. Yet, an obligation to manage or to create a joint management mechanism can only be regarded, at present, in terms of **lex ferenda**. He notes that the term "management" has not been defined and mentions management as an administrative process (Cano), and management as a technical approach (Milos Holy). He also notes that the geographic positions of countries (upstream,

downstream) condition their respective attitudes towards legal norms in general and to regulation provisions in particular. He also notes that for a country to share the costs of regulation works such country must expressly consent to such share or payments. Prof. Vinogradad also comments on the obligation not to discriminate on the basis of nationality and residence to grant access to judicial or other procedures. The article applies to persons having suffered actual harm as well as to persons for whom the harm is of a prospective nature. He notes that the title of the article (non discrimination) is broader than its actual content (equal access). Non discrimination is a substantive principle, while equal access is its procedural harm. There are practical problems with the principle, including the fact that many countries (unlike France and the Netherlands) consider that administrative law is strictly territorial, therefore not granting **locus standi** to foreigners. Equal access lacks "opinio iuris" and many states may not accept it as a residual rule of general application. In commenting on draft art. 31, Prof. Vinogradov notices that the key principle is good faith. He also notes that the information or data to be exempt from exchange or communication is the information vital to national defence or security and that the Draft has departed from previous proposals (Schwebel) which had acknowledged the matter of "trade secrets". He emphasizes the role of established law principles in getting the proposals of the ILC accepted, and he also wonders if no vital, but classified, information should be disclosed, or if the matter of vital and classified information should only be generally addressed by the Draft, leaving it to concerned countries to work out specific agreements.

The Law of International Watercourses and International Environmental Law

Prof. Caron warns that the efforts of the ILC might be leapfrogged by current developments in the area of international environmental law (although it will be interesting to see what kind of hurdles the codification and progressive development of international environmental law will face when brought to the level of specific discussion, within the ILC, that the law of international watercourses has been taken to). He then comments on part VI (Management, art. 26; Regulation, art. 27; Installations, art. 28; Armed Conflicts, art. 29; Indirect Procedures, art. 30; Vital Data and Information, art. 31; Non Discrimination, art. 32). The objectives of this part are twofold: implementation and alteration of the underlying social and economic reality.

Implementation includes procedures to resolve disputes between State parties, related to the treaty; and also resort to private remedies for some issues to be handled by the lower level

municipal courts of the parties. Dispute resolution procedures become very important because lacking compulsory procedural rules for the adjudication of differences (particularly submission to a third party) substantive obligations remain "soft law". Unpredictable judicial decisions are an incentive for the parties to an agreement to fully use conflict-solving mechanisms and procedures, before going to arbitration or courts.

Alteration or changes in the social and political reality imply the need to address common issues within an environment of political and administrative divisions. Joint management and permeable boundaries are answers to these issues. The latter might be translated in terms of non discrimination in the access to administrative and judicial procedures. In this last regard art. 32 grants standing to persons having suffered appreciable harm or are exposed to a threat thereof. For the provision to be meaningful, watercourse states must have the organization and the legal provisions required by functionally relevant relief; however, art. 32 has no requirements for either minimal facilities or remedies. Claims are to be related to harm, or threat thereof, "as a result of an activity related to an international watercourse". These activities would be quite broad. The obligations and duties imposed by arts. 26 and 32 are weak and therefore reduce the Draft Rules to the category of "soft law". The original recommendations of Prof. McCaffrey would have been more significant than the present drafting.

Remedies in Domestic Tribunals

Prof. Hunt notices that art. 32 does not provide for impact assessment or for compensation. Prof. Lammers commented that the Espoo Convention does not only provide that there should be equal access, but that there **should be access.** The Convention also provides for public information, both in the country of origin and in the country where the harm might be realized.

Summation of Colloquium

In summarizing the Colloquium Prof. Magraw noticed that the Draft Rules have been formulated at a time of increasing interdependence; there are difficulties in reconciling the principle of equitable utilization (arts. 5 and 6), the no appreciable harm rule (art. 7), the no priority among uses, special regard being given to vital human needs (art. 10) and the prohibition of pollution of art. 21; he also pointed out that views tend to vary with location.

