Distr.
LIMITED

A/CN.4/L.485
16 July 1993

Original: ENGLISH

INTERNATIONAL LAW COMMISSION
Forty-fifth session
3 May-23 July 1993

DRAFT REPORT ON THE INTERNATIONAL LAW COMMISSION ON THE WORK OF ITS FORTY-FIFTH SESSION

CHAPTER V

THE LAW OF THE NON-NAVIGATIONAL USES OF INTERNATIONAL WATERCOURSES

GE.93-61648 (E)

CONTENTS

	Paragraphs	Page
A. Introduction		
B. Consideration of the topic at the present session		
1. Issues of a general character		
(a) Draft convention or model rules		
(b) Dispute settlement		
(c) Other general comments		
2. Issues relevant to specific articles		
(a) Issues relevant to Part I (Introduction) of the articles		
Article 1. Scope of the present articles		
Article 2. Use of terms		
Article 3. Watercourse agreements		
Article 4. Parties to watercourse agreements		
(b) Issues relevant to Part II (General Principles) of the articles		
(i) Comments on Part II as a whole		
(ii) Comments on specific articles of Part II		
Article 5. Equitable and reasonable utilization and participation		
Article 6. Factors relevant to equitable and reasonable utilization		
Article 7. Obligation not to cause appreciable harm		
Article 8. General obligation to cooperate		
Article 9. Regular exchange of data and information		
Article 10. Relationship between uses		

CHAPTER V

THE LAW OF THE NON-NAVIGATIONAL USES OF INTERNATIONAL WATERCOURSES

A. Introduction 1/

1. The Commission included the topic "The law of the non-navigational uses of international watercourses" in its programme of work at its twenty-third session (1971), in response to the recommendation of the General Assembly in resolution 2669 (XXV) of 8 December 1970.

2. The work begun by the three previous Special Rapporteurs was continued by Mr. Stephen C. McCaffrey, who was appointed by the Commission as Special Rapporteur on the topic at its thirty-seventh session (1985).

3. The Commission, from its thirty-seventh (1985) to its forty-third (1991) sessions received seven reports from the Special Rapporteur on the topic. 2/

4. At its forty-third session the Commission adopted on first reading an entire set of draft articles on the topic, 3/ which was transmitted, in accordance with articles 16 and 21 of the Commission's Statute, through the Secretary-General to Governments for comments and observations, with the request that such comments and observations be submitted to the Secretary-General by 1 January 1993.

1/ For a fuller statement of the earlier historical background as well as a more detailed account of the Commission's work on the topic, see Yearbook ... 1985, vol. II (Part Two), pp. 68-71, paras. 268-278 and Yearbook ... 1989, vol. II (Part Two), pp. 122-124, paras. 621-636.

2/ For the seven reports see Yearbook ... 1985, vol. II (Part One), p. 87, document A/CN.4/393; Yearbook ... 1986, vol. II (Part One), p. 87, document A/CN.4/399 and Add.1 and 2; Yearbook ...1987, p. 15, document A/CN.4/406 and Add.1 and 2; Yearbook ... 1988, p. 205, document A/CN.4/412 and Add.1 and 2; Yearbook ... 1989, p. 91, document A/CN.4/421 and Add.1 and 2; document A/CN.4/427 and Corr.1 and A/CN.4/427/Add.1; and A/CN.4/436 and Corr.1 to 3.

3/ For the articles adopted on first reading see, The report of the International Law Commission on the work of its forty-third session, (Official Records of the General Assembly, Forty-sixth Session, Supplement No. 10) (A/46/10), pp. 161-172.

5. At its forty-fourth session (1992), the Commission appointed Mr. Robert Rosenstock, Special Rapporteur for the topic. 4/

B. Consideration of the topic at the present session

6. At the present session, the Commission considered the Special Rapporteur's first report (A/CN.4/451) at its 2309, 2311 to 2314 and 2316 meetings held between 18 June and 6 July 1993. The Commission also had before it the comments and observations on the draft articles received from Governments (A/CN.4/447 and Add.1-5).

7. In his report the Special Rapporteur analysed the written comments and observations received from Governments and made some changes in the articles adopted on first reading. 5/ He raised two issues of a general character, namely whether the eventual form of the articles should be a convention or model rules, and the question of dispute settlement procedure. He also examined articles 1 to 10 of Parts I and II of the topic.

8. At the conclusion of the debate, the Commission at its 2316th meeting, referred articles 1 to 10 to the Drafting Committee. The Drafting Committee devoted two meetings to the articles. Its report (A/CN.4/L.489) was introduced by the Chairman of the Drafting Committee at the ... meeting of the Commission. It contained the text of the articles adopted by the Committee on second reading namely articles 1 (scope of the present articles), 2 (use of terms), 3 (watercourse agreements), 4 (parties to watercourse agreements), 5 (equitable and reasonable utilization and participation), 6 (factors relevant to equitable and reasonable utilization), 8 (general obligation to cooperate), 9 (regular exchange of data and information) and l0 (relationship between different kinds of uses). It was also noted that the study the

---

4/ See the Report of the International Law Commission on the work of its forty-fourth session, (Official Records of the General Assembly, Forty-seventh Session, Supplement No. 10) (A/47/10), p. 130, para. 350.

