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THIRD REPORT ON THE LAW OF THE NON-NAVIGATIONAL USES OF INTERNATIONAL WATERCOURSES

by

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CONTENTS

CONTENTS (continued)

I. STATUS OF WORK ON THE TOPIC

1. A complete survey of the status of the Commission's work on the topic of the law of the non-navigational uses of international watercourses was provided both in the Special Rapporteur's preliminary report 1/ and in his second report. 2/ It is therefore hoped that it will suffice for present purposes merely to recall several key decisions that the Commission has taken during the course of its work on the topic.

2. The topic of international watercourses was included in the Commission's general programme of work in 1971 and has been on its active agenda since 1974. At its thirty-second session, in 1980, the Commission provisionally adopted six draft articles, articles 1 to 5 and article X, which read as follows:

Article 1

Scope of the present articles

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

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

Article 2

System States

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

Article 3

System agreements

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

1/ A/CN.4/393, paras. 2-47.

2/ A/CN.4/399 and Add.1-2, paras. 1-53.

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

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

Article 4

Parties to the negotiation and conclusion of system agreements

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

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

Article 5

Use of waters which constitute a shared natural resource

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

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

Article X

Relationship between the present articles and other treaties in force

Without prejudice to paragraph 3 of article 3, the provisions of the present article do not affect treaties in force relating to a particular

international watercourse system or any part thereof or particular project, programme or use.

3. On the recommendation of the Drafting Committee, the Commission in 1980 further accepted a provisional working hypothesis as to what was meant by the term "international watercourse system". The hypothesis was contained in a note which read as follows:

> "A watercourse system is formed of hydrographic components such as rivers, lakes, canals, glaciers and groundwater constituting by virtue of their physical relationship a unitary whole; thus, any use affecting waters in one part of the system may affect waters in another part.
>
> "An 'international watercourse system' is a watercourse system, components of which are situated in two or more States.
>
> "To the extent that parts of the waters in one State are not affected by or do not affect uses of waters in another State, they shall not be treated as being included in the international watercourse system. Thus, to the extent that the uses of the waters of the system have an effect on one another, to that extent the system is international, but only to that extent; accordingly, there is not an absolute, but a relative, international character of the watercourse."

4. At its thirty-fifth (1983) and thirty-sixth (1984) sessions the Commission had before it a complete set of draft articles on the topic, in the form of a tentative draft convention, which had been submitted by the then Special Rapporteur as a basis of discussion. 3/ This draft, as revised in 1984, consisted of 41 draft articles arranged in six chapters. The titles of the chapters, which provide a convenient overview of the scope of the draft, were as follows:

Chapter I. Introductory articles

Chapter II. General principles, rights and duties of watercourse States

Chapter III. Co-operation and management in regard to international watercourses

Chapter IV. Environmental protection, pollution, health hazards, natural hazards, safety and national and regional sites

Chapter V. Peaceful settlement of disputes

Chapter VI. Final provisions

3/ See Yearbook of the International Law Commission, 1983, vol. II (Part One), p. 155, document A/CN.4/367 (first report); and Yearbook ... 1984, vol. II (Part One), p. 101, document A/CN.4/381 (second report).

5. At the conclusion of its discussion of the topic in 1984, the Commission decided to refer to the Drafting Committee the nine draft articles contained in chapters I and II of the 1984 version of the draft convention. 4/ This action was, however, taken with the understanding "that the Drafting Committee would also have available the text of the provisional working hypothesis adopted by the Commission at its thirty-second session, in 1980 ..., the texts of articles 1 to 5 and X provisionally adopted by the Commission at the same session ..., and the texts of articles 1 to 9 as proposed by the Special Rapporteur in his first [1983] report ... ." 5/ The Drafting Committee has not been able to take up the articles due to lack of time. The Comission was able to consider the topic only very briefly and generally in 1985 and 1986. 6/

4/ This decision is recorded in the Commission's 1984 report to the General Assembly, Yearbook ... 1984, vol. II (Part Two), p. 88, document A/39/10, para. 280.

5/ Ibid., footnote 285.

6/ At its thirty-eighth session, in 1986, the Commission discussed several proposals made by the Special Rapporteur regarding the future course of work on the topic. The discussion was brief, as indicated above and, due to lack of time, not all members of the Commission were able to comment on the proposals. While no concrete decisions were made, the Special Rapporteur drew general conclusions from the debate. These conclusions are summarized in the Commission's report to the General Assembly on the work of its thirty-eighth session (Official Records of the General Assembly, Forty-first Session, Supplement No. 10 (A/41/10), paras. 236-242).

II. PROCEDURAL RULES RELATING TO THE UTILIZATION OF INTERNATIONAL WATERCOURSES: GENERAL CONSIDERATIONS

6. In his second report, in 1986, the Special Rapporteur offered for the Commission's consideration a set of five draft articles dealing with "the kinds of procedural requirements that are an indispensable adjunct to the general principle of equitable utilization." 7/ These requirements relate to cases in which a State contemplates a new use of an international watercourse - including an addition to or alteration of an existing use - where the new use may cause appreciable harm to other States using the watercourse. Due to the limited time available at that session, most members who commented on these articles did so only in very general terms.

7. The centerpiece of the present report is a set of draft articles on procedural requirements, reformulated in the light of comments made at the 1986 session. Before turning to these draft articles, however, the Special Rapporteur considers it important to place these articles in context by providing a brief sketch of (1) how the requirements they embody fit into the larger scheme of international watercourse management, and (2) why the requirements are in any event a necessary adjunct to the doctrine of equitable utilization.

A. Background: an overview of general principles of water resource management

8. In this section of the report, the Special Rapporteur will review in summary fashion the relevant features of a modern system of water resource management. The aim of this discussion is to provide a backdrop against which to consider the kinds of provisions that should be included in the present set of draft articles. The Commission's task includes both the codification and the progressive development of rules of general international law relating to the non-navigational uses of international watercourses, and it is believed that the process of the progressive development of norms in this field must be predicated upon a basic understanding of principles of optimal water resource management, as well as upon considerations of harmonious inter-State relations.

7/ Second report on the law of the non-navigational uses of international watercourses, A/CN.4/399/Add.2, para. 188.

9. Experts in the field agree that proper and effective planning is essential to the optimal utilization and management of water resources. 8/ It can also assist greatly in resolving conflicting water uses, be they existing or potential. As noted by one authority on water law, "[a] plan cannot solve unforeseeable problems, but it can provide a procedure and analytical method which when applied to new and unforeseen situations will lead to correct solutions". 9/

10. Water planning begins, of course, on the national level. The Mar del Plata Action Plan, adopted by the United Nations Water Conference held at Mar del Plata in 1977, contains the following general recommendation concerning national water policy:

> "Each country should formulate and keep under review a general statement of policy in relation to the use, management and conservation of water, as a framework for planning and implementing specific programmes and measures for efficient operation of schemes. National development plans and policies should specify the main objectives of water-use policy, which should in turn

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8/ See, e.g., Ely and Wolman, "Administration", in The Law of International Drainage Basins, A. Garretson, R. Hayton, and C. Olmstead, eds., Dobbs Ferry, N.Y., Oceana Publications, 1967, chap. 4, p. 124, at pp. 146-147 (hereafter cited as "Garretson et al."); Garretson, "Introduction" to Part II, Selected Basin Studies, in Garretson et al., at p. 163; S. Schwebel, Third report on the law of the non-navigational uses of international watercourses (hereafter referred to as "S. Schwebel, Third Report"), Yearbook ... 1982, vol. II (Part One), p. 65, at pp. 175, et seq., and authorities there cited, document A/CN.4/348, paras. 452 et seq.; Experiences in the development and management of international river and lake basins, Proceedings of the United Nations Interregional Meeting of International River Organizations, Dakar, Senegal, 5-14 May 1981, Natural Resources/Water Series No. 10, ST/ESA/120 (United Nations publication, Sales No. E.82.II.A.17), p. 9, para. 28, conclusion 5 (hereinafter cited as "Dakar Meeting Proceedings"); Report of the United Nations Water Conference, Mar del Plata, 14-25 March 1977, E/CONF.70/29 (United Nations publication, Sales No. E.77.II.A.12), p. 30, para. 43 (hereafter cited as "UN Water Conference Report"); Economic Commission for Europe, River Basin Management, Proceedings of the Seminar organized by the Committee on Water Problems of the United Nations Economic Commission for Europe and held in London (United Kingdom), 15-22 June 1970, ST/ECE/WATER/3 (United Nations publication, Sales No. E.70.II.E.17), p. 16, especially recommendations c, e, and f. See also the classic study by H. Smith, The Economic Uses of International Rivers, especially chap. V, "The function of International Commissions", pp. 120 et seq. (1931), noting the value of commissions in performing functions from the setting of broad planning goals to the determination of equitable allocations.

9/ F. Trelease, Recommendations for Water Resources Planning and Administration, A Report to the State of Alaska (1977), p. 16.

be translated into guidelines and strategies, subdivided, as far as possible, into programmes for the integrated management of the resource". 10/

The Action Plan goes on to recommend that States should, inter alia, "formulate master plans for countries and river basins to provide a long-term perspective for planning ...". 11/

11. Many States have formulated such policy statements and plans 12/ and in some countries, planning is effected on the regional or constituent state level. 13/ An example of planning within a federal system is the flexible process provided for in legislation of the United States state of Wyoming, which illustrates the modern approach to water resources management. That approach calls for the competent state agency to "formulate and from time to time review and revise water and related land resources plans for the state of Wyoming and for appropriate regions and river basins." 14/ These plans are to implement state policies concerning the state's water and related land resources. 15/ The legislation calls for the plans to survey the quantity and quality of existing water resources; to determine current uses of water and activities that affect or are related to water; to identify prospective needs and demands for water, as well as opportunities for development and regulation of water resources; to identify state, regional and local water-resource management goals and objectives for each plan; and to evaluate prospective and anticipated uses and projects in terms of the goals that have been identified. 16/ The Wyoming legislation thus envisions a flexible process of hydrological data collection, determination of existing and future needs, identification of objectives and evaluation of new uses and activities in terms of the objectives.

10/ United Nations Water Conference Report, supra, note 8, p. 30, para. 43. The report goes on, in its next paragraph, to specify the manner in which policy statements and plans should be formulated and implemented.

11/ Ibid., p. 31, para. 44 (h).

12/ See, e.g., the comparative study by the Secretariat (Department of Economic and Social Affairs) of national water systems in selected countries, in National Systems of Water Administration, ST/ESA/17 (United Nations publication, Sales No. E.74.II.A.10).

13/ In India, for example, "the central Government is constitutionally limited in the exercise of power by the fact that irrigation [and control of surface waters are] in the hands of the states, though it does play a larger role with regard to power generation and navigation." Ahuja, "Water Administration in India", in National Systems of Water Administration, ibid., p. 108, at p. 114. See this study at pp. 114-115 for a discussion of national and sub-national jurisdiction over water in India, including coverage of national, regional, community and local
powers.

14/ Wyo. Stat. 1977, sect. 41-2-107.

15/ Ibid.

16/ Ibid., sect. 41-2-109.

12. The planning process becomes more complicated, but is no less important, when the water resources in question are located in more than one jurisdiction. It perhaps goes without saying that this is true even when the jurisdictions in question are constituent governmental units of a federal State. Again, the United States experience is instructive. Of the various ways of resolving disputes between US states over interstate water allocation, 17/ the interstate water compact is most relevant for present purposes, since it is closely analogous to a bilateral treaty governing an international watercourse. 18/ The Delaware River Basin Compact is a modern interstate agreement which provides a convenient illustration of how modern water planning may be effected in a multi-jurisdictional setting. 19/

13. As the Delaware River flows from its headwaters in New York to the sea, it forms the boundary first between New York and Pennsylvania, then between New Jersey and Pennsylvania, and finally between New Jersey and Delaware. It empties into the Atlantic Ocean at Delaware Bay.

> "By most standards it is a small river basin, [20/] but the demands upon its waters are enormous. Not only must it meet the heavy industrial and domestic water supply needs of the industries and communities [including Philadelphia] supporting some 7 million people in the basin, but its waters are used in a much broader service area outside the basin by some 15 million additional users, primarily in New York City, which taps the Delaware sources for a major part of its water supply. The upper and lower valleys of the basin are

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17/ Three methods of resolving water disputes between US states have evolved over the years: lawsuits in the US Supreme Court between the states involved to establish an equitable apportionment (see, e.g., Kansas v. Colorado, 206 United States Reports (hereafter cited as "U.S.") 46 (1907), and Kansas v. Colorado, 185 U.S. 125 (1902)); interstate water compacts; and apportionments made by the federal legislature (Congress) in the exercise of its powers over navigable waters and federal property.

18/ For a general discussion of water compacts between US states, see J. Muys, Interstate Water Compacts: The Interstate Compact and Federal-Interstate Compact, study prepared for the National Water Commission, 1 July 1971. See also the collection of interstate compacts in Documents on the Use and Control of the Waters of Interstate and International Streams, Compacts, Treaties, and Adjudications, pp. 3-378, T. Richard Witmer, comp. and ed., 90th Cong., 2d Sess., House Doc. No. 319 (United States Government Printing Office, 2d ed., 1968) (hereafter cited as "Documents on the Use and Control").

19/ See, generally, Martin, Birkhead, Burkhead and Munger, River Basin Administration and the Delaware (1960).

20/ The Delaware drains an area of 12,765 square miles.

distinctly different economic units: the upper primarily rural with low population density and little industry; the lower heavily metropolitan, [and] industrialized ..." 21/

The Delaware River basin is thus an interesting case study since it involves a rural, less developed and populated area upstream and an industrialized region downstream. Similar factual settings exist with regard to a number of international watercourses. The fact that Delaware River water is transferred out of the basin, to the Hudson River watershed, adds an interesting dimension.

14. It was in fact the idea of using the headwaters of the Delaware in New York state as a new source of water for New York City that led eventually to the establishment of a commission to plan and regulate the use of water in the Delaware River basin. 22/ New York City's consideration of this plan in the early 1920s prompted the other riparian states to resume the negotiation of an interstate compact which would establish a comprehensive plan for the use and apportionment of the waters of the basin. After two proposed compacts had failed of ratification in Pennsylvania, however, New York City decided unilaterally to proceed with the project.

15. Fearful that the planned diversion would result in environmental damage and injuries to instream uses, 23/ New Jersey brought a lawsuit against both the City and the state of New York, invoking the original jurisdiction of the US Supreme Court, seeking to enjoin New York from going forward with the project. 24/ The Supreme Court allowed New York to proceed with its plans, but protected downstream interests by (1) limiting diversion from the basin to a quantity that would not substantially injure instream recreation uses or oyster fisheries in Delaware Bay, 25/ and (2) requiring the construction of a sewage treatment plant, as well as

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21/ Muys, supra, note 18, at p. 118.

22/ For a discussion of the genesis of the Delaware River Basin Compact see Muys, supra, note 18, at pp. 118 et seq.

23/ Examples of instream uses are estuarine oyster fisheries, anadromous fish runs, navigation and recreation.

24/ New Jersey v. New York, 283 U.S. 336 (1931). Pennsylvania became a party to the suit by intervention, 280 U.S. 528, 533, but it was denied the relief it sought. 283 U.S., at p. 481.