The lack of a compulsory mechanism for dispute settlement was much regretted, with some participants arguing that lacking this mechanism the no appreciable harm rule takes preeminence over the equitable utilization principle. Attention was given to the lack of information and knowledge, as well as a lack of

resources, in some developing countries. The normative strength of the duty to cooperate was a common theme. The importance of public participation, effective management mechanisms, implementation, and specific watercourse regimes were also highlighted. The need to have a consolidated text with the commentaries to the articles was noted. They should be a UN document.

Convention on Environmental Impact Assessment in a Transboundary Context 2/

A Convention on environmental impact assessment on a transboundary context was signed in Espoo, Finland on 25 February 1991. The Convention acknowledges the relationships between economics and the environment. It endorses environmentally sound and sustainable development. The parties promote international cooperation in the assessment of environmental impacts in transboundary context, anticipatory policies, mitigation, prevention and monitoring of environmental impacts, particularly in a transboundary context.

General Provisions

Art. 2 requires that the parties, individually or jointly, take all appropriate and effective measures to prevent, reduce and control significant adverse transboundary environmental impacts from proposed activities. Every party has to take the administrative, legal and other measures required by the implementation of the Convention, including the preparation of environmental impact assessments, with public participation procedures, and preparation of environment impact assessment documentation. Appendix I to the Convention identifies the activities likely to cause a significant adverse transboundary impact. Appendix II identifies the necessary documentation. The preparation of environmental impact assessments prior to a decision is mandatory for the party of origin. It shall ensure that the parties to be affected are notified of a proposed activity. The parties can agree for activities not included in Appendix I to be included in the Convention. Criteria to include new activities are in Appendix III. The party of origin shall ensure participation opportunities for the public of the area likely to be affected, whose participation shall be equivalent to the one provided to the public of the area of origin. The minimum requirement of the Convention is to undertake environmental impact assessment at project level. In addition the parties shall endeavour to apply the principles of

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2/ Convention on Environmental Impact Assessment in a Transboundary Context, Espoo, Finland, 25 February 1991, United Nations, E/ECE/1250.

environmental impact assessments to policies, plans and programmes. The parties can protect information whose supply would be prejudicial to industrial and commercial secrecy and national security. They can also implement measures more stringent than the ones provided for in the Convention. At the same time the Convention does not prejudice any obligations resulting from international law in relation to activities having, or likely to have, a transboundary impact.

Notification

Notification procedures are provided for in art. 3. Their purpose is to ensure adequate and effective consultations under art. 5. The notification is due for activities listed in Appendix I. Notifications shall include the parties that the party of origin considers likely to be affected, and shall take place as early as possible, but no later than the notification to the public of the party of origin. Notification shall include the activity and any available information on impact; nature of the possible decision; indication of a reasonable time for response. Response shall be given within the time indicated by the party of origin, indicating if there is intention to participate in the assessment procedure; lacking to preclude the application of paras. 5,6,7, and 8 of art. 3 and also the application of arts. 4 to 7. The party of origin can carry out the environmental impact assessment under its national law in case of lack of response, or of a response indicating no desire to participate.

A response indicating a desire to participate obliges the party of origin to relevant information to the affected party including environmental impact assessment procedures, and timing for comments; and also the proposed activity and its possible significant adverse transboundary impact. The affected party shall in turn provide reasonably available information on the potentially affected environment of the affected party. The information shall be provided promptly, and as appropriate, through a joint body, where one exists. Should no notification take place the concerned party can request information on activities listed in Appendix I, should the party consider that it would be affected by a significant adverse transboundary impact. Information sufficient to hold discussions on whether an impact might take place shall be exchanged. Lacking agreement, the parties can submit the question to an enquiry commission as provided in Appendix IV, unless they agree on another method to settle the question. The parties shall ensure that the public of the affected areas be informed of the proposed activities and be given opportunities to make comments or objections to the activities, whose comments or objections will be transmitted to a competent authority of the country of origin.

Documentation of the Environmental Impact Assessment

This documentation shall, as a minimum, contain the information of Appendix II (art. 4). The documentation shall be furnished by the party of origin. The information shall be distributed to the authorities and the public of the affected areas. Comments shall be transmitted to the party of origin, within a reasonable time, and before a final decision is taken on the proposed activity.