25/ Ibid., 283 U.S., at pp. 345-347. With regard to the proposed inter-basin transfer of water, the Court had the following to say: "The removal of water to a different watershed obviously must be allowed at times unless States are to be deprived of the most beneficial use on formal grounds. In fact it has been allowed repeatedly and has been practiced by the States concerned." 283 U.S., at p. 343, citing Missouri v. Illinois, 200 U.S. 496; Wyoming v. Colorado, 259 U.S. 419; and Connecticut v. Massachusetts, 282 U.S. 660.

treatment of industrial waste, at the main source of pollution in New York state, and requiring New York to maintain minimum flows by releasing water from its reservoirs. 26/

16. In the course of the opinion, Justice Oliver Wendell Holmes, writing for the Court, made the following statement of the generally applicable principles, which has since become a classic in the field of US interstate water law:

> "A river is more than an amenity, it is a treasure. It offers a necessity of life that must be rationed among those who have power over it. New York has the physical power to cut off all the water within its jurisdiction. But clearly the exercise of such a power to the destruction of the interests of lower States could not be tolerated. And on the other hand equally little could New Jersey be permitted to require New York to give up its power altogether in order that the river might come down to it undiminished. Both States have real and substantial interests in the River that must be reconciled as best they may. The different traditions and practices in different parts of the country may lead to varying results but the effort always is to secure an equitable apportionment without quibbling over formulas." 27/

17. Subsequent efforts to arrive at a comprehensive plan for the use and development of the river 28/ culminated in 1961 with the conclusion of the Delaware

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26/ Ibid.

27/ Ibid., at pp. 342-343.

28/ These efforts are described in Muys, supra, note 18, at pp. 120 et seq. Among the principal events leading to the conclusion of the Delaware River Basin Compact were the following: (1) The formation of the Interstate Commission on the Delaware River Basin (INCODEL) by the enactment of reciprocal legislation by the four basin states between 1936 and 1939. INCODEL focused its efforts principally upon pollution control, but did submit to the basin states a proposed compact providing for a comprehensive basin plan and an interstate commission. This compact was rejected by the states. (2) The filing by New York City in 1952 of a petition with the US Supreme Court seeking an increase in the diversions permitted under the Court's 1931 decree. This action was resolved when the Court approved a compromise between the states in 1954. New Jersey v. New York, 347 U.S. 995 (1954). (3) The devastation wrought in the Delaware Valley region by hurricanes "Connie" and "Diane" in July 1955, which spurred planning efforts. (4) The formation of the Delaware River Basin Advisory Committee (DRBAC), composed of the governors of the four basin states, as well as the mayors of Philadelphia and New York City. The DRBAC ultimately drafted the agreement that became the Delaware River Basin Compact.

River Basin Compact between the four basin states and the federal government. 29/ Article 1, section 1.3, of the Compact contains the following findings and statements of purpose:

> "(a) The water resources of the basin are affected with a local, state, regional and national interest and their planning, conservation, utilization, development, management and control, under appropriate arrangements for intergovernmental cooperation, are public purposes of the respective signatory parties.
>
> "(b) The water resources of the basin are subject to the sovereign right and responsibility of the signatory parties, and it is the purpose of this compact to provide for a joint exercise of such powers of sovereignty in the common interests of the people of the region.
>
> "(c) The water resources of the basin are functionally inter-related, and the uses of these resources are interdependent. A single administrative agency is therefore essential for effective and economical direction, supervision and coordination of efforts and programs of federal, state and local governments and of private enterprise.
>
> "(d) ... ever increasing economies and efficiencies in the use and reuse of water resources can be brought about by comprehensive planning, programming and management.
>
> "(e) In general, the purposes of this compact are to promote interstate comity; to remove causes of present and future controversy; to make secure and protect present developments within the states; to encourage and provide for the planning, conservation, utilization, development, management and control of the water resources of the basin; to provide for cooperative planning and action by the signatory parties with respect to such water resources; and to apply the principle of equal and uniform treatment to all water users who are similarly situated and to all users of related facilities, without regard to established political boundaries." 30/

18. Article 2 of the Compact establishes the Delaware River Basin Commission (DRBC), to be composed of the governors of the signatory states and one commissioner to be appointed by the President of the United States to serve during

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29/ State ratifications: Del. Code Ann., sec. 1001; N.J. Stat. Ann., secs. 32:11D-1 et seq.; McKinney's Cons. Laws N.Y. Ann., Book 10, sec. 801; Purdon's Pa. Stat. Ann. 1949, Tit. 32, sec. 815.101. Federal government enactment: Act of September 27, 1961, 75 Stat. 688; reprinted in Documents on the Use and Control, supra, note 18, at pp. 95 et seq.

30/ Documents on the Use and Control, supra, note 18, at pp. 97-98.

the President's term of office. 31/ The commission's general purposes and duties are stated in article 3, section 3.1, as follows:

> "The commission shall develop and effectuate plans, policies and projects relating to the water resources of the basin. It shall adopt and promote uniform and coordinated policies for water conservation, control, use and management in the basin. It shall encourage the planning, development and financing of water resources projects according to such plans and policies." 32/

The commission's general planning duties are set forth in section 3.2, which directs the commission to formulate and adopt:

> "(a) A comprehensive plan, after consultation with water users and interested public bodies, for the immediate and long-range development and uses of the water resources of the basin; [and]
>
> "(b) [An annual] water resources program, based upon the comprehensive plan, which shall include a systematic presentation of the quantity and quality of water resources needs of the area to be served for such reasonably foreseeable period as the commission may determine, balanced by existing and proposed projects required to satisfy such needs, including all public and private projects affecting the basin, together with a separate statement of the projects proposed to be undertaken by the commission during such period; ... 33/

19. To enable it to implement the comprehensive plan and water resources programme, article 3 goes on to endow the DRBC with broad powers, 34/ including powers of water allocation, use regulation, project planning and construction, research, data collection and publication, rate fixing and project approval.

31/ The governors are normally represented by alternates, as permitted by sect. 2.3. The commission meets once a month, and more often if circumstances require. The day-to-day work of the commission is performed by its staff. See Muys, supra, note 18, at p. 187.

32/ Ibid., at p. 99.

33/ Ibid., at pp. 99-100. Article 13 elaborates on the contents of the plan and programme envisioned in article 3. Section 13.2 explains that a water-resources programme is to be adopted annually by the commission, taking into account needs "during the ensuing six years or such other reasonably foreseeable period as the commission may determine".

34/ See also art. 10, which allows the commission to "regulate and control withdrawals and diversions from surface waters and ground waters of the basin"; and art. 14, which in sect. 14.2 authorizes the commission to "make and enforce reasonable rules and regulations for the effectuation, application and enforcement of [the] compact".

Specifically, section 3.3 empowers the commission, "in accordance with the doctrine of equitable apportionment, to allocate the waters of the basin to and among the [signatory states], and to impose conditions, obligations and release requirements related thereto, subject to [specified] limitations ..." 35/ Furthermore, any new project "having a substantial effect on the water resources of the basin" must be approved by the commission, which is directed to grant approval "whenever it finds and determines that such project would not substantially impair or conflict with the comprehensive plan ..." 36/

20. Articles 4 through 10 provide for specific commission powers relating to water supply, pollution control, flood protection, watershed management (including soil conservation, promotion of sound forestry practices, and fish and wildlife management), recreation, hydroelectric power, and regulation of withdrawals and diversions.

21. The Delaware River Basin Compact thus provides a useful example of a modern planning approach to the management of an inter-jurisdictional watercourse, including an administrative body for the implementation of that approach. A similar framework for multi-purpose planning and integrated development of a watercourse system, this time on the international level, was established in 1972 for the Senegal River. 37/ That river's principal tributaries rise in Guinea and

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35/ This flexible provision for the administrative allocation of basin waters in accordance with the principle of equitable apportionment is a unique feature of the compact. See Muys, supra, note 18, at p. 149. The DRBC's powers of allocation are, however, limited by the 1954 decree of the US Supreme Court in New Jersey v. New York, 347 U.S. 995 (1954). See sects. 3.3-3.5 of the compact.

36/ Ibid., sect. 3.8. That section goes on to provide for review of the commission's determinations "in any court of competent jurisdiction." "The DRBC exercised its sect. 3.8 project review power for the first time in August 1962 when it approved Philadelphia's application to enlarge its Northeast Sewage Treatment Works. It has subsequently [as of 1971] reviewed over 1,400 proposed projects for their compatibility with the comprehensive plan." Muys, supra, note 18, at p. 161 (footnotes omitted).

37/ Convention relative au statut du fleuve Sénégal, and Convention portant creation de l'Organisation pour la mise en valeur du fleuve Sénégal, both signed at Nouakchott 11 March 1972, reprinted in Treaties concerning the utilization of international watercourses for other purposes than navigation: Africa, Natural Resources, Water Ser. No. 13, ST/ESA/141 (United Nations publication, Sales No. E/F.84.II.A.7), pp. 16 and 21, respectively. The OMVS Convention was modified by three resolutions of the Conference of Heads of State and Government of the OMVS, 6/75/C.C.E.G/MN.N of 16 December 1975, 6/C.C.E.G./ML.B of 21 December 1978, and 8/C.C.E.G./S.SL of 11 December 1979, as well as by the Convention of 17 November 1975. See generally the excellent discussion of the treaties and practice under them in Parnall and Utton, "The Senegal Valley Authority: A Unique Experiment in International River Basin Planning", 51 Indiana Law Journal 235 (1976). See also Quoc-Lan Nguyen, "Powers of the Organization for the Development of the Senegal River in development of the river basin," Dakar Meeting Proceedings, supra, note 8, at p. 142.

Mali, and meet near Bakel, Senegal. From this point the river forms the boundary between Senegal and Mauritania until it empties into the sea at St. Louis, Senegal. The flow of the river varies dramatically with the seasons, 38/ making co-operative efforts at management all the more important to optimum utilization of the river's benefits by all States concerned.

22. On 11 March 1972, the heads of State of Mali, Mauritania and Senegal signed the "Convention relative au statut du fleuve Sénégal" (hereafter referred to as the "Statute") and the "Convention portant création de l'Organisation pour la mise en valeur du fleuve Sénégal" (hereafter referred to as the "OMVS Convention"). 39/ The two agreements are open for signature by the other basin State, 40/ Guinea. 41/ The Statute begins by declaring the Senegal an "international river", and affirming the will of the contracting parties to develop close co-operation in order to allow rational exploitation of the resources of the Senegal River. It goes on to set forth general principles governing navigational and non-navigational uses by member States. Article 11 of the Statute provides for the creation of an organization to oversee the implementation of the Statute's provisions. This organization is the subject of the OMVS Convention.

23. Article 1 of the latter agreement establishes an institution to be known as the Organization for the Development of the Senegal River (OMVS), and charges the Organization with (1) the general implementation of the Statute; (2) the promotion and co-ordination of studies and works for the development of the Senegal River basin on the territories of the States members of the Organization; and (3) any technical or economic mission that the member States collectively wish to confer upon it. 42/ The Organization acts through four bodies: the Conference of Heads of State and Government, which is the supreme organ of the OMVS; the Council of Ministers; the Secretariat General; and the Standing Commission on the Waters of

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38/ "At Bakel [Senegal], the flow varies as much as from 3,500 cubic meters per second in September to ten cubic meters per second in May." Parnall and Utton, supra, note 37, at p. 237.

39/ The two agreements appear to have entered into force later that year. Parnall and Utton state that instruments of ratification of the agreements were deposited by Senegal and Mauritania on 13 October 1972, and by Mali on 25 November 1972. Parnall and Utton, supra, note 37, at p. 238, note 9, and accompanying text. For the history of the two agreements, including a discussion of antecedent treaties, see ibid., at pp. 238-239.

40/ The term "basin" is used here for convenience, in its hydrologic sense, and no legal connotations are intended.

41/ See article 15 of the Statute and article 21 of the OMVS Convention.

42/ With respect to the powers of the OMVS, see generally Quoc-Lan Nguyen, supra, note 37.

the Senegal River. 43/ Inasmuch as the Conference ordinarily meets only once a year, the work of the OMVS is carried out principally by the Council and the Secretariat. The decisions of the Conference as well as those of the Council are binding upon all member States. 44/

24. The Council, which is the decision-making organ of the OMVS, is broadly responsible for elaborating general policy concerning the management of the Senegal River, the development of its resources, and the modalities of co-operation between the States concerned. It is charged with the establishment of priorities for development projects and, importantly, must give prior approval to any development programmes of concern to one or more member States. 45/ The Council is also endowed with the power to determine the contributions of member States to the Organization's budget, to arrange project financing, and to apportion the responsibility therefor among the member States. 46/ All member States are required to attend meetings of the Council, which occur twice a year or when called by a member State. Council decisions are taken by unanimous vote. 47/

25. The executive organ of the OMVS is the Secretariat. It is directed by a High Commissioner, who is appointed for a renewable four-year term by the Conference, and represents the Organization between Council meetings. The High Commissioner represents the organization as well as member States in their relations with international assistance institutions or bilateral co-operation agencies with regard to the Senegal River. Within the scope of the powers delegated to him by the Council, he is empowered to negotiate on behalf of all member States of the OMVS. He is also responsible for gathering data concerning the Senegal River basin on the territory of the member States; submitting to the Council a joint programme of works for the co-ordinated development and rational exploitation of the basin's resources; the execution of studies and works relating to regional infrastructures; 48/ and the examination of proposals for hydro-agricultural development formulated by member States and submission of them, together with an evaluation by the Commission, to the Council. 49/ The High Commissioner may also

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43/ Quoc-Lan Nguyen also mentions a fifth body, the Inter-State Committee for Research and Agricultural Development, set up by a 1976 resolution of the Council of Ministers. This advisory committee is charged with the harmonization of the agricultural research-and-development programmes of the member States. Quoc-Lan Nguyen, supra, note 37, at p. 146.

44/ OMVS Convention, supra, note 37, articles 5 and 8.

45/ OMVS Convention, supra, note 37, article 8.

46/ Ibid.

47/ Ibid., art. 10.

48/ Ibid., art. 13.

49/ Ibid., art. 14.

be charged by one or more member States with the preparation of studies concerning, and supervision of works relating to, the development of the river. 50/

26. The Standing Commission on the Waters of the Senegal River, set up by the amending convention in 1975, is charged with establishing the principles and procedures for the apportionment of the waters of the Senegal River among the States concerned as well as among the sectors utilizing those waters, namely, industry, agriculture and transport. The Commission is composed of representatives of member States, and prepares advisory opinions for submission to the Council of Ministers. 51/

27. The development of the Senegal River basin by the OMVS has been characterized as proceeding in four stages: data collection; planning; implementation; and review and synthesis. 52/ Among many other significant accomplishments, the OMVS has collected and synthesized data, defined needs and benefits, set goals and arranged project financing, and engaged in significant research and planning activities, as well as project development. 53/ Its broad responsibilities and supranational authority make the OMVS unique among institutional mechanisms for the integrated development and administration of international water resources. 54/

28. The fundamental principles and institutional framework established by the Statute-OMVS Convention régime thus represent an advanced, highly developed planning approach to the management of international water resources. This approach is a concrete existing illustration of the kind of international watercourse management scheme called for in the Report of the Dakar Interregional Meeting of International River Organizations:

> "... in view of the hydrologic unity of the drainage basins, it would be desirable that integrated development programmes be drawn up and possibly

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50/ Ibid., art. 14.

51/ OMVS Convention, art. 20.

52/ Parnall and Utton, supra, note 37, at p. 249.

53/ See Parnall and Utton, supra, note 37, especially pp. 246 et seq. Among the projects completed under OMVS auspices, according to Dean Parnall, is a dam designed to halt salt water intrusion in the Delta region.

54/ See the survey of institutional arrangements in Parnall and Utton, supra, note 37, at pp. 254 et seq.

executed at the basin level by recognized agencies. Where this approach was not viable, co-ordination of the activities of the various agencies concerned should be sought." 55/

B. The relationship between procedural rules and the doctrine of equitable utilization

29. The régime of the Senegal River is, however, unique among administrative arrangements that have been established to provide for the management of international water resources or to facilitate co-operation among concerned States in the use and development thereof. 56/ More importantly, while most major

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55/ Dakar Meeting Proceedings, supra, note 8, conclusion No. 5, at p. 9. See also the conclusion of H. Smith on this point in his seminal work on the law of international watercourses:

> "The first principle is that every river system is naturally an indivisible unit, and that as such it should be so developed as to render the greatest possible service to the whole human community which it serves, whether or not that community is divided into two or more political jurisdictions. It is the positive duty of every government concerned to co-operate to the extent of its power in promoting this development, though it cannot be called upon to imperil any vital interest or to sacrifice without full compensation and provision for security any other particular interest of its own, whether political, strategic, or economic, which the law of nations recognises as legitimate."

H. Smith, supra, note 8, at pp. 150-151.

56/ For illustrative lists of such arrangements and discussions thereof see, e.g.: Yearbook ... 1974, vol. II (Part Two), pp. 351 et seq. document A/CN.4/274; Dakar Meeting Proceedings, supra, note 8, especially pp. 142 et seq.; Ely and Wolman, supra, note 8, at pp. 125-133; Management of International Water Resources: Institutional and Legal Aspects, Natural Resources/Water Series No. 1, ST/ESA/5 ((United Nations publication, Sales No. E.75.II.A.2), annex IV, at pp. 198 et seq. (1975); and Parnall and Utton, supra, note 37, at pp. 254 et seq. Notable among these administrative mechanisms are the Danube Commission; the Intergovernmental Co-ordinating Committee of the River Plate Basin; the International Commission for the Protection of the Moselle against Pollution; the International Commission for the Protection of the Rhine against Pollution; the Lake Chad Basin Commission; the International Joint Commission, Canada and the United States; the International Boundary and Water Commission, Mexico and the United States; the Committee for Co-ordination of the Lower Mekong Basin; the River Niger Commission; the Permanent Joint Technical Commission for Nile Waters, Egypt and Sudan; the Permanent Indus Commission, India and Pakistan; the Joint Rivers

international river systems have been placed under some form of co-operative institutional administration, 57/ there are many international watercourses which have not. In sum, not only do many existing institutional arrangements or other conventional régimes not provide for the kind of planning approach that is represented by the Wyoming Statute, the Delaware River Basin Compact, and the OMVS Convention, numerous international watercourse systems are not governed by any such régime at all.

30. This state of affairs often means that the only norms regulating the behaviour of the States concerned in respect of an international watercourse system are the rules of general international law relating to international watercourses. These norms focus on the conduct of individual States rather than the optimal management and development of the watercourse system as a whole. In setting the minimum obligations of States, normative prescriptions provide the backbone of any system of integrated river basin management. For this reason, they are an esseential ingredient of such a régime. Operating alone, however, they can hardly be expected to produce a situation of optimal management and integrated development of an international watercourse system, i.e. one which yields the maximum possible benefit for all concerned States.

31. On the other hand, the potential of the fundamental principles of modern international watercourse law for achieving an equitable balance of the uses, needs and interests of concerned States should not be underestimated. The corner-stone of this normative régime is the principle of equitable utilization, according to which States are entitled to a reasonable and equitable share of the uses and benefits of the waters of an international watercourse. 58/

(continued)

Commission, India and Bangladesh; the Helmand River Delta Commission, Afghanistan and Iran; the Joint Finnish-Soviet Commission on the Utilization of Frontier Watercourses; and the Organization for the Management and Development of the Kagera River Basin.

57/ See the institutional arrangements referred to in the previous footnote.

58/ Perhaps the best-known formulation of the doctrine of equitable utilization is that found in article IV of the International Law Association's Helsinki Rules on the Uses of the Waters of International Rivers (hereafter referred to as "Helsinki Rules"):

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

32. The primary virtue of this principle is its flexibility, which makes it appropriate for application to the wide variety of international watercourse systems and human needs they serve. 59/ However, this very attribute renders the principle, standing alone, difficult of unilateral application by the individual States concerned. That is, the doctrine obviously sets no a priori standards that are universally and mechanically applicable concerning, e.g., the amount of water a State may divert, the quality of water to which it is entitled, or the uses it may make of an international watercourse. Instead, it relies on a balancing of factors relevant to each individual case, 60/ a task to which a third-party dispute resolution mechanism is best suited.

33. It is thus possible that without implementing procedures that permit a State to determine its equitable share in advance and in consultation with other concerned States, that State's unilateral determination of its equitable share might be challenged by the other States. The doctrine of equitable utilization would then operate only as a post hoc check on the State's use of the international watercourse in question. In other words, an equitable allocation would be achieved in many cases only by means of the process of claim and counter-claim - and perhaps ultimate resort to third-party dispute resolution - that could result from a State's use of the watercourse.

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Helsinki Rules, adopted by the International Law Association at the Fifty-second Conference held in Helsinki, 20 August 1966, p. 9 (London, 1967); see International Law Association, Report of the fifty-second Conference, Helsinki, 1966 (London, 1967), pp. 486 et seq.; and reproduced in part in Yearbook ... 1974, vol. II (Part Two), pp. 357-359, document A/CN.4/274, para. 405. For discussions of the doctrine and surveys of authority supporting it, see S. Schwebel, Third Report, supra, note 8, at pp. 75-85, paras. 41-84; and S. McCaffrey, Second report on the law of the non-navigational uses of international watercourses (hereafter referred to as "S. McCaffrey, Second Report"), document A/CN.4/399 and Add.1-2, paras. 75-178.

59/ The uniqueness of each international watercourse, as well as its physical and human context, is generally recognized. As noted in one study, "each basin has its own economic, geographic, ecological, cultural, and political variables; no comprehensive system of rigid rules can anticipate adequately the variables from basin to basin". Parnall and Utton, supra, note 37, at p. 253.

60/ See, e.g., the Lake Lanoux Arbitration, Reports of International Arbitral Awards, vol. 12, pp. 285-317, in which the tribunal considered a variety of factors in deciding that France could proceed with its project; the Helsinki Rules, supra, note 58, article V, setting forth an illustrative list of 11 factors to be considered as relevant; and article 8 of the articles proposed in the second report of the previous Special Rapporteur, Mr. Evensen, supra, note 3, setting forth 11 factors to be considered as relevant.

34. As has already been seen, however, the modern approach to water resource management requires basin-wide planning ex ante rather than accommodation of conflicting uses ex post. While norms of general international law cannot achieve the same state of affairs that would be produced by a basin-wide system of water resource planning and management, however, they can go a long way towards that goal. This is because the doctrine of equitable utilization does not exist in isolation; it is a part of a normative structure that includes procedural requirements necessary to its implementation. The substantive and procedural principles thus form an integrated whole.

35. To summarize, the very generality and elasticity of the equitable utilization principle requires that it be complemented by a set of procedural rules for its implementation. Without such a set of procedures, a State would often discover the limits of its rights only by depriving another State of its equitable share - probably without intending to do so. It cannot lightly be presumed that State practice has created such a legal state of affairs, since this would mean that the norm of equitable utilization, in effect, creates disputes rather than avoiding them. There would be no legal certainty in respect of States' use of international watercourses. The result of an absence of procedures for the provision of data, information and notification as well as for consultation has been noted in one study in the following way: "Too often disputes over rights in international rivers are characterized by misunderstanding, if not simple ignorance, of important facts about the drainage basin and the needs of other basin countries." 61/

36. But as will be shown below, the practice of States does attest to the existence of a procedural complement to the substantive norm of equitable utilization. Without the sharing of data and information, and without prior notification of planned projects or new uses, the doctrine of equitable utilization would be of little use to States in planning their watercourse activities; it would be of use principally to third-party dispute settlers. Therefore,

> "It is reasonable ... that procedural requirements should be regarded as essential to the equitable sharing of water resources. They have particular importance because of the breadth and flexibility of the formulae for equitable use and appropriation. In the absence of hard and precise rules for allocation, there is a relatively greater need for specifying requirements for advance notice, consultation, and decision procedures. Such requirements are, in fact, commonly found in agreements by neighbouring states concerning common lakes and rivers." 62/

37. Furthermore, States' observance over time of procedures for the implementation of the equitable utilization doctrine will open lines of communication which may ultimately lead to an integrated system of international watercourse planning and management. The co-operation between the States concerned

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61/ Ely and Wolman, supra, note 8, at p. 141.

62/ O. Schachter, Sharing the World's Resources, p. 69 (1977).

"at first, may be no more than the exchange of data independently collected; next, standardization of data; then joint collection of data; then exchange of forecasts of water utilization; then exchange of plans; then common planning of projects; then agreements in one or more of the fields of equitable apportionment of consumptive use, stream pollution, machinery for settlement of disputes, etc.; then, hopefully, agreements for development of resources in one nation at the joint cost and for the joint benefit of several, for coordinated administration of facilities, and so on." 63/

38. The following chapter of the present report will first present an illustrative survey of the authority supporting procedural rules relating to the utilization of international watercourses. It will then offer for the Commission's consideration a set of draft articles concerning those rules.

63/ Ely and Wolman, supra, note 8, at pp. 146-147.

III. DRAFT ARTICLES CONCERNING GENERAL PRINCIPLES OF CO-OPERATION AND NOTIFICATION

39. In his second report, the Special Rapporteur offered a broad overview of the landscape of procedural rules and discussed the manner in which these rules best fit into the framework of the draft as a whole. 64/ He noted that procedural requirements relate to existing uses as well as to new uses, and suggested that at least one category of situations concerning existing uses could be covered by article 8, referred to the Drafting Committee in 1984. 65/

40. The national and international arrangements reviewed in part II of the present report demonstrate that a régime providing optimum benefits for all jurisdictions making use of a watercourse entails good-faith co-operation and an ongoing process of communication between the concerned States. It has also been seen that the basic norm governing the use of international watercourses, that of equitable utilization, is predicated upon good-faith co-operation and communication among the States concerned. To be sure, the procedural requirements under general international law are not so refined as those under régimes such as that established by the Senegal River conventions. Indeed they cannot be, because of the diversity of international watercourses, as well as economic, cultural, political, and other human variables. Yet, as discussed above, the rule of equitable utilization would mean little in the absence of procedures that will at least permit States to determine in advance whether their actions will violate it.

41. State practice therefore reveals a recognition of the need for a spectrum of procedures relating to the utilization of international watercourses, ranging from the provision of data and information (concerning both hydrological factors and present or projected water needs) to notification of contemplated actions with regard to an international watercourse that may adversely affect another State. It is also widely recognized that good-faith co-operation between the States concerned is essential to the smooth and effective functioning of these and, more generally, to basin-wide development and management of international watercourses. 66/ The following sections of this chapter will survey authority for, and present possible formulations of, the most fundamental procedural rules relating to the non-navigational uses of international watercourses. A final chapter of the present report will offer an introductory discussion of additional procedures that water resource specialists recognize as being highly important to the harmonious and efficient development of international watercourse systems.

64/ See S. McCaffrey, Second Report, supra, note 58, at paras. 189-197.

65/ Ibid., para. 194. The Drafting Committee has as yet been unable to consider article 8 due to lack of time.

66/ See, e.g., H. Smith's "first principle", quoted in note 55, supra.

A. The general duty to co-operate

42. Good-faith co-operation between States with regard to their utilization of an international watercourse is an essential basis for the smooth functioning of other procedural rules and, ultimately, for the attainment and maintenance of an equitable allocation of the uses and benefits of the watercourse. The following paragraphs will survey illustrations of the broad support for this general obligation in treaty practice, decisional law, resolutions of international organizations and other international legal instruments.

1. International agreements

43. Numerous international agreements relating to the environment in general and watercourses in particular require co-operation between the States parties. 67/

67/ A number of these agreements are listed in annex I of this report. See, e.g., the 1964 Agreement between Poland and the USSR concerning the Use of Water Resources in Frontier Waters, discussed below, United Nations, Treaty Series, vol. 552, p. 175 and Yearbook ... 1974, vol. II (Part Two), p. 316, document A/CN.4/274, para. 273; the 1968 Agreement between Bulgaria and Turkey concerning co-operation in the use of the waters of rivers flowing through the territory of both countries, 23 October 1968, United Nations, Treaty Series, vol. 807, p. 117; the 1971 Act of Santiago concerning Hydrologic Basins, signed by Argentina and Chile on 26 June 1971, Yearbook ... 1974, vol. II (Part Two), p. 324, document A/CN.4/274, para. 327; the 1961 Treaty between Canada and the United States relating to the Co-operative development of the water resources of the Columbia River Basin, signed 17 January 1961, Yearbook ... 1974, vol. II (Part Two), p. 76, document A/5409, para. 188; and the 1978 Great Lakes water quality Agreement between Canada and the United States, signed 22 November 1978, entered into force 22 November 1978, arts. 7-10, United States Treaties and other International Agreements, 1978-1979, vol. 30, part 2, p. 1383.

See also the many international agreements which provide for the establishment of commissions or other forms of administrative machinery to promote and facilitate co-operation between the States parties. (A number of these bodies are referred to in note 56, supra.) For example, article 1 of the 1963 Agreement between France, the Federal Republic of Germany, Luxembourg, the Netherlands and Switzerland concerning the International Commission for the Protection of the Rhine against Pollution calls for the parties to co-operate in protecting the waters of the Rhine against pollution. Yearbook ... 1974, vol. II (Part Two), p. 301, document A/CN.4/274, para. 138. See also, e.g. the Agreement between Bulgaria and Greece concerning the establishment of a Greek-Bulgarian Commission for co-operation between the two countries in questions relating to electric power and the utilization of the rivers crossing their territories, done 12 July 1971, entered into force 12 July 1971, ibid., p. 319, para. 306; and the 1968 Agreement between Czechoslovakia and Hungary concerning the establishment of a river administration in the Rajka-Gonyu sector of the Danube, entered into force 27 February 1968, United Nations, Treaty Series, vol. 640, p. 49.

For example, in article 4 of the Act regarding navigation and economic co-operation between the States of the Niger basin, 68/ the contracting States undertake to establish close co-operation with regard to the study and execution of any project likely to have an appreciable effect on certain features of the régime of the river, its tributaries and sub-tributaries, their condition of navigability, agricultural and industrial exploitation, the sanitary conditions of their waters and the biological characteristics of their fauna and flora. Article 5 of the same agreement provides for the establishment of an inter-governmental organization in order to further the co-operation between the riparian States. 69/

44. The 1964 Agreement concerning the use of water resources in frontier waters between Poland and the Soviet Union 70/ provides in its article 3 that the purpose of the Agreement is to ensure co-operation between the parties in economic, scientific and technical activities relating to the use of water resources in frontier waters. In article 5 the parties undertake to co-ordinate all activities capable of causing changes in the existing situation with regard to the use of water resources in frontier waters, and article 6 requires that the parties co-ordinate plans for the development of frontier water resources. Articles 7 and 8 provide for co-operation with regard, inter alia, to water projects and the regular exchange of data and information.

45. In the 1962 Convention concerning the protection of the waters of Lake Geneva against pollution, 71/ France and Switzerland agree to co-operate closely in order to protect from pollution waters of the lake as well as those leading from it, including both the surface and the ground water of their tributaries in so far as these contribute to the pollution of the subject waters. The Convention also establishes a joint commission which is empowered to conduct research, make recommendations to the parties of measures concerning existing or future pollution, and prepare drafts of rules concerning health standards. 72/

68/ Done at Niamey, 26 October 1963, United Nations, Treaty Series, vol. 587, p. 9. The agreement was adopted at the Conference of the Riparian States of the River Niger, its Tributaries and Sub-tributaries, held at Niamey from 24 to 26 October 1963, and came into force on 1 February 1966. The parties are Cameroon, Chad, Dahomey, Ivory Coast, Guinea, Mali, Niger, Nigeria and Upper Volta. See Yearbook ... 1974, vol. II (Part One), p. 289, document A/CN.4/274, para. 40.

69/ The article goes on to provide that the organization will be entrusted with the task of encouraging, promoting and co-ordinating the studies and programmes concerning the exploitation of the resources of the Niger River basin.

70/ United Nations, Treaty Series, vol. 552, p. 175; entered into force on 16 February 1965.