Consultations Based on the Environmental Impact Assessment Documentation

According to art. 5 consultations shall take place, after completion of environmental impact assessment documentation and without undue delay, on, inter alia, the impact of the proposed measures and measures to reduce or eliminate this impact. Consultations can include alternatives to the proposed activities and mitigation and monitoring measures; forms of mutual assistance in reducing impacts; and any other appropriate matters. Parties shall agree on timeframes for consultations, which can take place through joint bodies, where they exist.

Final Decision

Art. 6 requires that final decisions take into account the environmental impact statement, the corresponding documentation, the comments derived from art. 3 and the outcome of the consultations of art. 5. The decision shall be provided to the affected party, with the reasons and considerations thereof. Additional information made available after decisions, but before implementation, shall be transmitted to the concerned parties, which may require consultations to decide whether a decision needs to be revised.

Post Project Analysis

Art. 7 allows the concerned parties to determine, at the request of any of them, if a post project analysis shall be carried out, and if so, to what extent. Post project analysis shall take into account the likely significant adverse transboundary environmental impacts, the surveillance of the activity and the determination of any adverse transboundary impact. Discovery of significant impacts, or of new factors are reasons for consultations on necessary measures to reduce or eliminate the impact.

Bilateral and Multilateral Cooperation

Art. 8 provides for new or existing arrangements to be used for the implementation of the Convention. They may be based on the elements of Appendix VI.

Research Programmes

According to art. 9 these programmes can refer to methods to assess impacts, better understanding of cause-effect relationships, and their integrated environmental management; implementation of decisions with a view to minimization or prevention of impacts; development of creative approaches in the search for environmentally sound alternatives; and very important, development of methodologies for the application of environmental impact assessment at macroeconomic level.

Appendices

Appendices are integral part of the Convention (art. 10).

Administration of the Convention

Administration of the Convention is implemented in arts. 11 to 14.

Settlement of Disputes

Disputes are to be settled through negotiations or any other method acceptable to the parties. A party may declare to the Depository of the Convention that a compulsory means of dispute settlement, consisting of either arbitration or submission of the dispute to the International Court of Justice, or both, has been accepted. Should the two methods have been accepted, the dispute may be submitted only to the International Court of Justice, unless the parties agree otherwise (art. 15).

Appendix I

The list of activities subject to environmental impact assessment include, inter alia, large dams and reservoirs; trading ports and inland waterways permitting the passage of vessels of over 1,350 tons; waste disposal installations; groundwater extractions where the volumes to be extracted amount to 10 cubic meters or more; offshore hydrocarbon; major storage facilities for oil, deforestation of large areas; major mining, etc.

Appendix II

The environmental impact assessment documentation shall, as a minimum, according to art. 4, contain: description of the activity; and a description of reasonable alternatives to the activity, including no action; a description of the environment likely to be affected; a description of the potential impact on the environment and its significance; a description of mitigation measures; indication of methods, assumptions and data used;

identification of gaps and uncertainties; outline of monitoring and management programmes as well as of post project assessment; non technical summaries including visual aids.

Appendix III

The criteria to determine the significance of activities not listed in Appendix I include size, location, and effects.

Appendix IV

Inquiry commissions consist of three members. The parties shall propose one member each, and the third is selected by the two experts proposed by the parties. The third member shall be the president of the commission. He/she cannot be a national of, nor reside in the territory, of the parties, nor be an employee of the parties or have dealt with the matter in any capacity. There are two months to appoint the president, otherwise it is appointed by the Executive Secretary of the ECE. The Executive Secretary has other appointment prerogatives, in case of failure of one of the parties to appoint its member to the commission. The inquiry commission has ample and broad powers. The Appendix provides procedural rules, and norms on apportionment of costs. Decisions shall be based on accepted scientific principles.

Appendix V

Post project analysis shall monitor compliance with conditions of approval and effectiveness of mitigation measures; review of an impact for proper management and to cope with uncertainties; and verification of past predictions in order to transfer experiences.

Appendix VI

Bilateral and multilateral cooperation may include additional requirements for the implementation of the Convention; institutional and administrative or other arrangements to be made on reciprocal and equivalent basis; harmonization of policies and measures in order to attain the greatest similarity in standards and methods for EIA, methodological improvement and harmonization; establishment of threshold levels, critical loads of transboundary pollution, and criteria; and other joint activities.