71/ Entered into force 1 November 1963. Summarized in Yearbook ... 1974, vol. II (Part Two), p. 308, document A/CN.4/274, paras. 202 et seq.

72/ Ibid., arts. 2-4.

46. The 1983 Agreement between Mexico and the United States on Co-operation for the Protection and Improvement of the Environment in the Border Area 73/ is an example of a framework agreement that encompasses boundary water resources. Article 1 of that Agreement provides that the parties

> "agree to cooperate in the field of environmental protection in the border area on the basis of equality, reciprocity and mutual benefit. The objectives of the present Agreement are to establish the basis for cooperation between the Parties for the protection, improvement and conservation of the environment and the problems which affect it ...".

The parties agree in article 2 to "co-operate in the solution of the environmental problems of mutual concern in the border area, in accordance with the provisions of this Agreement." Annex I to the agreement is entitled an "Agreement of Cooperation" between the United States and Mexico, and relates to the pollution of a trans-border stream flowing between the city of Tijuana, in Mexico, and the city of San Diego, in the United States. Article 1 of the annex provides in part that

> "the United States of America and the United Mexican States agree to cooperate in accordance with their prevailing national legislation in order to anticipate and consider the effects and consequences that the works planned may have on environmental conditions in the Tijuana-San Diego zone and, if necessary, agree on a determination of the measures necessary to preserve environmental conditions and ecological processes."

47. Finally, it is worth recalling that the 1982 United Nations Convention on the Law of the Sea contains a broad obligation of co-operation in respect of the marine environment. In particular, article 197, entitled "Co-operation on a global or regional basis," provides as follows:

> "States shall co-operate on a global basis and, as appropriate, on a regional basis, directly or through competent international organizations, in formulating and elaborating international rules, standards and recommended practices and procedures consistent with this Convention for the protection and preservation of the marine environment, taking into account characteristic regional features." 74/

Subsequent articles go on to provide for, inter alia, notification concerning environmental damage, contingency plans, exchange of information and data, and co-operation in establishing scientific criteria for standard setting.

73/ Agreement between the United States of America and the United Mexican States on Co-operation for the Protection and Improvement of the Environment in the Border Area, signed at La Paz, Mexico, 14 August 1983; entered into force 16 February 1984. Text reproduced in International Legal Materials, vol. 22, p. 1025.

74/ The Law of the Sea: United Nations Convention on the Law of the Sea with Index and Final Act of the Third United Nations Conference on the Law of the Sea (United Nations publication, Sales No. E.83.V.5), p. 71.

2. Decisions of international courts and tribunals

48. The award of the tribunal in the Lake Lanoux Arbitration 75/ is replete with statements broadly confirming the obligation to co-operate in respect of international watercourses. As this case was the subject of extensive consideration in the second report, 76/ only several passages will be noted here:

> "... international practice ... limit[s] itself to requiring States to seek the terms of an agreement by preliminary negotiations without making the exercise of their competence conditional on the conclusion of this agreement ... But the reality of the obligations thus assumed cannot be questioned, and they may be enforced, for example, in the case of an unjustified breaking off of conversations, unusual delays, disregard of established procedures, systematic refusal to give consideration to proposals or adverse interests, and more generally in the case of infringement of the rules of good faith." 77/

> "... States today are well aware of the importance of the conflicting interests involved in the industrial use of international rivers and of the necessity of reconciling some of these interests with others through mutual concessions. The only way to achieve these adjustments of interest is the conclusion of agreements on a more and more comprehensive basis. International practice reflects the conviction that States should seek to conclude such agreements; there would thus be an obligation for States to agree in good faith to all negotiations and contacts which should, through a wide confrontation of interests and reciprocal goodwill, place them in the best circumstances to conclude agreements." 78/

49. In cases involving maritime delimitation, a field involving analogous considerations of natural resource allocation, the International Court of Justice has stressed that States have an obligation to resolve their differences co-operatively, through good-faith negotiations aimed at reaching an equitable result. In the North Sea Continental Shelf cases, 79/ the Court had the following to say with regard to the "principles and rules of law" that were applicable to the continental shelf delimitation in question:

75/ Yearbook ... 1974, vol. II (Part Two), p. 194, document A/5409, para. 1055.

76/ S. McCaffrey, Second Report, supra, note 58, paras. 111-124.

77/ Yearbook ... 1974, vol. II (Part Two), p. 197, document A/5409, para. 1065, citing "The Tacna-Arica Question", in United Nations, Reports of International Arbitral Awards, vol. II (United Nations publication, Sales No. 1949. V. 1), pp. 921 et seq.; and "Railway traffic between Lithuania and Poland", in P.C.I.J., series A/B 42, pp. 108 et seq.

78/ Ibid., p. 197, document A/5409, para. 1066.

79/ Federal Republic of Germany v. Denmark; Federal Republic of Germany v. Netherlands, I.C.J. Reports, 1969, Judgment of 20 February 1969, p. 3.

> "... those principles [are] that delimitation must be the object of agreement between the States concerned, and that such agreement must be arrived at in accordance with equitable principles. On a foundation of very general precepts of justice and good faith, actual rules of law are here involved which govern the delimitation of adjacent continental shelves ..." 80/

The Court went on to say that the parties were

> "under an obligation to enter into negotiations with a view to arriving at an agreement, and not merely to go through a formal process of negotiation as a sort of prior condition for the automatic application of a certain method of delimitation in the absence of agreement," 81/

and that

> "this obligation merely constitutes a special application of a principle which underlies all international relations, and which is moreover recognized in Article 33 of the Charter of the United Nations as one of the methods for the peaceful settlement of international disputes." 82/

50. Again, in the Fisheries Jurisdiction case, 83/ involving a subject-matter perhaps even more closely analogous to international watercourse allocation, the Court spoke of "the obligation to take account of the rights of other States and the needs of conservation. ... 84/ It enjoined the parties "to conduct their negotiations on the basis that each must in good faith pay reasonable regard to the legal rights of the other ..., thus bringing about an equitable apportionment of the fishing resources based on the facts of the particular situation ..." 85/

3. Declarations and resolutions adopted by intergovernmental organizations, conferences and meetings

51. States have, within the United Nations and at other international conferences, repeatedly recognized the importance of co-operation in relation to international

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80/ Ibid., pp. 47-48, para. 85.

81/ Ibid., p. 48, para. 85.

82/ Ibid., p. 48, para. 86.

83/ United Kingdom v. Iceland (Merits), I.C.J. Reports, 1974, Judgment of 25 July 1974, p. 3.

84/ Ibid., p. 32, para. 71.

85/ Ibid., p. 34, para. 78.

watercourses and other common natural resources. 86/ Article 3 of the Charter of Economic Rights and Duties of States calls for co-operation among States in respect of shared natural resources in general:

> "In the exploitation of natural resources shared by two or more countries, each State must co-operate on the basis of a system of information and prior consultations in order to achieve optimum use of such resources without causing damage to the legitimate interest of others." 87/

A previous Special Rapporteur concluded that "the terms of this provision clearly embrace international watercourses", 88/ a proposition with which the Commission evidently agreed. 89/

52. The General Assembly addressed this same subject in resolutions 2995 (XXVII) of 15 December 1972 on Co-operation between States in the field of the environment, and 3129 (XXVIII) of 13 December 1973 on Co-operation in the field of the environment concerning natural resources shared by two or more States. By way of illustration, the former provides that, "in exercising their sovereignty over natural resources, States must seek, through effective bilateral and multilateral

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86/ In addition to the instruments referred to in the following text, see, e.g., chapter 5 on Co-operation in the field of economics, of science and technology and of the environment, of the Final Act of the Conference on Security and Co-operation in Europe, done at Helsinki 1 August 1975, reprinted in International Legal Materials, vol. 14, p. 1292 (1975); Recommendation C (74) 224 of the Council of the Organization for Economic Co-operation and Development, adopted 14 November 1974, text in OECD, OECD and the Environment, p. 142 (1986); the 1978 Principles of Conduct on Shared Natural Resources adopted by the United Nations Environment Programme; the Act of Asunción on the use of international rivers, signed by the Ministers for Foreign Affairs of the States of the River Plate Basin (Argentina, Bolivia, Brazil, Paraguay, and Uruguay) at their Fourth Meeting held from 1 to 3 June 1971, text in Yearbook ... 1974, vol. II (Part Two), pp. 322 et seq., document A/CN.4/274, paras. 324 et seq., the Act of Santiago concerning hydrologic basins, signed 26 June 1971 by Argentina and Chile, excerpted in ibid., p. 324, para. 327; the Declaration on water resources, signed 9 July 1971 by Argentina and Uruguay, excerpted in ibid., pp. 324-325, para. 328; and the Act of Buenos Aires on hydrologic basins, signed 12 July 1971 by Argentina and Bolivia, noted in ibid., p. 325, para. 329.

87/ General Assembly resolution 3281 (XXIX) of 12 December 1974.

88/ S. Schwebel, First report on the law of the non-navigational uses of international watercourses, Yearbook ... 1979, vol. II (Part One), p. 171, document A/CN.4/320, para. 112.

89/ See article 5 as provisionally adopted by the Commission in 1980, "Use of waters which constitute a shared natural resource" (para. 2, above).

co-operation or through regional machinery, to preserve and improve the environment." And operative paragraph 2 of the latter resolution states that

> "co-operation between countries sharing ... natural resources [common to two or more States] and interested in their exploitation must be developed on the basis of a system of information and prior consultation within the framework of the normal relations existing between them".

53. The subject of co-operation in the utilization of common water resources and in the field of environmental protection was also addressed by the 1972 Declaration of the United Nations Conference on the Human Environment. Principle 24 of that Declaration provides as follows:

> "International matters concerning the protection and improvement of the environment should be handled in a co-operative spirit by all countries, big or small, on an equal footing. Co-operation through multilateral or bilateral arrangements or other appropriate means is essential to effectively control, prevent, reduce and eliminate adverse environmental effects resulting from activities conducted in all spheres, in such a way that due account is taken of the sovereignty and interests of all States." 90/

The Action Plan for the Human Environment, adopted at the same conference, provides in its recommendation 51 for co-operation specifically with reference to international watercourses. The opening paragraph of that recommendation provides as follows:

> "It is recommended that Governments concerned consider the creation of river-basin commissions or other appropriate machinery for co-operation between interested States for water resources common to more than one jurisdiction." 91/

54. The United Nations Water Conference held in 1977 at Mar del Plata produced a number of recommendations relating to regional and international co-operation with regard to the use and development of international watercourses. For example, recommendation 90 provides that:

90/ Report of the United Nations Conference on the Human Environment (United Nations publication, Sales No. E.73.II.A.14), p. 5.

91/ Ibid., p. 17.

> "It is necessary for States to co-operate in the case of shared water resources in recognition of the growing economic, environmental and physical interdependencies across international frontiers. Such co-operation, in accordance with the Charter of the United Nations and principles of international law, must be exercised on the basis of the equality, sovereignty and territorial integrity of all States, and taking due account of the principle expressed, inter alia, in principle 21 of the Declaration of the United Nations Conference on the Human Environment." 92/

And recommendation 84 reads: "In the case of shared water resources, co-operative action should be taken to generate appropriate data on which future management can be based and to devise appropriate institutions and understandings for co-ordinated development." 93/

4. Studies by intergovernmental and non-governmental organizations

55. The importance of co-operation between States in the use and development of international watercourses has also been recognized in numerous studies by intergovernmental and non-governmental organizations. 94/ An instrument expressly recognizing the importance of co-operation between States to the effectiveness of

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92/ United Nations Water Conference Report, supra, note 8, at p. 53. Principle 21 of the Stockholm Declaration, referred to in recommendation 90, provides as follows:

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

Report of the United Nations Conference on the Human Environment, supra, note 90, chap. I, sect. II.

93/ United Nations Water Conference Report, supra note 8, at p. 51. See also the resolutions adopted at the same conference on Technical co-operation among developing countries in the water sector, ibid., p. 76; River commissions, ibid., p. 77; and Institutional arrangements for international co-operation in the water sector, ibid., p. 78.

94/ See generally the studies referred to and excerpted in Yearbook ... 1974, vol. II (Part Two), pp. 199 et seq., document A/5409 and pp. 356 et seq., document A/CN.4/274.

procedural and other rules concerning international watercourses is the International Law Association's Rules on Water Pollution in an International Drainage Basin, adopted in 1982. Article 4 of the rules provides: "In order to give effect to the provisions of these Articles, states shall cooperate with the other States concerned." 95/

56. Similarly, the Asian-African Legal Consultative Committee's Draft Propositions on the Law of International Rivers provide in proposition IV that: "Every basin State shall act in good faith in the exercise of its rights on the waters of an international drainage basin in accordance with the principles governing good-neighbourly relations." 96/ A forceful statement of the importance of co-operation concerning international water resources, owing to the physical properties of water, is found in principle XII of the European Water Charter, adopted in 1967 by the Committee of Ministers of the Council of Europe, which declares: "Water knows no frontiers; as a common resource it demands international co-operation." 97/

57. The Institute of International Law adopted a resolution on the Utilization of Non-Maritime International Waters (Except for Navigation) at its meeting at Salzburg in 1961, the preambular paragraphs of which declare, inter alia, that "the maximum utilization of available natural resources is a matter of common interest," and that "in the utilization of waters of interest to several States, each of them can obtain, by consultation, by plans established in common and by reciprocal concessions, the advantages of a more rational exploitation of a natural resource. ..." 98/ At its 1979 meeting in Athens, the Institute adopted a resolution entitled "The pollution of rivers and lakes and international law" under which States are obligated to co-operate "in good faith with the other States concerned". The resolution goes on to provide that States are to carry out this duty by, inter alia, providing data concerning pollution, giving advance

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95/ International Law Association, Report of the Sixtieth Conference held at Montreal, August 29th, 1982, to September 4th, 1982, p. 539 (1983).

96/ Draft propositions on the law of international rivers, formulated in 1973 by a Sub-Committee of the Asian-African Legal Consultative Committee (AALCC), Proposition IV, para. 1, text and Rapporteur's commentary in AALCC, Report of the fourteenth session held at New Delhi (10-18 January 1973), pp. 7-14, also found in Yearbook ... 1974, vol. II (Part Two), p. 339, document A/CN.4/274, paras. 364 et seq.

97/ European Water Charter, adopted by the Consultative Assembly of the Council of Europe (CE) on 28 April 1967 (Recommendation 493 (1967)) and by the Committee of Ministers of the CE on 26 May 1967 (Resolution (67) 10), Principle XII, text in ibid., pp. 342-343, para. 373.

98/ Annuaire de l'Institut de droit international, Salzburg session, September 1961, vol. 49, tome II, pp. 381-384 (1961); reprinted in Yearbook ... 1974, vol. II (Part Two), p. 202, document A/5049, para. 1076.

notification of potentially polluting activities and consulting on actual or potential transboundary pollution problems. 98a/

5. The proposed article

58. In the light of the broad recognition of the obligation of States to co-operate in their relations in respect of common natural resources in general, and international watercourses in particular, as well as the necessity of such co-operation to the achievement of optimal development and allocation of international freshwater resources, the following article is submitted for the Commission's consideration as a foundation for succeeding articles on procedural rules. It is proposed as the first article of chapter III of the draft. A heading for that chapter is also included below for organizational purposes, even though the present report will not contain all of the proposed draft articles to be included in that chapter.

III. General principles of co-operation, notification, and provision of data and information

Article 10

General obligation to co-operate

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

Comment. The second report of the present Special Rapporteur submitted in 1986, did not contain a proposed article covering the general obligation to co-operate. It did indicate, however, that such an article might be proposed in a subsequent report 99/ and recalled that an article providing for co-operation among concerned States had been submitted by the previous Special Rapporteur. 100/

98a/ Annuaire de l'Institut de droit international, 1979, vol. 58, Part Two, pp. 199, 201, arts. IV(B) and VII. Text also reproduced in S. Schwebel, Third Report, supra., note 8, para. 259. The portion of the resolution providing for the particular modalities of co-operation is set forth in text at note 219, infra.