Appendix VII

Arbitration request shall identify the matter for arbitration and the articles of the Convention at issue. The tribunal consists of three members. Appointments and requirements, as well as prohibitions, are similar to the ones laid down for the members of enquiry commissions. Decisions

shall be based on international law and the Convention. A decision must be rendered only after the tribunal verifies that the claim is well-founded in fact and law. The tribunal can hear counterclaims. Parties with an interest of a legal nature which can be affected by a decision may intervene in the proceedings with the consent of the tribunal. The award shall be rendered within 5 months. The award shall be accompanied by a statement of reasons; it is final and it is binding. Disputes in the interpretation of the award are also subject to arbitration.

Positive note in the ongoing clash between Hungary and the Slovakian Republic 3/

A positive note has been struck in the ongoing clash between Hungary and the Slovakian Republic over construction of the Danube Dam and the hydroelectric plant at Gabccikovo. Both countries have agreed to a European Community Commission proposal to create a fact-finding group that will report on the immediate effects of the dam. A five-member panel (three representatives from the European Community Commission and one from each nation) will evaluate the study and make recommendations. The dispute will go to binding arbitration if all sides still disagree.

The joint project was undertaken 15 years ago by Hungary and Czechoslovakia to harness the river for electrical power, navigation improvement, and flood control. It was halted last spring when Hungary, citing environmental and territorial violations, announced its official withdrawal from the project. Slovakia has forged ahead with its construction plans, completing 90 percent of the project to date.

The Republic is eager to phase out its coal-fired power plants which produce acid rain and is anxious to begin selling electricity to other countries to raise the capital necessary for economic stability when it becomes a sovereign nation in January. Hungary argues that the hydroelectricity generated by the Gabcikovo power plant is minimal and that the environmental damage caused by the diversion of the Danube River will be irreparable.

Compulsory pollution insurance 4/

3/ International Water Report, page 5, Vol. 15, No. 4, Autumn 1992.

4/ OECD Environment Committee urges nations to consider compulsory pollution insurance, as quoted in Colorado Journal of International Environmental Law and Policy, page 336, Vol. 3, No. 1.

A report issued by the Organization for Economic Cooperation and Development (OECD) on 10 April 1991 called on member nations to require compulsory pollution insurance for some corporations. In its report, the Environment Committee of the OECD recommended compulsory insurance for small and midsized operations vulnerable to accidental pollution but without the budget to compensate victims.

International agreements 5/

France, Germany, the Netherlands, and Switzerland completed an agreement in April 1991 to cut salt discharges into the Rhine River. By agreeing to reduce the discharges, the countries executed the second phase of the 1985 Bonn Convention on the protection of the Rhine against pollution by chlorides.

Representatives from four nations signed an agreement in July 1991 to cooperate in preserving the ecological balance of the Adriatic Sea. Ministers from Albania, Greece, Italy and Yugoslavia joined European Community Environment Commissioner, Carlo Ripa de Meana, in signing the pledge to increase information exchange, improve pollution monitoring, and create protected areas along the Adriatic coasts.

Transboundary pollution 6/

Officials from the United States and Mexico released a draft plan on 1 August 1991 designed to resolve pollution problems along the U.S.-Mexico border. Under the initial phase of the bilateral plan, both countries would determine the volume and extent of waste problems along the border, and examine how the waste is being disposed. The plan also recommends more investment in wastewater treatment plants and an increase in the number of environmental enforcement officials in Mexico.

5/ Four nations agree on plan to cut salty discharges into Rhine River, [Current Reports] 14 Int'l Env't Rep.(BNA) 217 (April 24, 1991) and Four nations, EC agree to cooperate in reducing pollution of the Adriatic [Current Reports] 14 Int'l Env't Rep.(BNA) 422 (July 31, 1991) as quoted in footnote 4.

6/ Keith Bradsher, U.S. and Mexico Draft Plan to Fight Pollution. New York Times, August 2, 1991, at 2, col.5. See also United States and Mexico Draft Environmental Plan for Border, Reuters (August 1, 1991) as quoted in footnote 4.