99/ See S. McCaffrey, Second Report, supra, note 58, para. 198, comment (1).

100/ See article 10 as contained in the second report of Mr. Evensen, supra, note 3.

B. Notification and consultation concerning proposed uses

59. In this section of the report, the Special Rapporteur will resubmit the five draft articles contained in his second report, with some modifications, for the Commission's consideration. The extensive authority supporting the rules reflected in these draft articles has been set forth in great detail in previous reports of the present 101/ and former Special Rapporteurs. 102/ Therefore, no attempt will here be made at exhaustive coverage of that authority. 103/ Rather, examples only will be cited, for convenience of reference and to avoid undue repetition.

60. The purpose of articles on notification and consultation is to provide for a process of exchange of information between concerned States when one of them contemplates the initiation of a new use (including changes in an existing use) of an international watercourse that may adversely affect the other States. Notification of proposed new uses benefits not only the States that are potentially affected by the use, but the proposing State as well. In the absence of a notification and consultation procedure, cautious observance of the obligations to use the international watercourse in question in a reasonable and equitable manner, and to refrain from causing other States appreciable harm, might inhibit States from making new uses and, in general, from developing the watercourse. As observed in a previous report on the present topic,

> "Doubts, divergences of criteria or convictions, or impasses cannot be resolved if the system States are not in communication with one another, particularly at the technical level of project and programme data and information, at least where these works and activities may have significant transnational impact. ... To be sure, system States should be encouraged in appropriate cases to strengthen this residual duty by more detailed procedures and more specific scope for the data and information exchange in system agreements. ... [But the duty itself] serves to foster the minimal

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101/ See S. McCaffrey, Second Report, supra, note 58. Many of the authorities surveyed in part II of that report bear upon the principles of notification and consultation. See also part III of the report, paras. 189-198.

102/ See especially the third report of Mr. Schwebel, supra, note 8, pp. 92-110, paras. 113-186, and especially pp. 105-110, paras. 170-186.

103/ See also the studies by Bourne, "Procedure in the Development of International Drainage Basins: Notice and Exchange of Information," 22 University of Toronto Law Journal 172 (1972) (hereafter referred to as "Bourne, Notice"); ibid., "Procedure in the Development of International Drainage Basins: The Duty to Consult and to Negotiate," 1972 Canadian Yearbook of International Law, p. 212 (hereafter referred to as "Bourne, Consultation and Negotiation"); and F. Kirgis, Prior Consultation in International Law, A Study of State Practice, Chapter II, pp. 16-87 (1983).

co-operation essential to their beneficial use of their shared water resources." 104/

61. With these introductory remarks as a background, the Special Rapporteur will briefly review illustrations of the authority supporting a State's obligation to notify other States of contemplated new watercourse uses that may affect the watercourse within their territories, or their use thereof.

1. International agreements 105/

62. The 1954 Convention between Yugoslavia and Austria concerning water economy questions relating to the Drava 106/ provides in its article 4 that should Austria, the upper riparian State,

"seriously contemplate plans for new installations to divert water from the Drava basin or for construction work which might affect the Drava river régime to the detriment of Yugoslavia, Austria undertakes to discuss such plans with Yugoslavia prior to legal negotiations concerning rights in the water." 107/

63. An early example of a provision for new uses is contained in one of the few general conventions relating to the utilization of international watercourses. Article 4 of the 1923 Convention relating to the development of hydraulic power affecting more than one State 108/ contemplates advance discussions between concerned States of proposed new uses:

104/ S. Schwebel, Third Report, supra, note 8, pp. 103-104, para. 158.

105/ A number of international agreements containing provisions relating to notification and consultation concerning new uses are listed in annex II to this report.

106/ Entered into force 15 January 1955. United Nations Treaty Series, vol. 227, p. 128; summarized in Yearbook ... 1974, vol. II (Part Two), at p. 142, document A/5409, paras. 693 et seq.

107/ Ibid., art. 4. The quotation is taken from the summary of the article in Yearbook ... 1974, vol. II (Part Two), at p. 142, document A/5409, para. 697. The article goes on to provide that if no agreed settlement can be reached by discussion, either directly or through the Joint Commission set up by the Convention, the matter is to be referred to the Court of Arbitration, also provided for in the 1954 agreement.

108/ League of Nations, Treaty Series, vol. XXXVI, p. 81; summarized in Yearbook ... 1974, vol. II (Part Two), p. 57, document A/5409, paras. 68 et seq. The Convention and Protocol of Signature were adopted by the Second Conference on Communications and Transit, held at Geneva in 1923, and entered into force on 30 June 1925. For a list of the 39 States represented at the Conference, including

"If a contracting State desires to carry out operations for the development of hydraulic power which might cause serious prejudice to any other contracting State, the States concerned shall enter into negotiations with a view to the conclusion of agreements which will allow such operations to be executed."

64. A number of agreements provide for notification and exchange of information concerning new projects or uses through an institutional mechanism established to facilitate the management of a watercourse. An example is the 1975 Statute of the Uruguay River, 109/ adopted by Uruguay and Argentina, which contains detailed provisions on notification requirements, contents of the notification, the period for reply, and procedures applicable in the event the parties fail to agree on the proposed project. These provisions are set forth in full, since they are relevant to most of the draft articles submitted in the present report:

"Article 7

"A party planning the construction of new channels, the substantial modification or alteration to existing ones, or the execution of any other works of such magnitude as to affect navigation, the régime of the river or the quality of its waters, shall so inform the Commission, which shall determine expeditiously, and within a maximum period of 30 days, whether the project may cause appreciable harm to the other party.

"If it is determined that such is the case, or if no decision is reached on the subject, the party concerned shall, through the Commission, notify the other party of its project.

(continued)

countries of Western and Eastern Europe, Latin America, North America, and Asia, as well as Nordic countries, see ibid., note 39. A much earlier example of a treaty requiring advance notification is the Treaty of Bayonne of 26 May 1866, construed and applied by the tribunal in the renowned Lake Lanoux Arbitration. Additional Act to the Boundary Treaties of 2 December 1856, 14 April 1862 and 26 May 1866, signed at Bayonne on 26 May 1866, summarized in Yearbook ... 1974, vol. II (Part Two), p. 170, document A/5409, para. 895. For the applicable portions of the tribunal's award (in English translation), see International Law Reports, vol. 24, p. 101, at pp. 103 and 138 (1957).

109/ Actos internacionales Uruguay-Argentina, 1830-1980 (Montevideo, 1981), pp. 594-596. Pertinent articles of this agreement are also set forth in S. Schwebel, Third Report, supra, note 8, at p. 108, para. 180.

"The notification shall give an account of the main aspects of the project and, as appropriate, its mode of operation and such other technical data as may enable the notified party to assess the probable effect of the project on navigation or on the régime of the river or the quality of its waters.

"Article 8

"The notified party shall be allowed a period of 180 days in which to evaluate the project, from the date on which its delegation to the Commission receives the notification.

"If the documentation referred to in article 7 is incomplete, the notified party shall be allowed a period of 30 days in which, through the Commission, so to inform the party planning to execute the project.

"The aforementioned period of 180 days shall begin to run from the date on which the delegation of the notified party receives complete documentation.

"This period may be extended by the Commission, at its discretion, if the complexity of the project so requires.

"Article 9

"If the notified party presents no objections or does not reply within the period specified in article 8, the other party may execute or authorize the execution of the planned project.

"Article 10

"The notified party shall have the right to inspect the works in progress in order to determine whether they are being carried out in accordance with the project submitted.

"Article 11

"If the notified party concludes that the execution of the works or the mode of the operation may cause appreciable harm to navigation or to the régime of the river or the quality of its waters, it shall so inform the other party, through the Commission, within the period of 180 days specified in article 8.

"Its communication shall state which aspects of the works or of the mode of operation may cause appreciable harm to navigation or to the régime of the river or the quality of its waters, the technical grounds for that conclusion and suggested changes in the project or the mode of operation.

"Article 12

"If the parties fail to reach agreement within 180 days of the date of the communication referred to in article 11, the procedure indicated in chapter XV shall be followed." 110/

Another agreement between the same parties, the 1973 Treaty on the River Plate and its maritime outlet, 111/ contains similar provisions for notification of contemplated uses through an administrative commission.

65. Experience under the 1909 Boundary Waters Treaty between Canada and the United States has demonstrated the need for prior notification and consultation concerning new uses with potentially adverse trans-boundary impacts. The former chairman of the International Joint Commission, established by the Treaty, has emphasized the importance of such procedures in the following words:

"First, it is quite impossible to have satisfactory co-riparian relationships without the concerned parties being obliged by custom or practice to consult with the others before any plans are undertaken in the private or public sector which may have transboundary water quality or water quantity, or general environmental, effects on other members of the river basin family. Prior consultation is, therefore, of the essence and due notice and consultation becomes a prerequisite for sound relations." 112/

66. The 1960 Convention between the Land of Baden-Wuerttemberg, the Free State of Bavaria (both states of the Federal Republic of Germany), Austria and Switzerland, on the Protection of Lake Constance against Pollution 113/ provides in its article 1, paragraph 3, for notification and discussions concerning planned projects. That text has been summarized as providing as follows:

110/ Ibid. Chapter XV of the Statute (art. 60), referred to in article 12, provides for "Judicial settlement of disputes", while chapter XIV (arts. 58 and 59) provides for a conciliation procedure. Ibid., at pp. 606-607.

111/ Entered into force 12 February 1974. Summarized in Yearbook ... 1974, vol. II (Part Two), p. 298, document A/CN.4/274, paras. 115 et. seq.

112/ Cohen, "River basin planning: observations from international and Canada-United States experience", Dakar Meeting Proceedings, supra, note 8, at p. 126, quoted in S. Schwebel, Third Report, supra, note 8, at para. 179.

113/ 27 October 1960, entered into force 10 December 1961, Legislative Texts and Treaty Provisions concerning the Utilization of International Rivers for other Purposes than Navigation (hereafter referred to as "Legislative Texts"), document ST/LEG/SER.B/12, Treaty 127, p. 438 (1963); summarized in Yearbook ... 1974, vol. II (Part Two), p. 110, document A/5409, paras. 435 et. seq.

"... the riparian States shall inform each other, in good time, of any contemplated utilization of the water that might prejudice the interest of another riparian State in maintaining the salubrious condition of the water. Such contemplated measures shall not be put into effect until they have been discussed jointly by the riparian States, unless delay would entail a danger or the other States have expressly consented to their being carried out immediately." 114/

67. It will be recalled that the 1972 Statute of the Senegal River 115/ requires that States parties receive the prior approval of other contracting States before undertaking any project which might appreciably affect the characteristics of the régime of the river. The treaty régime governing the Niger River similarly provides for close co-operation between the riparian States and prior notification and consultation, through the Niger River Commission, concerning any works or modification likely to affect the characteristics of Niger River waters. 116/

68. One study notes that the requirement of prior consent was also "applied rather consistently by the United Kingdom in its treaties with indigenous governments in Africa and the Indian subcontinent." 117/

114/ Yearbook ... 1974, vol. II (Part Two), p. 110, document A/5409, para. 436. See also arts. 7-11 of the Agreement between Austria, the Federal Republic of Germany, and Switzerland regulating the withdrawal of water from Lake Constance of 30 April 1966, entered into force 25 November 1967, United Nations, Treaty Series, vol. 620, p. 191, and Yearbook ... 1974, vol. II (Part Two), p. 301, document A/CN.4/274, para. 142, under which "riparian States shall, before authorizing [certain specified] withdrawals of water, afford one another in good time an opportunity to express their views" (art. 7). In the event that the parties are unable to resolve any differences regarding proposed withdrawals, provision is made for progressive stages of dispute resolution, including consultation through a joint committee, discussion through the diplomatic channel, and, finally, binding arbitration (arts. 8-11).

115/ Senegal River Statute, supra, note 37, art. 4.

116/ See the Act Regarding Navigation and Economic Co-operation between the States of the Niger Basin (Act of Niamey), 26 October 1963, art. 4, United Nations, Treaty Series, vol. 587, p. 9; and the Agreement concerning the River Niger Commission of 25 November 1964, art. 12, ibid., vol. 587, p. 19. See the discussion of the Niger régime in F. Kirgis, supra, note 103, at pp. 47-49.

117/ F. Kirgis, supra, note 103, at p. 42. Kirgis continues: "In each instance the United Kingdom, with its overwhelming bargaining power, stood to gain from the prior consent requirement." Ibid. See, e.g., the 1906 Treaty between Great Britain and the Independent State of the Congo, Legislative Texts, supra, note 113, Treaty No. 5, at p. 99; the Treaty between Ethiopia and the United Kingdom relative to the frontiers between the Anglo-Egyptian Sudan, Ethiopia, and

69. Negotiations were held between Egypt and the Sudan concerning the Aswan High Dam project, in response to the Sudan's claim that it was entitled to be consulted in a timely fashion. The negotiations led to the 1959 Nile Waters Agreement, 118/ which was concluded prior to the commencement of construction of the dam. 119/

70. Article 7 of the 1960 Indus Waters Treaty between India and Pakistan contains the following detailed provisions concerning notification of planned works:

> "If either Party plans to construct any engineering work which would cause interference with the waters of any of the Rivers and which, in its opinion, would affect the other Party materially, it shall notify the other Party of its plans and shall supply such data relating to the work as may be available and as would enable the other Party to inform itself of the nature, magnitude and effect of the work. If a work would cause interference with the waters of any of the Rivers but would not, in the opinion of the Party planning it, affect the other Party materially, nevertheless the Party planning the work shall, on request, supply the other Party with such data regarding the nature, magnitude and effect, if any, of the work as may be available." 120/

(continued)

Eritrea, 15 May 1902, Legislative Texts, supra, note 113, Treaty No. 13, at p. 115; and the 1929 Agreement between Egypt and the United Kingdom in regard to the use of the waters of the river Nile for irrigation purposes, 7 May 1929, League of Nations, Treaty Series, vol. 93, p. 44, Legislative Texts, supra, note 113, Treaty No. 7, at p. 100.

118/ United Nations, Treaty Series, vol. 453, p. 51.

119/ Dean Kirqis concludes that this "incident is therefore normatively significant and tends to support a rule of consultation, at least before final action is taken." F. Kirqis, supra, note 103, at p. 44.

120/ Indus Waters Treaty (India-Pakistan), 19 September 1960, art. 7, para. 2, United Nations, Treaty Series, vol. 419, p. 125, Legislative Texts, supra, note 113, Treaty No. 98, p. 300. See also Dean Kirqis' discussion of negotiations between Bangladesh and India concerning the diversion of water from the Ganges River by India, which led to the Agreement on the Sharing of the Ganges Waters of 5 November 1977, International Legal Materials, vol. 17, p. 103 (1978). F. Kirqis, supra, note 103, at pp. 46-47. Kirqis concludes that, "taken as a whole, ... the Ganges diversion situation supports the prior consultation norm for successive rivers. India did consult extensively before building a dam and diversion canal of a specified capacity; it proceeded to use the canal up to its capacity only when any damage to Bangladesh would be minimal; and it agreed to set up [a] joint committee to which Bangladesh could resort for consultation in the event of later difficulties." Ibid.

71. These agreements and many others containing similar provisions illustrate the widespread practice of States of agreeing to notify and consult with other States with regard to proposed uses that could significantly affect the other States' use of or interest in an international watercourse. The existence of an obligation of this nature is also indicated by the decisions of bodies called upon to resolve disputes between States relating to international watercourses.

2. Decisions of international courts and tribunals

72. The most noteworthy international decision relating to notification and consultation is, of course, the award of the tribunal in the Lake Lanoux Arbitration. 121/ This decision, which was the subject of extensive consideration in the Special Rapporteur's second report, 122/ was based upon a number of principles of general international law concerning watercourses, including the following: (1) At least in the factual context of the case, international law does not require prior agreement between the upper and lower riparian concerning a proposed new use, but "prefers to resort to less extreme solutions, limiting itself to requiring States to seek the terms of an agreement by preliminary negotiations without making the exercise of their competence conditional on the conclusion of this agreement;" 123/ (2) under then-current trends in international practice concerning hydroelectric development, "consideration must be given to all interests, whatever their nature, which may be affected by the works undertaken, even if they do not amount to a right;" 124/ (3) "the upper riparian State, under the rules of good faith, has an obligation to take into consideration the various interests concerned, to seek to give them every satisfaction compatible with the pursuit of its own interests and to show that it has, in this matter, a real desire to reconcile the interests of the other riparian with its own;" 125/ and (4) there is an "intimate connection between the obligation to take adverse interests into account in the course of negotiations and the obligation to give a reasonable place to such interests in the solution adopted." 126/

121/ Aware of 16 November 1957, United Nations, Reports of International Arbitral Awards, vol. 12, pp. 285-317; extensive excerpts in Yearbook ... 1974, vol. II (Part Two), at pp. 194-199, document A/5409, paras. 1055-1068.

122/ S. McCaffrey, Second Report, supra; note 58, at paras. 111-124.

123/ Yearbook ... 1974, vol. II (Part Two), p. 197, document A/5409, para. 1065.

124/ Ibid., p. 198, para. 1068.

125/ Ibid.

126/ Ibid.

73. France had, in fact, consulted with Spain prior to the initiation of the diversion project there at issue, in response to Spain's claim that it was entitled to prior notification under article 11 of the 1866 Additional Act to the Treaty of Bayonne. 127/

74. The fact that there are not more decisions of international courts and tribunals bearing upon international watercourses in general, and the duty to notify and consult in particular, is probably due in large part to the prevalence of joint commissions and other administrative mechanisms through which States can prevent and resolve disputes concerning the use of watercourses.

3. Declarations and resolutions adopted by intergovernmental organizations, conferences and meetings

75. Recommendation 51 of the Action Plan adopted at the 1972 United Nations Conference on the Human Environment contained the following principle relating to notification of planned new uses:

> "Nations agree that when major water resource activities are contemplated that may have a significant environmental effect on another country, the other country should be notified well in advance of the activity envisaged; ..." 128/

76. Nearly 40 years earlier, the Seventh International Conference of American States adopted the Declaration of Montevideo, which provides, inter alia, not only for advance notice of planned works, but also for prior consent with regard to potentially injurious modifications:

> "2. ... no State may, without the consent of the other riparian State, introduce into watercourses of an international character, for the industrial or agricultural exploitation of their waters, any alteration which may prove injurious to the margin of the other interested State.
>
> "...
>
> "7. The works which a State plans to perform in international waters shall be previously announced to the other riparian or co-jurisdictional States. The announcement shall be accompanied by the necessary technical documentation in order that the other interested States may judge the scope of such works, and by the name of technical expert or experts who are to deal, if necessary, with the international side of the matter.

127/ Additional Act to the Treaty of Bayonne, 26 May 1866, Legislative Texts, supra, note 113, Treaty No. 185; International Law Reports, vol. 24, p. 103 (1957).

128/ Report of the United Nations Conference on the Human Environment, supra, note 90, p. 17.

"8. The announcement shall be answered within a period of three months, with or without observations. In the former case, the answer shall indicate the name of the technical expert or experts to be charged by the respondent with dealing with the technical experts of the applicant, and shall propose the date and place for constituting the Mixed Technical Commission of technical experts from both sides to pass judgement on the case. The Commission shall act within a period of six months, and if within this period no agreement has been reached, the members shall set forth their respective opinions, informing the Governments thereof." 129/

77. The Declaration of Asunción on the Use of International Rivers, adopted by the Foreign Ministers of the countries of the River Plate Basin at their fourth meeting, held from 1 to 3 June 1971, also embodies a prior consent requirement, but only for contiguous rivers:

"1. In contiguous international rivers, which are under dual sovereignty, there must be a prior bilateral agreement between the riparian States before any use is made of the waters." 130/

78. In 1974, the Council of the OECD adopted a recommendation on principles concerning trans-frontier pollution which, although of general application, is directly relevant to the present inquiry. The recommendation contains a "Principle of information and consultation", which reads as follows:

"6. Prior to the initiation in a country of works or undertakings which might create a significant risk of transfrontier pollution, this country should provide early information to other countries which are or may be affected. It should provide these countries with relevant information and data, the

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129/ Declaration of Montevideo concerning the industrial and agricultural use of international rivers, approved by the Seventh Inter-American Conference at its fifth plenary session, 24 December 1933, Pan-American Union, Seventh International Conference of American States, Plenary Sessions, Minutes and Antecedents (Montevideo, 1933), p. 114; reproduced in Yearbook ... 1974, vol. II (Part Two), p. 212, document A/5409, annex I.A. Paragraph 9 of the Declaration provides for the resolution of any remaining differences through diplomatic channels, conciliation, and, ultimately, any procedures under conventions in effect in America. The tribunal is to act within a three-month period and its award is to take into account the proceedings of the Mixed Technical Commission provided for in para. 8. It may be noted that Bolivia and Chile recognized that the Declaration embodied obligations applicable to the Lauca River dispute between the two States. See Council of the Organization of American States, documents OEA/SER.G/VI, C/INF-47, 15 and 20 April 1962, and OEA/Ser.G/VI, C/INF-50, 19 April 1962.

130/ Text reproduced in Yearbook ... 1974, vol. II (Part Two), p. 324, document A/CN.4/274, para. 326. With regard to successive rivers, the Declaration provides in its paragraph 2 that "each State may use the waters in accordance with its needs provided that it causes no appreciable damage to any other State of the Basin".

transmission of which is not prohibited by legislative provisions or prescriptions or applicable international conventions, and should invite their comments.

"7. Countries should enter into consultation on an existing or foreseeable transfrontier pollution problem at the request of a country which is or may be directly affected and should diligently pursue such consultations on this particular problem over a reasonable period of time.

"8. Countries should refrain from carrying out projects or activities which might create a significant risk of transfrontier pollution without first informing the countries which are or may be affected and, except in cases of extreme urgency, providing a reasonable amount of time in the light of circumstances for diligent consultation. Such consultations held in the best spirit of co-operation and good-neighbourliness should not enable a country to unreasonably delay or to impede the activities or projects on which consultations are taking place." 131/

79. Finally, one of the recommendations of the United Nations Water Conference, held at Mar del Plata from 14 to 25 March 1977, relates to "Regional co-operation". The relevant paragraph of that recommendation reads as follows:

"(g) In the absence of an agreement on the manner in which shared water resources should be utilized, countries which share these resources should exchange relevant information on which their future management can be based in order to avoid foreseeable damages; ..." 132/

131/ Recommendation C (74) 222 of 14 November 1974, reprinted in OECD, OECD and the Environment (Paris, 1986), pp. 144 and 145-146, quoted in S. Schwebel, Third Report supra, note 8 at para. 173.

132/ United Nations Water Conference Report, supra, note 8 at p. 52.

4. Studies by intergovernmental and non-governmental organizations

80. In 1963, the Inter-American Juridical Committee (IAJC) adopted a draft convention on the industrial and agricultural use of international rivers and lakes, which was transmitted for comment to member States of the Organization of American States. A revised draft convention was then prepared by the IAJC in 1965. That revised draft includes a complete set of provisions on notification and consultation which are in many respects similar to those contained in the 1933 Declaration of Montevideo set forth above. Those setting forth the basic obligations of notification and reply read as follows:

"Article 8

"A State that plans to build works for utilization of an international river or lake must first notify the other interested States. The notification shall be in writing and shall be accompanied by the necessary technical documents in order that the other interested States may have sufficient basis for determining and judging the scope of the works. Along with the notification, the names of the technical expert or experts who are to have charge of the first international phase of the matter should also be supplied.

"Article 9

"The reply to the notification must be given within six months and no postponements of any kind may be allowed, unless the requested State asks for supplementary information in addition to the documents that were originally provided, which request may be made only within thirty days following the date of the said notification and must set forth in specific terms the background information that is desired. In such case, the term of six months shall be counted from the date on which the aforesaid supplementary information is provided." 133/

Subsequent provisions of the draft permit the notifying State to proceed if it receives no reply within the period stipulated in article 9, and provide for the formation of a Joint Commission of technical experts to review any observations made in reply to the notification. In its report containing the draft convention, the IAJC made the following observations concerning the importance of provisions on notification of planned works:

133/ Report of the Inter-American Juridical Committee on the work accomplished during its 1965 meeting (OEA/Ser.1/VI.1, CIJ-83) (Washington, D.C., Panamerican Union, 1966), pp. 7-10. Text of the revised draft convention reproduced in part in Yearbook ... 1974, vol. II (Part Two), pp. 350-351, document A/CN.4/274, para. 379.

"The Convention would clearly be incomplete without this section. It is obviously not sufficient to enunciate general principles if, when a case arises, the parties are not required to establish contact in order to compare views and try to reconcile their interests.

"It should therefore be made mandatory for interested States to be notified of the intention of another State to carry out such works. In this way, potentially serious conflicts are eliminated and, instead, understanding among States will be facilitated, to the benefit of the works themselves, because, once agreement among the interested States has been confirmed, they will be able to proceed more rapidly and free of material or legal obstacles." 134/

81. At its tenth session, held at Karachi in January 1969, the Asian-African Legal Consultative Committee (AALCC) appointed a sub-committee to prepare draft articles on the law of international watercourses, "particularly in the light of the experience of the countries of Asia and Africa and reflecting the high moral and juristic concepts inherent in their own civilizations and legal systems." After considering drafts submitted by the delegations of Pakistan and Iraq, as well as a proposal that the firth eight articles of the International Law Association's 1966 "Helsinki Rules" be taken as the basis of the Committee's study, the Sub-Committee in 1972 recommended to the plenary that it consider a set of revised draft propositions submitted by the Sub-Committee's Rapporteur. That draft is in fact similar in many respects to the Helsinki Rules. The following provisions of the revised draft are pertinent to the present survey:

"Proposition IV

"...

"2. A basin State may not ... undertake works or utilizations of the waters of an international drainage basin which would cause substantial damage to another basin State unless such works or utilizations are approved by the States likely to be adversely affected by them or are otherwise authorized by a decision of a competent international court or arbitral commission.

"...

"Proposition X

"A State which proposes a change of the previously existing uses of the waters of an international drainage basin that might seriously affect utilization of the waters by another co-basin State, must first consult with

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134/ Organization of American States, Ríos y lagos internacionales (utilización para fines agrícolas e industriales), 4th ed., rev. (Washington, D.C., 1971), p. 128. Text reproduced in S. Schwebel, Third Report, supra, note 8, at para. 170.

the other interested co-basin States. In case agreement is not reached through such consultation, the States concerned should seek the advice of a technical expert or commission. If this does not lead to agreement, resort should be had to the other peaceful methods provided for in Article 33 of the United Nations Charter, and in particular, to international arbitration and adjudication." 135/

82. The Institute of International Law first decided to study the question of the law relating to international rivers in 1910, and adopted a resolution on "international regulations regarding the use of international watercourses" at its 1911 meeting. 136/ In 1956, the Institute again turned its attention to the field of international watercourses, appointing a commission to study the topic of the utilization of non-maritime international waters (except for navigation), with Mr. Juraj Andrassy as Rapporteur. At its 1961 session, the Institute adopted a resolution on that topic which was based on a draft prepared by the Rapporteur. The resolution contains the following provisions of present interest:

"Article 3. If the States are in disagreement over the scope of their rights of utilization, settlement will take place on the basis of equity, taking particular account of their respective needs, as well as of other pertinent circumstances.

"Article 4. No State can undertake works or utilizations of the waters of a watercourse or hydrographic basin which seriously affect the possibility of utilization of the same waters by other States except on condition of assuring them the enjoyment of the advantages to which they are entitled under article 3, as well as adequate compensation for any loss or damage.

"Article 5. Works or utilizations referred to in the preceding article may not be undertaken except after previous notice to interested States.

"Article 6. In case objection is made, the States will enter into negotiations with a view to reaching an agreement within a reasonable time.

"For this purpose, it is desirable that the States in disagreement should have recourse to technical experts and, should occasion arise, to commissions and appropriate agencies in order to arrive at solutions assuring the greatest advantage to all concerned.

"Article 7. During the negotiations, every State must, in conformity with the principle of good faith, refrain from undertaking the works or

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135/ Asian-African Legal Consultative Committee, Report of the Fourteenth Session held at New Delhi (10-18 January 1973) (New Delhi), pp. 7-14; reprinted in Yearbook ... 1974, vol. II (Part Two), pp. 339-340, document A/CN.4/274, para. 367.

136/ Annuaire de l'Institut de droit international, Madrid session, April 1911 (Paris, 1911), vol. 24, pp. 365-367. The text of the resolution is reprinted in Yearbook ... 1974, vol. II (Part Two), p. 200, document A/5409, para. 1072.

utilizations which are the object of the dispute or from taking any other measures which might aggravate the dispute or render agreement more difficult.

"Article 8. If the interested States fail to reach agreement within a reasonable time, it is recommended that they submit to judicial settlement or arbitration the question whether the project is contrary to the above rules.

"If the State objecting to the works or utilizations projected refuses to submit to judicial settlement or arbitration, the other State is free, subject to its responsibility, to go ahead, while remaining bound by its obligations arising from the provisions of articles 2 to 4. 137/

"Article 9. It is recommended that States interested in particular hydrographic basins investigate the desirability of creating common organs for establishing plans of utilization designed to facilitate their economic development as well as to prevent and settle disputes which might arise." 138/

83. The Inter-American Bar Association, at its Tenth Conference in 1957, unanimously adopted a resolution on the use of international rivers. After reciting the general rule that States have the right to use the waters of an international watercourse system "in so far as such use does not affect adversely the equal right of the States having under their jurisdiction other parts of the system", the resolution goes on to lay down, inter alia, a rule of prior consent to the initiation of new, potentially harmful uses:

"3. States having under their jurisdiction part of a system of international waters are under a duty to refrain from making changes in the existing régime that might affect adversely the advantageous use by one or more other States having a part of the system under their jurisdiction, except in accordance with (i) an agreement with the State or States affected or (ii) a decision of an international court or arbitral commission; ..." 139/

137/ Articles 2 and 3 concern the right of every State to utilize waters which traverse its territory, the limitation of that right by the right of utilization of "other States interested in the same watercourse or hydrographic basin" (art. 2 (2)), and settlement on the basis of equity of any disagreements on the scope of the right of utilization.

138/ Annuaire de l'Institut de droit international, Salzburg session, September 1961 (Basel, 1961), vol. 49, tome II, pp. 381-384. The text of the resolution is reprinted in Yearbook ... 1974, vol. II (Part Two), p. 202, document A/5409, para. 1076.

139/ Inter-American Bar Association, Proceedings of the Tenth Conference held at Buenos Aires from 14 to 21 November 1957, vol. 1, pp. 246-248 (Buenos Aires, 1958); reprinted in Yearbook ... 1974, vol. II (Part Two), p. 208, document A/5409, para. 1092.