River pollution agreement 7/

On 21 August 1991, in the first international environmental accord of its kind, the Port of Rotterdam, The Netherlands, and the German Chemical Manufacturer's Association agreed to reduce the amount of pollutants in industrial effluents that reach the Rhine River and its tributaries. More than 100 German chemical companies agreed to cut discharge levels of various metals by 33 to 50 percent. In exchange, Rotterdam will renounce any claims for damages against the companies until 1995.

7/ Port of Rotterdam, German Chemical Firms reach Agreement on Rhine Pollution [Current Reports] 14 Int'l Env't Rep.(BNA) 457 (August 28, 1991). See also Germany agrees to Rhine Pollution Cut, CHEM. WK., August 28/September 4, 1991, at 10, as quoted in footnote 4.

Annex I

ILC Draft Rules

"The International Law Commission,

"Having adopted provisionally the draft articles on the law of the non-navigational uses of international watercourses,

Wishes to express to the Special Rapporteur, Mr. Stephen C. McCaffrey, its deep appreciation for the outstanding contribution he has made to the treatment of the topic by his scholarly research and vast experience, thus enabling the Commission to bring to a successful conclusion its first reading of the draft articles relating to the law of the non-navigational uses of international watercourses."

D. Draft articles on the law of the non-navigational uses of international watercourses

1. Text of draft articles provisionally adopted by the Commission on first reading

Part I

INTRODUCTION

Article 1 216/

Scope of the present articles

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

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

Article 2 217/

Use of terms

For the purposes of the present articles:

(a) "international watercourse" means a watercourse, parts of which are situated in different States;

216/ Initially adopted as article 2. For the commentary, see Yearbook ... 1987, vol. II (Part Two), p. 25.

217/ Subpara. (c) was initially adopted as article 3. For the commentary, see ibid., p. 26. For the commentary to subparas. (a) and (b) see Section D (2) below.

(b) "watercourse" means a system of surface and underground waters constituting by virtue of their physical relationship a unitary whole and flowing into a common terminus;

(c) "watercourse State" means a State in whose territory part of an international watercourse is situated.

Article 3 218/

Watercourse agreements

1. Watercourse States may enter into one or more agreements, hereinafter referred to as "watercourse agreements", which apply and adjust the provisions of the present articles to the characteristics and uses of a particular international watercourse or part thereof.

2. Where a watercourse agreement is concluded between two or more watercourse States, it shall define the waters to which it applies. Such an agreement may be entered into with respect to an entire international watercourse or with respect to any part thereof or a particular project, programme or use, provided that the agreement does not adversely affect, to an appreciable extent, the use by one or more other watercourse States of the waters of the watercourse.

3. Where a watercourse State considers that adjustment or application of the provisions of the present articles is required because of the characteristics and uses of a particular international watercourse, watercourse States shall consult with a view to negotiating in good faith for the purpose of concluding a watercourse agreement or agreements.

Article 4 219/

Parties to watercourse agreements

1. Every watercourse State is entitled to participate in the negotiation of and to become a party to any watercourse agreement that applies to the entire international watercourse, as well as to participate in any relevant consultations.

2. A watercoure State whose use of an international watercourse may be affected to an appreciable extent by the implementation of a proposed watercourse agreement that applies only to a part of the watercourse or to a particular project, programme or use is entitled to participate in consultations on, and in the negotiation of, such an agreement, to the extent that its use is thereby affected, and to become a party thereto.

218/ Initially adopted as article 4. For the commentary, see Yearbook ... 1987, vol. II (Part Two), p. 27.

219/ Initially adopted as article 5. For the commentary, see ibid., p. 30.

Part II

GENERAL PRINCIPLES

Article 5 220/

Equitable and reasonable utilization and participation

1. Watercourse States shall in their respective territories utilize an international watercourse in an equitable and reasonable manner. In particular, an international watercourse shall be used and developed by watercourse States with a view to attaining optimal utilization thereof and benefits therefrom consistent with adequate protection of the watercourse.

2. Watercourse States shall participate in the use, development and protection of an international watercourse in an equitable and reasonable manner. Such participation includes both the right to utilize the watercourse and the duty to cooperate in the protection and development thereof, as provided in the present articles.

Article 6 221/

Factors relevant to equitable and reasonable utilization

1. Utilization of an international watercourse in an equitable and reasonable manner within the meaning of article 5 requires taking into account all relevant factors and circumstances, including:

(a) geographic, hydrographic, hydrological, climatic, ecological and other factors of a natural character;

(b) the social and economic needs of the watercourse States concerned;

(c) the effects of the use or uses of the watercourse in one watercourse State on other watercourse States;

(d) existing and potential uses of the watercourse;

(e) conservation, protection, development and economy of use of the water resources of the watercourse and the costs of measures taken to that effect;

(f) the availability of alternatives, of corresponding value, to a particular planned or existing use.

220/ Initially adopted as article 6. For the commentary, see ibid., p. 31.

221/ Initially adopted as article 7. For the commentary, see ibid., p. 36.

2. In the application of article 5 or paragraph 1 of this article, watercourse States concerned shall, when the need arises, enter into consultations in a spirit of cooperation.

Article 7 222/

Obligation not to cause appreciable harm

Watercourse States shall utilize an international watercourse in such a way as not to cause appreciable harm to other watercourse States.

Article 8 223/

General obligation to cooperate

Watercourse States shall cooperate on the basis of sovereign equality, territorial integrity and mutal benefit in order to attain optimal utilization and adequate protection of an international watercourse.

Article 9 224/

Regular exchange of data and information

1. Pursuant to article 8, watercourse States shall on a regular basis exchange reasonably available data and information on the condition of the watercourse, in particular that of a hydrological, meteorological, hydrogeological and ecological nature, as well as related forecasts.

2. If a watercourse State is requested by another watercourse State to provide data or information that is not reasonably available, it shall employ its best efforts to comply with the request but may condition its compliance upon payment by the requesting State of the reasonable costs of collecting and, where appropriate, processing such data or information.

3. Watercourse States shall employ their best efforts to collect and, where appropriate, to process data and information in a manner which facilitates its utilization by the other watercourse States to which it is communicated.

222/ Initially adopted as article 8. For the commentary, see Yearbook ... 1988, vol. II (Part Two), p. 35.

223/ Initially adopted as article 9. For the commentary, see ibid., p. 41.

224/ Initially adopted as article 10. For the commentary, see ibid., p. 43.

Article 10 225/

Relationship between uses

1. In the absence of agreement or custom to the contrary, no use of an international watercourse enjoys inherent priority over other uses.

2. In the event of a conflict between uses of an international watercourse, it shall be resolved with reference to the principles and factors set out in articles 5 to 7, with special regard being given to the requirements of vital human needs.

PART III

PLANNED MEASURES

Article 11 226/

Information concerning planned measures

Watercourse States shall exchange information and consult each other on the possible effects of planned measures on the condition of an international watercourse.

Article 12 227/

Notification concerning planned measures with possible adverse effects

Before a watercourse State implements or permits the implementation of planned measures which may have an appreciable adverse effect upon other watercourse States, it shall provide those States with timely notification thereof. Such notification shall be accompanied by available technical data and information in order to enable the notified States to evaluate the possible effects of the planned measures.

Article 13 228/

Period for reply to notification

Unless otherwise agreed, a watercourse State providing a notification under article 12 shall allow the notified States a period of six months within which to study and evaluate the possible effects of the planned measures and to communicate their findings to it.

225/ For the commentary see Section D (2) below.

226/ For the commentary, see Yearbook ... 1988, vol. II (Part Two), p. 45.

227/ For the commentary, see ibid., p. 46.

228/ For the commentary, see ibid., p. 49.

Article 14 229/

Obligations of the notifying State during the period for reply

During the period referred to in article 13, the notifying State shall cooperate 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 implement or permit the implementation of the planned measures without the consent of the notified States.

Article 15 230/

Reply to notification

1. The notified States shall communicate their findings to the notifying State as early as possible.

2. If a notified State finds that implementation of the planned measures would be inconsistent with the provisions of articles 5 or 7, it shall communicate this finding to the notifying State within the period referred to in article 13, together with a documented explanation setting forth the reasons for the finding.

Article 16 231/

Absence of reply to notification

If, within the period referred to in article 13, the notifying State receives no communication under paragraph 2 of article 15, it may, subject to its obligations under articles 5 and 7, proceed with the implementation of the planned measures, in accordance with the notification and any other data and information provided to the notified States.

Article 17 232/

Consultations and negotiations concerning planned measures

1. If a communication is made under paragraph 2 of article 15, the notifying State and the State making the communication shall enter into consultations and negotiations with a view to arriving at an equitable resolution of the situation.