84. The International Law Association (ILA), at its Dubrovnik Conference in 1956, adopted a statement of principles "as a sound basis upon which to study further the development of rules of international law with respect to international rivers." 140/ One of those principles concerns consultation regarding new works:

> "VI. A State which proposes new works (construction, diversion, etc.) or change of previously existing use of water, which might affect utilization of the water by another State, must first consult with the other State. In case agreement is not reached through such consultation, the States concerned should seek the advice of a technical commission, and if, this does not lead to agreement, resort should be had to arbitration." 141/

A milestone in the work on the law of international watercourses 142/ was the adoption in 1966 of the Helsinki Rules on the Uses of the Waters of International Rivers. 143/ In chapter 6 of the Rules, which is entitled "Procedures for the Prevention and Settlement of Disputes", the ILA made several recommendations of present interest:

"Article XXIX

> "1. With a view to preventing disputes from arising between basin States as to their legal rights or other interest, it is recommended that each basin State furnish relevant and reasonably available information to the other basin States concerning the waters of a drainage basin within its territory and its use of, and activities with respect to, such waters.
>
> "2. A State, regardless of its location in a drainage basin, should in particular furnish to any other basin State, the interests of which may be substantially affected, notice of any proposed construction or installation which would alter the régime of the basin in a way which might give rise to a dispute. ... The notice should include such essential facts as will permit the recipient to make an assessment of the probable effect of the proposed alteration.

140/ The International Law Association, Report of the Forty-Seventh Conference, Dubrovnik, 1956 (Aberystwyth, Cambrian News, 1957), pp. 244-248; reprinted in Yearbook ... 1974, vol. II (Part Two), p. 203, document A/5409, para. 1080.

141/ Ibid.

142/ For the history of the work on the subject, see Yearbook ... 1974, vol. II (Part Two), pp. 202 et seq., and 357, document A/5409, paras. 1077 et seq., and document A/CN.4/274, para. 404.

143/ Helsinki Rules, supra, note 58.

"3. A State providing the notice referred to in paragraph 2 of this Article should afford to the recipient a reasonable period of time to make an assessment of the probable effect of the proposed construction or installation and to submit its views thereon to the State furnishing the notice.

"4. If a State has failed to give the notice referred to in paragraph 2 of this Article, the Alteration by the State in the régime of the drainage basin shall not be given the weight normally accorded to temporal priority in use in the event of a determination of what is a reasonable and equitable share of the waters of the basin." 144/

On the question of whether these provisions reflect a legal obligation, one commentator has made the following observations:

"When in these Articles the term 'it is recommended' is used, this must not be misinterpreted as falling short of a legal obligation; the term is only the appropriate expression for a procedural obligation. In fact, the 'recommendations' contained in [the] Articles ... are nothing else than the common and long established practice of all States in disputes of this sort. ... The near universality [of international agreements containing similar provisions] is a very solid base indeed for our assumption that here an obligatory custom has developed." 145/

In any event, the ILA subsequently adopted articles which clearly indicate an obligation to provide advance notification. At its 1980 Belgrade Conference, the Association adopted nine articles on "regulation of the flow of water of international watercourses", which included the following provisions:

"Article 7

"1. A basin State is under a duty to give the notice and information and to follow the procedure set forth in article XXIX of the Helsinki Rules.

"...

"Article 8

"In the event of objection to the proposed regulation, the States concerned shall use their best endeavours with a view to reaching an agreement. If they fail to reach an agreement within a reasonable time, the

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144/ Ibid.

145/ Külz, "Further Water Disputes between India and Pakistan", 18, International and Comparative Law Quarterly, p. 734 (1969).

States should seek a solution in accordance with chapter 6 of the Helsinki Rules." 146/

And in 1982, the Association adopted a set of Rules on Water Pollution in an International Drainage Basin, 147/ Articles 5 and 6 of which are pertinent to the present survey:

"Article 5

"Basin States shall:

"(a) inform the other States concerned regularly of all relevant and reasonably available data, both qualitative and quantitative, on the pollution of waters of the basin, its causes, its nature, the damage resulting from it, and the preventive procedures;

"(b) notify the other States concerned in due time of any activities envisaged in their own territories that may involve a significant threat of, or increase in water pollution in the territories of those other States; and

"(c) promptly inform States that might be affected, of any sudden change of circumstances that may cause or increase water pollution in the territories of those other States." 148/

"Article 6

"Basin States shall consult one another on actual or potential problems of water pollution in the drainage basin so as to reach, by methods of their own choice, a solution consistent with their rights and duties under international law. This consultation, however, shall not unreasonably delay the implementation of plans that are the subject of the consultation." 149/

85. In 1968, the Secretary-General of the United Nations appointed a panel of experts to assist Member States in dealing effectively with problems associated

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146/ ILA, Report of the Fifty-ninth Conference ..., pp. 367-369. Text reproduced in S. Schwebel, Third Report, supra, note 8, at para. 128.

147/ ILA, Report of the Sixtieth Conference, held at Montreal, August 29th, 1982, to September 4th, 1982 (Canada, 1983), p. 535.

148/ Ibid., p. 540.

149/ Ibid., p. 541.

with the development and management of international water resources. 150/ This group's recommendations and conclusions are set forth in the report of the Panel of Experts on the Legal and Institutional Aspects of International Water Resources Development, 151/ a document which is highly instructive as to legal, institutional, and policy aspects of international watercourse management. The report points out that while relatively minor modifications in watercourse use may be handled by the concerned States on an ad hoc basis, larger projects are best dealt with through some form of joint machinery:

> "Initial decisions with respect to international water resources projects and programmes may appear to call merely for co-ordination and consultation; however, as soon as major undertakings are envisaged, the additional legal and institutional machinery for the facilitation of actual collaboration becomes desirable, if not indispensable." 152/

The approach of the report to new uses is generally to provide for procedures which attempt to anticipate potential problems and deal with them at the technical level, so as to avoid unnecessary politicization. In the words of the report:

> "Emphasis is placed on mechanisms conducive to early resolution, at the technical level, in a deliberate effort to prevent differences from becoming formal disputes between or among the parties to an international basin or project agreement or between these States and third States. ... Successful accommodation or early settlement avoids work stoppages, strained relations and, most importantly, the hardening of the national position that inevitably occurs once a difference emerges as a full-fledged dispute." 153/

The report repeatedly emphasizes the importance of formulating positions on the basis of complete factual data as well as engineering and management considerations, a process that would be impossible without advance notification of planned projects:

> "Experience has shown that a Government's position is often taken in response to sincere but somewhat speculative apprehension, that is, fear of what might possibly happen if a certain course of action is pursued. With respect to the water resources in the international system, it is normally helpful to all concerned to ascertain the extent to which such fear is justified. This can be done only by full development of the objective data base from which all parties should be drawing their conclusions. The

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150/ The panel of experts was appointed in pursuance of Economic and Social Council resolution 1033 (XXXVII) of 14 August 1964.

151/ Management of International Water Resources: Institutional and Legal Aspects, supra, note 56.

152/ Ibid., at p. 18.

153/ Ibid., at p. 144, para. 454.

collection of all relevant data and their dissemination to all concerned may serve to allay the apprehension, or may show the apprehension to be well founded. Full study of the problem on the basis of all the information may cause one side or the other to give ground or propose some solution that will resolve the differences." 154/

86. Finally, the Intergovernmental Working Group of Experts on Natural Resources Shared by Two or More States, established by the Governing Council of UNEP, 155/ adopted a final report in 1978 which contains a set of "Draft Principles of Conduct in the Field of the Environment for the Guidance of States in the Conservation and Harmonious Exploitation of Natural Resources Shared by Two or More States." 156/ The Draft Principles were subsequently approved by the Governing Council, which referred them to the General Assembly for adoption. 157/ They were then submitted by the Secretary-General to Member States for comment, discussed in the Second Committee and, finally, addressed by the General Assembly in resolution 34/186, which was adopted without a vote on 18 December 1979. That resolution states that the General Assembly "takes note" of the report of the Working Group, and of the draft principles, and that it

> "Requests all States to use the principles as guidelines and recommendations in the formulation of bilateral or multilateral conventions regarding natural resources shared by two or more States, on the basis of the principle of good faith and in the spirit of good-neighbourliness ..."

While the Draft Principles do not contain a definition of the term "natural resources shared by two or more States", 158/ international watercourses would seem to fall comfortably within their ambit. Particularly relevant for present purposes are Principles 6 and 7, which read as follows:

154/ Ibid., p. 145, para. 458.

155/ UNEP Governing Council decision No. 44 (III). The Working Group was established pursuant to General Assembly resolution 3129 (XXVIII) of 13 December 1973. The Working Group held five sessions between 1976 and 1978.

156/ UNEP/IG.12/2, annexed to document UNEP/GC.16/17. The decisions of the Governing Council and the 1978 Report of the Working Group are reproduced in International Legal Materials, vol. 17, pp. 1091-1099 (1978). For a summary of the background of the Draft Principles and of the action taken by the General Assembly, see Note presented by Mr. Constantin A. Stavropoulos, Yearbook ... 1983, vol. II (Part One), p. 195, document A/CN.4/L.353.

157/ Governing Council decision 6/14, adopted 19 May 1978.

158/ For lack of time, the Working Group was not able to elaborate a definition of "shared natural resources". UNEP/IG.12/2, para. 16, annexed to UNEP/GC.6/17.

"Principle 6

"1. It is necessary for every State sharing a natural resource with one or more other States:

"(a) To notify in advance the other State or States of the pertinent details of plans to initiate, or make a change in the conservation or utilization of the resource which can reasonably be expected to affect significantly [159/] the environment in the territory of the other State or States; and

"(b) Upon request of the other State or States, to enter into consultations concerning the above-mentioned plans; and

"(c) To provide, upon request to that effect by the other State or States, specific additional pertinent information concerning such plans; and

"(d) If there has been no advance notification as envisaged in subparagraph (a) above, to enter into consultations about such plans upon request of the other State or States.

"2. In cases where the transmission of certain information is prevented by national legislation or international conventions, the State or States withholding such information shall nevertheless, on the basis, in particular, of the principle of good faith and in the spirit of good-neighbourliness, co-operate with the other interested State or States with the aim of finding a satisfactory solution.

"Principle 7

"Exchange of information, notification, consultations and other forms of co-operation regarding shared natural resources are carried out on the basis of the principle of good faith and in the spirit of good-neighbourliness and in such a way as to avoid any unreasonable delays either in the forms of co-operation or in carrying out development or conservation projects." 160/

159/ The Draft Principles begin with the following definition of the term "significantly affect":

"DEFINITION

"In the present text, the expression 'significantly affect' refers to any appreciable effects on a shared natural resource and excludes de minimis effects."

UNEP/IG.12/2, annexed to document UNEP/GC.16/17.

160/ Ibid.

5. The proposed articles

87. The Special Rapporteur submits that the foregoing authorities, among others, 161/ provide ample support for the inclusion in the Commission's draft articles on the law of the non-navigational uses of international watercourses of a set of articles on notification and consultation regarding contemplated new uses of an international watercourse. Further, many of these authorities reflect a recognition of the necessity of providing for a graduated set of procedures in order to allow the States involved to preserve or arrive at an equitable system-wide allocation of watercourse uses and benefits, while preventing the escalation of disputes. Thus, these authorities include provisions concerning negotiation and, ultimately, third-party dispute settlement as a necessary complement to the initial requirements concerning notification, information exchange and consultation.

88. The set of draft articles that will be proposed in this section of the report follows the approach taken by these authorities, requiring notification regarding proposed projects, and that the concerned States attempt to resolve any difference of views as to the effect of a proposed project first through consultations and, if these are unsuccessful, through negotiations. If the parties are unable satisfactorily to resolve their differences through negotiations, the articles would require them to have recourse to third-party dispute resolution. The latter means of dispute settlement, which will be addressed in a subsequent report, might itself consist of a staged process, including, e.g., intial referral to conciliation and ultimate resort to binding arbitration.

89. While the Special Rapporteur would thus recommend a graduated process of resolving any disputes concerning new uses - since such a process seems most likely to result in agreement between the States involved - he wishes to emphasize the importance of not allowing this process to delay unduly the implementation of plans for new watercourse uses. Indeed, arriving at a fair balance between the twin objectives of achieving agreement concerning new uses, and avoiding undue delay, is a major challenge facing the Commission.

90. With the foregoing considerations in mind, the Special Rapporteur submits the following draft articles for the Commission's consideration.

161/ As stated earlier, this survey is offered only for illustrative purposes, and does not purport to be exhaustive. Not mentioned in the survey are the studies by individual experts in the field of the question of the duty to provide notification and to consult concerning proposed new uses. See, e.g., S. Schwebel, Third Report, supra, note 8; Bourne, Notice, and Bourne, Consultation and Negotiation, supra, note 103; F. Kirgis, supra, note 103; O. Schachter, supra, note 62, at p. 69; W. Griffin, Legal Aspects of the Use of Systems of International Waters, U.S. Senate document No. 118, 85th Congress, 2d Session, pp. 90-91 (1958); Griffin, "The Use of Waters of International Drainage Basins under Customary International Law", American Journal of International Law, vol. 50 (1959), p. 50, at pp. 79-80; H. Smith, supra, note 8, at pp. 151-152; and G. Glos, International Rivers: A Policy-Oriented Perspective, p. 144 (1961).

Article 11

Notification concerning proposed uses

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

Comments

(1) Neither this article nor those that follow employ the adjectives "watercourse" or "system" to modify the term "State". Indeed, such a modifier may not be necessary if it is made clear in an introductory article 162/ that the entire set of draft articles applies only as between States having in their territories a part or component of an international watercourse system. Of course, an adjective of this kind can be added at a later stage if the Commission's disposition of the introductory articles so requires.

(2) The term "contemplates" is intended to indicate that the new use is still in the preliminary planning stages, and has not yet been authorized or permitted.

(3) The term "new use" comprehends an addition to or alteration of an existing use, as well as new projects, programmes, etc. In short, the article is intended to require notification of any contemplated alteration in the régime of the watercourse that might entail adverse effects with regard to another State.

(4) The Commission may find it desirable at an appropriate juncture to define, in an article, such terms a "new use" and "contemplated new use".

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

(6) The State contemplating the new use is to make the determination of whether it "may cause appreciable harm to other States" on the basis of objective scientific and technical data.

162/ See, e.g., article 2 as provisionally adopted by the Commission in 1980 (para. 2 above) or article 3 as proposed by the previous Special Rapporteur (supra, note 3).

(7) The term "timely" is intended to require notification sufficiently early in the planning stages to permit meaningful consultation and negotiation, if such proves necessary.

(8) The reference to "available" technical data and information is intended to indicate that the notifying State is generally not required to conduct additional research at the request of a potentially affected State, but must only provide such relevant data and information as has been developed in relation to the proposed use, and is readily accessible. (A subsequent article will cover information that need not be disclosed for national security reasons.) If a notified State desires information that is not readily available, but is in the sole possession of the notifying State, it would generally be appropriate for the former to offer to indemnity the latter for expenses incurred in producing the information.

Article 12

Period for reply to notification

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

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

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

3. If the notifying State and the notified States do not agree on what constitutes, under the circumstances, a reasonable period of time for study and evaluation, they shall negotiate in good faith with a view to agreeing upon such a period, taking into consideration all relevant factors, including the urgency of the need for the new use and the difficulty of evaluating its potential effects. The process of study and evaluation by the notified State shall proceed concurrently with the negotiations provided for in this paragraph, and such negotiations shall not unduly delay the initiation of the contemplated use or the attainment of an agreed resolution under paragraph 3 of article 13.

Comments

(1) Determination of the period of time within which the notified State is required to reply is not an easy matter. It must be a period that produces an equitable balance between the interest of the notifying and notified States in a wide variety of situations. This consideration suggests that the period should not be one that is inflexibly fixed for all cases. It may be, however, that it would be advisable to provide additional guidance to States by setting a minimum period, such as six months, within which the determination must be made and communicated. 163/ The second alternative formulation of paragraph 1, alternative B, is submitted for the Commission's consideration with the latter idea in mind.