229/ For the commentary, see ibid., p. 50.

230/ For the commentary, see ibid.

231/ For the commentary, see ibid., p. 51.

232/ For the commentary, see ibid.

2. The consultations and negotiations shall be conducted on the basis that each State must in good faith pay reasonable regard to the rights and legitimate interests of the other State.

3. During the course of the consultations and negotiations, the notifying State shall, if so requested by the notified State at the time it makes the communication, refrain from implementing or permitting the implementation of the planned measures for a period not exceeding six months.

Article 18 233/

Procedures in the absence of notification

1. If a watercourse State has serious reason to believe that another watercourse State is planning measures that may have an appreciable adverse effect upon it, the former State may request the latter to apply the provisions of article 12. The request shall be accompanied by a documented explanation setting forth the reasons for such belief.

2. In the event that the State planning the measures nevertheless finds that it is not under an obligation to provide a notification under article 12, it shall so inform the other State, providing a documented explanation setting forth the reasons for such finding. If this finding does not satisfy the other State, the two States shall, at the request of that other State, promptly enter into consultations and negotiations in the manner indicated in paragraphs 1 and 2 of article 17.

3. During the course of the consultations and negotiations, the State planning the measures shall, if so requested by the other State at the time it requests the initiation of consultations and negotiations, refrain from implementing or permitting the implementation of those measures for a period not exceeding six months.

Article 19 234/

Urgent implementation of planned measures

1. In the event that the implementation of planned measures is of the utmost urgency in order to protect public health, public safety or other equally important interests, the State planning the measures may, subject to articles 5 and 7, immediately proceed to implementation, notwithstanding the provisions of article 14 and paragraph 3 of article 17.

233/ For the commentary, see ibid., p. 52.

234/ For the commentary, see ibid., p. 53.

2. In such cases, a formal declaration of the urgency of the measures shall be communicated to the other watercourse States referred to in article 12 together with the relevant data and information.

3. The State planning the measures shall, at the request of any of the States referred to in paragraph 2, promptly enter into consultations and negotiations with it in the manner indicated in paragraphs 1 and 2 of article 17.

PART IV

PROTECTION AND PRESERVATION

Article 20 235/

Protection and preservation of ecosystems

Watercourse States shall, individually or jointly, protect and preserve the ecosystems of international watercourses.

Article 21 236/

Prevention, reduction and control of pollution

1. For the purposes of this article, "pollution of an international watercourse" means any detrimental alteration in the composition or quality of the waters of an international watercourse which results directly or indirectly from human conduct.

2. Watercourse States shall, individually or jointly, prevent, reduce and control pollution of an international watercourse that may cause appreciable harm to other watercourse States or to their environment, including harm to human health or safety, to the use of the waters for any beneficial purpose or to the living resources of the watercourse. Watercourse States shall take steps to harmonize their policies in this connection.

3. Watercourse States shall, at the request of any of them, consult with a view to establishing lists of substances, the introduction of which into the waters of an international watercourse is to be prohibited, limited, investigated or monitored.

235/ Initially adopted as article 22. For the commentary see Report of the International Law Commission on the work of its forty-second session, (Official Records of the General Assembly, Forty-fifth session, Supplement No. 10) (A/45/10), p. 147.

236/ Initially adopted as article 23. For the commentary, see ibid., p. 158.

Article 22 237/

Introduction of alien or new species

Watercourse States shall take all measures necessary to prevent the introduction of species, alien or new, into an international watercourse which may have effects detrimental to the ecosystem of the watercourse resulting in appreciable harm to other watercourse States.

Article 23 238/

Protection and preservation of the marine environment

Watercourse States shall, individually or jointly, take all measures with respect to an international watercourse that are necessary to protect and preserve the marine environment, including estuaries, taking into account generally accepted international rules and standards.

PART V

HARMFUL CONDITIONS AND EMERGENCY SITUATIONS

Article 24 239/

Prevention and mitigation of harmful conditions

Watercourse States shall, individually or jointly, take all appropriate measures to prevent or mitigate conditions that may be harmful to other watercourse States, whether resulting from natural causes or human conduct, such as flood or ice conditions, water-borne diseases, siltation, erosion, salt-water intrusion, drought or desertification.