(2) On the other hand, the standard of a "reasonable period of time", employed in alternative A of paragraph 1, may be preferable for the reason that a fixed period may be unreasonably long in some cases and unreasonably short in others. A fixed period that, in an individual case, is unreasonably long may operate to discourage the notifying State from providing notice. Conversely, a fixed, generally applicable period that is unreasonably short when applied to a concrete case may none the less raise a presumption of reasonableness which is so strong that it is very difficult for the potentially affected States to overcome. This is an issue which merits careful consideration by the Commission.

(3) The obligation to negotiate set forth in paragraph 3 is drawn by analogy from the same obligation in respect of the determination of reasonable or equitable shares. 164/ In both cases the process entails a weighing of relevant

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163/ Cf. article 8 (4) as contained in S. Schwebel, Third Report, supra, note 8, p. 103, para. 156. That paragraph provides, inter alia, as follows:

> "4. The proposing State ... shall allow the other system State, unless otherwise agreed, a period of not less than six months to study and evaluate the potential for harm of the project or programme and to communicate its determination to the proposing State."

164/ See article 8 (2) as referred to the Drafting Committee in 1984. That paragraph provides as follows:

> "2. In determining according to paragraph 1 of this article whether a use is reasonable and equitable the watercourse States concerned shall negotiate in a spirit of good faith and good-neighbourly relations in order to solve the outstanding issues.
>
> "If the watercourse States concerned fail to reach agreement by negotiations within a reasonable period of time they shall resort to the peaceful settlement procedures provided for in chapter V of this Convention."

See J. Evensen, Second Report, supra, note 3.

considerations. Moreover, since an unduly short period may result in the initiation of a use which upsets an equitable allocation, the opportunity for meaningful study and evaluation is closely tied to both the duty to avoid causing injury and the principle of equitable utilization.

(4) Authority supporting the obligation to negotiate has been placed before the Commission on previous occasions, inter alia, in relation to article 8 as contained in the second report of the previous Special Rapporteur and referred to the Drafting Committee in 1984; and with regard to article 8 as contained in the third report of Mr. Schwebel. 165/ Some of the authorities reviewed in the present report in relation to the obligations to co-operate and to notify concerning proposed uses also support the duty to negotiate. This is true in particular of the North Sea Continental Shelf cases 166/ and the Lake Lanoux Arbitration. 167/ In the latter case, the tribunal found that under general international law an agreement with potentially affected States was not a prerequisite to the initiation of a new use. It continued:

> "... international practice prefers to resort to less extreme solutions, limiting itself to requiring States to seek the terms of an agreement by preliminary negotiations without making the exercise of their competence conditional on the conclusion of this agreement." 168/

The tribunal went on to emphasize the reality of the obligation to negotiate in good faith and to explain that it may be enforced in the case, inter alia, of an unjustified breaking off of conversations, undue delay, and "systematic refusal to give consideration to proposals or adverse interests, and more generally in the case of infringement of the rules of good faith". 169/

165/ See, generally, S. Schwebel, Third Report, supra, note 8, pp. 91-100, paras. 111-186. See also S. Schwebel, Second report on the law of the law of the non-navigational uses of international watercourses, Yearbook ... 1980, vol. II (Part One), pp. 170 et seq., document A/CN.4/332 and Add.1, paras. 73 et seq., discussing the North Sea Continental Shelf, Fisheries Jurisdiction and Lake Lanoux cases.

166/ Supra, note 79. See especially the passage quoted in text at note 81, supra.

167/ See note 75, supra. See especially the passages quoted in text at notes 77 and 78.

168/ Yearbook ... 1974, vol. II (Part Two), p. 197, document A/5409, para. 1065.

169/ Ibid. See the entire passage, quoted in the present report at note 77, supra.

(5) The good-faith aspect of the duty to negotiate was also emphasized by the International Court of Justice in the North Sea Continental Shelf cases. The Court's judgment in those cases holds interesting lessons for the field of watercourse law, requiring as it does that the parties apply equitable principles in their negotiations. In the following passages - which, the Special Rapporteur submits, are equally applicable in the context of watercourses 170/ - the Court addressed the parties' obligation to negotiate with a view to arriving at an equitable apportionment of the natural resources in question:

> "... the parties are under an obligation to enter into negotiations with a view to arriving at an agreement, and not merely to go through a formal process of negotiation as a sort of prior condition for the automatic application of a certain method of delimitation in the absence of agreement; they are under an obligation so to conduct themselves that the negotiations are meaningful, which will not be the case when either of them insists upon its own position without contemplating any modification of it;
>
> "... so far as ... [this] rule is concerned, the Court would recall ... that the obligation to negotiate merely constitutes a special application of a principle which underlies all international relations, and which is moreover recognized in Article 33 of the Charter of the United Nations as one of the methods for the peaceful settlement of international disputes.
>
> "... Defining the content of the obligation to negotiate, the Permanent Court [of International Justice], in its Advisory Opinion in the case of Railway Traffic between Lithuania and Poland, said that the obligation was 'not only to enter into negotiations but also to pursue them as far as possible with a view to concluding agreements', even if an obligation to negotiate did not imply an obligation to reach agreement (P.C.I.J., Series A/B, No. 42, 1931, at p. 116)." 171/

(6) In the Fisheries Jurisdiction case the Court also emphasized the parties' obligation to negotiate concerning the apportionment of a natural resource upon which both depended. The Court first observed that "due recognition must be given to the rights of both Parties, namely the rights of the United Kingdom to fish in the waters in dispute, and the preferential rights of [the coastal State,]

170/ Specifically, the Court's statements with regard to the duty to negotiate are applicable, in the Special Rapporteur's view, to the duty to negotiate to arrive at an equitable apportionment (see art. 8 (2) as referred to the Drafting Committee in 1984), the duty contained in para. 3 of the present article, and the duty laid down in art. 13 (3), infra.

171/ North Sea Continental Shelf cases, supra, note 79, at pp. 48-49, paras. 85-87. The Court went on to direct the parties to the cases to enter into fresh negotiations because those which had occurred had not satisfied the conditions laid down in the quoted passage.

Iceland." 172/ After declaring that "both States have an obligation to take full account of each other's rights", and referring, inter alia, to the principle of "equitable exploitation" 173/ of the resources in question, the Court went on to explain that

> "... it is implicit in the concept of preferential rights that negotiations are required in order to define or delimit the extent of those rights ... The obligation to negotiate thus flows from the very nature of the respective rights of the Parties; to direct them to negotiate is therefore a proper exercise of the judicial function in this case." 174/

(7) The Special Rapporteur submits that the process involved in both of these cases - i.e., the achievement of an equitable apportionment or reasonable result through good-faith negotiations - is closely analogous to that involved in the case of watercourses. Moreover, direct support for the duty to negotiate in good faith in respect of new watercourse uses is provided by the award in the Lake Lanoux Arbitration, 175/ as well as by a number of international instruments. 176/ The set of draft articles submitted in the present report - in particular, articles 12 and 13 - therefore requires that, in the event of a dispute as to the matter at hand, the parties negotiate in good faith with a view to reaching a reasonable or, as the case may be, equitable result. In article 12, this obligation applies to determination of the period for reply to notification. In article 13, it applies to arriving at an accommodation of the interests of the notifying and notified States with regard to the contemplated new use.

172/ Fisheries Jurisdiction case, supra, note 83, at p. 32, para. 71. In language which might, to a certain extent, be applied by analogy to the rights of States using the same international watercourse, the Court continued:

> "Neither right is an absolute one: the preferential rights of a coastal State are limited according to the extent of its special dependence on the fisheries and by its obligation to take account of the rights of other States and the needs of conservation; the established rights of other fishing States are in turn limited by reason of the coastal State's special dependence on the fisheries and its own obligation to take account of the rights of other States, including the coastal State, and of the needs of conservation."

173/ Ibid., para. 72.

174/ Ibid., p. 33, para. 74.

175/ Note 75, supra. See the discussion of this award earlier in this comment, and the passages quoted in text at notes 77 and 78, supra.

176/ See, e.g., the instruments referred to in the earlier part of the present section, in particular arts. 3 and 4 of the Convention relating to the development of hydraulic power affecting more than one State, note 108, supra, and accompanying text.

(8) The last sentence of paragraph 3 is designed to assure, in so far as possible, that the flexible means provided in that paragraph for the determination of a reasonable period of study and evaluation do not themselves consume an inordinate amount of time or unduly impede other aspects of the process of accommodation.

Article 13

Reply to notification: consultation and negotiation concerning proposed uses

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

2. The notifying State, upon being informed by the notified State as provided in paragraph 1 of this article, is under a duty to consult with the notified State with a view to confirming or adjusting the determinations referred to in that paragraph.

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

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

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

Comments

(1) It will be noted that paragraph 1 calls for the notified State to make two separate determinations in order to trigger the obligations of the notifying State under paragraph 2: (a) a determination that the contemplated use would, or is likely to, cause the notified State appreciable harm; and (b) a determination that such use would, or is likely to, result in the proposing State's depriving the

notified State of its equitable share. The reason both determinations are required is that, as explained in the Special Rapporteur's second report, 177/ the fact that one State's use of a watercourse causes another State harm does not, in and of itself, mean that the second State has sustained legally recognizable injury.

(2) The duty to consult provided for in paragraph 2 is supported by, inter alia, the authorities summarized in the present section of this report. 178/

(3) The duty to negotiate set forth in paragraph 3 is based upon the authorities reviewed in this section of the report, as well as those adverted to in the comments to article 12.

(4) The requirements of paragraph 4 are based primarily upon the principles stated by the International Court of Justice in paragraph 78 of its judgment in the Fisheries Jurisdiction case, and the award in the Lake Lanoux arbitration. 179/ The term "interests" as used in that paragraph is also drawn from the Lake Lanoux award which, it will be recalled, required that consideration be given "to all interests, whatever their nature, which may be affected by the works undertaken, even if they do not amount to a right". 180/

(5) The expression "differences arising out of the application of this article" contained in paragraph 5 is intended to comprehend differences concerning such matters as (a) the adequacy of compliance with the terms of the article; (b) the evaluation of the potential for harm of the contemplated new use, project or programme; (c) modifications of the notifying State's plans or of either State's existing uses; and (d) either State's equitable share or participation.

Article 14

Effect of failure to comply with articles 11 to 13

1. If a State contemplating a new use fails to provide notice thereof to other States as required by article 11, any of those other States believing that the contemplated use may cause them appreciable harm may invoke the obligations of the former State under article 11. In the event that the States concerned do not agree upon whether the contemplated new use may cause appreciable harm to other States within the meaning of article 11, they shall

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177/ S. McCaffrey, Second Report, supra, note 2, paras. 179-187.

178/ See also the leading studies by Professors Bourne and Kirgis, cited in note 103, supra, and the authorities there cited.

179/ See especially the passages of the award quoted in the present report at notes 124-126, supra.

180/ Yearbook ... 1974, vol. II (Part Two), p. 198, document A/5409, para. 1068. This passage also appears in the present report at note 124, supra.

promptly enter into negotiations, in the manner required by paragraphs 3 and 4 of article 13, with a view to resolving their differences. If the States concerned are unable to resolve their differences through negotiations, they shall resolve such differences through the most expeditious procedures of pacific settlement available to and binding upon them or, in the absence thereof, in accordance with the dispute settlement provisions of these draft articles.

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

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

Comments

(1) Paragraph 1 is intended to provide for the situation in which the State contemplating a new use fails to provide notice thereof as required by article 11. It allows another State - which may have learned indirectly and only in very general terms of the proposed new use - to invoke the proposing State's obligations under article 10 to provide detailed information concerning the plans in question.

(2) A State contemplating a new use may not have provided notice because of its belief that the new use would not be likely to cause appreciable harm to other States. In such a case, paragraph 1 would require the proposing State, at the request of the other States concerned, to provide full information concerning the new use, or at least to enter promptly into negotiations with those other States with a view to reaching agreement on whether appreciable harm might result from the proposed new use.

(3) Paragraph 2 would allow the notifying State to proceed with the planned new use if the notified State failed to reply within a reasonable period. However, the proposing State would remain under an obligation not to deprive other States utilizing the watercourse of their equitable shares. In other words, it may not cause them "appreciable harm", in the legal sense of the expression. The latter obligation is set forth in article 9 as referred to the Drafting Committee in 1984. Square brackets have been placed around the number 9 since the article has not yet been adopted by the Commission and might eventually be renumbered.

(4) Paragraph 3 is intended to encourage compliance with the notification, consultation and negotiation requirements of articles 10 to 12 by making a notifying State liable for any harm to other States resulting from the new use, even if such harm would otherwise be allowable under article [9] as being a consequence of the notifying State's equitable utilization of the watercourse.

This assumes, of course, that aricle [9] will be reformulated to take into account the distinction between factual "harm" and legal "injury", as recommended in the Special Rapporteur's second report. 181/

Article 15

Proposed uses of utmost urgency

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

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

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

Comments

(1) The principle object of this article is to permit the notifying State to proceed with the new use in certain extraordinary situations involving public emergencies. For example, it may be clearly necessary for the notifying State to proceed immediately with the implementation of planned protective measures in order to avoid disastrous consequences. The need for a provision of this kind is recognized in various international instruments. 182/ The examples of threats to public health or safety are given in the text of the article in order to emphasize the gravity and exceptional nature of the circumstances which it envisions.

181/ See S. McCaffrey, Second Report, supra, note 2, paras. 179-187.

182/ See, e.g., art. 29 of the 1922 Convention relating to watercourses and dikes on the Danish-German frontier, League of Nations, Treaty Series, vol. X, p. 217.

(2) The fact that implementation of the plans is urgently necessary does not, however, relieve the notifying State from its obligations under article 11 to provide notice, information and data. If circumstances permit, a reasonable period of time should also be allowed for study and evaluation under article 12 prior to the execution of the project. If the nature of the urgency is such that grave public health and safety consequences would ensue unless the project were implemented immediately, the processes of study and evaluation (under article 12), as well as those of consultation and notification (under article 13) are to proceed concurrently with the implementation of the project. The purpose of requiring that these processes continue, despite the fact that implementation of the project has begun, has been aptly explained in an earlier report in the following way:

> "Modifications avoiding some of or all the anticipated appreciable harm may possibly be engineered during the implementation phase; further examination of the project or programme on a joint basis may lead to the conclusion that the harm feared by the co-system State will not in fact be appreciable; compensation for any appreciable harm may be negotiated. Other system States may realize, or be made to realize, the danger and urgency, resulting in system State collaboration in appropriate circumstances." 183/

(3) The Commission may wish to consider the possibility of including an additional provision in this article which would require the notifying State to provide assurances that it would furnish full compensation for any appreciable harm resulting from the project in question. 184/ Such a requirement would appear to constitute a fair condition on what otherwise amounts to a right to proceed with a new use after a unilateral determination of its urgent need. The fact that paragraph 3 would make the notifying State liable for any appreciable harm caused by the exercise of this right may, in and of itself, constitute an insufficient assurance from the point of view of other States using the watercourse.

(4) The requirement in paragraph 1 that the proposing State make a determination of utmost urgency "in good faith" is drawn from the good-faith requirement recognized in the Lake Lanoux award 185/ and, by analogy, from that laid down in the Fisheries Jurisdiction judgment. 186/

183/ S. Schwebel, Third Report, supra, note 8, p. 105, para. 165.

184/ Cf. art. 8, para. 7 as proposed in ibid., p. 103, para. 156.

185/ See note 121, supra, at, e.g., p. 198, para. 1068.

186/ Fisheries Jurisdiction case, supra, note 83, at para. 78.

(5) As in the case of paragraph 3 of article 14, the "article [9]" mentioned in paragraph 3 of the present article refers to article 9 as sent to the Drafting Committee in 1984. The reference to that article is based upon the assumption that it will be reformulated to take into account the distinction between factual "harm" and legal "injury", as recommended in the second report of the Special Rapporteur. 187/

187/ See S. McCaffrey, Second Report, supra, note 2, paras. 179-187. Virtually the same comments were made in relation to article 14 in comments 3 and 4 to that article, supra.