Article 25 240/

Emergency situations

1. For the purposes of this article, "emergency" means a situation that causes, or poses an imminent threat of causing, serious harm to watercourse States or other States and that results suddenly from natural

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237/ Initially adopted as article 24. For the commentary, see ibid., p. 167.

238/ Initially adopted as article 25. For the commentary, see ibid., p. 169.

239/ Initially adopted as article 26. For the commentary, see ibid., p. 172.

240/ Initially adopted as article 27. For the commentary, see ibid., p. 174.

causes, such as floods, the breaking up of ice, landslides or earthquakes, or from human conduct as for example in the case of industrial accidents.

2. A watercourse State shall, without delay and by the most expeditious means available, notify other potentially affected States and competent international organizations of any emergency originating within its territory.

3. A watercourse State within whose territory an emergency originates shall, in cooperation with potentially affected States and, where appropriate, competent international organizations, immediately take all practicable measures necessitated by the circumstances to prevent, mitigate and eliminate harmful effects of the emergency.

4. When necessary, watercourse States shall jointly develop contingency plans for responding to emergencies, in cooperation, where appropriate, with other potentially affected States and competent international organizations.

PART VI

MISCELLANEOUS PROVISIONS

Article 26 241/

Management

1. Watercourse States shall, at the request of any of them, enter into consultations concerning the management of an international watercourse, which may include the establishment of a joint management mechanism.

2. For the purposes of this article, "management" refers, in particular, to:

(a) planning the sustainable development of an international watercourse and providing for the implementation of any plans adopted; and

(b) otherwise promoting rational and optimal utilization, protection and control of the watercourse.

Article 27 242/

Regulation

1. Watercourse States shall cooperate where appropriate to respond to needs or opportunities for regulation of the flow of the waters of an international watercourse.

241/ For the commentary see Section D (2) below.

242/ Ibid.

2. Unless they have otherwise agreed, watercourse States shall participate on an equitable basis in the construction and maintenance or defrayal of the costs of such regulation works as they may have agreed to undertake.

3. For the purposes of this article, "regulation" means the use of hydraulic works or any other continuing measure to alter, vary or otherwise control the flow of the waters of an international watercourse.

Article 28 243/

Installations

1. Watercourse States shall, within their respective territories, employ their best efforts to maintain and protect installations, facilities and other works related to an international watercourse.

2. Watercourse States shall, at the request of any of them which has serious reason to believe that it may suffer appreciable adverse effects, enter into consultations with regard to:

(a) the safe operation or maintenance of installations, facilities or other works related to an international watercourse; or

(b) the protection of installations, facilities or other works from wilful or negligent acts or the forces of nature.

Article 29 244/

International watercourses and installations in time of armed conflict

International watercourses and related installations, facilities and other works shall enjoy the protection accorded by the principles and rules of international law applicable in international and internal armed conflict and shall not be used in violation of those principles and rules.

243/ Ibid.

244/ For the commentary, see Section D (2) below.

Article 30 245/

Indirect procedures

In cases where there are serious obstacles to direct contacts between watercourse States, the States concerned shall fulfil their obligations of cooperation provided for in the present articles, including exchange of data and information, notification, communication, consultations and negotiations, through any indirect procedure accepted by them.

Article 31 246/

Data and information vital to national defence or security

Nothing in the present articles obliges a watercourse State to provide data or information vital to its national defence or security. Nevertheless, that State shall cooperate in good faith with the other watercourse States with a view to providing as much information as possible under the circumstances.

Article 32 247/

Non-discrimination

Watercourse States shall not discriminate on the basis of nationality or residence in granting access to judicial and other procedures, in accordance with their legal systems, to any natural or juridical person who has suffered appreciable harm as a result of an activity related to an international watercourse or is exposed to a threat thereof.

245/ This article, initially adopted as article 21, has been moved to Part VI and reformulated to make it applicable to the entire set of articles. In particular, the article has been recast to provide for indirect means of fulfilling the entire range of procedural obligations set forth in the draft. The commentary to former article 21 remains valid for article 30. That commentary may be found in Yearbook ... 1988, vol. II (Part Two), p. 54.

246/ Initially adopted as article 20. For the commentary see ibid.

247/ For the commentary, see Section D (2) below.