5/ In his report, the Special Rapporteur also referred to the most recent developments relevant to the environment and to watercourses but expressed the view that nothing in them required fundamental change in the text of the draft articles. He referred in particular to the work product of the United Nations Conference on Environment and Development (A/CONF.151/26/Rev.1 (vol. 1)); Convention on Environmental Impact Assessment in a Transboundary Context of 1991 (E/ECE/1250); and Convention on the Protection and Use of Transboundary Watercourses and International Lakes of 1992 (International Legal Materials, vol. XXXI, p. 1312).

Special Rapporteur has been requested to undertake concerning unrelated groundwaters may require reconsideration of some aspects of the articles. In line with its policy of not adopting articles not accompanied by commentaries, the Commission agreed to defer action on the proposed draft articles to its next session. At that time, it will have before it the material required to enable it to take a decision on the proposed draft articles. At the present stage, the Commission merely took note of the report of the Drafting Committee.

1. Issues of a general character

(a) Framework convention or model rules

9. In the report, the Special Rapporteur expressed the view that it could be more productive in certain types of work, such the as topic of watercourses, if the Commission were to decide at an early stage on the form of the final product. He noted that this issue had also been mentioned by some Governments in their comments. At a minimum, he felt that the Commission should have a preliminary exchange on this point before any further drafting was undertaken. The Special Rapporteur noted the differences between a framework convention and model rules but did not express any particular preference for either. The utility of a framework convention, he suggested was to be measured by the extent of its ratification; that of model rules, in the strength and depth of the endorsement of the rules by the General Assembly. He saw no point in advocating a framework convention absent some expectation of widespread acceptance and, even more so, no defensible point in advocating any other approach at this stage unless such advocacy was combined with a willingness to support a recommendation for very strong endorsement of the work product by the General Assembly.

10. As regards the form of the future instrument, some members commented on the arguments presented by the Special Rapporteur as supportive in favour of model rules. The first of those arguments was that there would be little point in advocating the framework convention approach, absent some expectation of widespread acceptance. That argument was described as somewhat unconvincing, for States had indeed demonstrated a widespread acceptance of the articles as the basis of a framework agreement. The Special Rapporteur’s second observation was that the model rules would require very strong endorsement by the General Assembly. Such endorsement would however, it was

noted, be no stronger than the support given to the framework convention. The Special Rapporteur also stated that model rules would facilitate including more specific guidance, an assertion which was considered as questionable, given the wide variety of rivers and situations involved.

11. While the idea of formulating model rules met with reservations on the part of several members, one member saw some merit in it inasmuch as the more flexible the final document was the more possibilities there would be for States to adapt the general rules to the regime applicable to specific watercourses and, hence, the wider the recognition such general rules would receive.

12. Most of the members who commented on the issue expressed preference for a framework convention, pointing out that this approach underlay all the work carried out so far, had been broadly endorsed in the Sixth Committee, and was generally given preference in the written comments of Governments. The Commission was a codification body and not a "think tank" called upon to produce studies. The Commission, it was noted also, had in its commentary to article 3, already expressed preference for a framework convention "which will provide for the States parties the general principles and rules governing the non-navigational uses of international watercourses, in the absence of a specific agreement among the States concerned and provide guidelines for the negotiation of future agreements". Though model rules would make it possible to circumvent the problem of ratification, this should not overshadow the legal advantages of a binding instrument, particularly since the present draft articles had all the qualities and elements of a framework convention. The points were also made that many of the draft articles dealt with procedural mechanisms which could become fully effective only within the framework of a treaty and that the draft articles could realize their full potential only if they were embodied in an instrument with binding force. It was also said that in an era of growing environmental awareness the importance of the matter warranted the conclusion of a multilateral treaty.

13. The point was made by one member, who was in favour of a framework agreement, that if the Commission chose to remain faithful to the framework approach, it would have to clarify the meaning of the term "adjust" in article 3.

14. While recognizing that there had been a broad though not unanimous understanding in the Commission that the draft articles would ultimately form

the basis of a framework convention, i.e. a convention containing residual rules that would apply in the absence of more specific agreements, one member felt that a framework convention fell short of the aims and purposes of codification and progressive development of the law and expressed preference for a general convention specifying in detail the rights and duties of watercourse States. He observed that the perceived differences in the characteristics of individual watercourses did not constitute an effective bar to the real application of the law on watercourses and that the elaboration of a general convention was politically feasible. In his view, the signing of the Helsinki Convention on the Protection and Use of Transboundary Watercourses and of International Lakes demonstrated that it was politically and legally possible to regulate State activities, relating to varied watercourses, through uniform, specific and directly applicable rules. A fortiori, he could not accept the suggestion that the present endeavour should culminate in a set of model rules.

15. Some members felt that it was too early to choose between model rules and a framework convention; and the Commission's final decision on the matter should be postponed to a later stage. The point was made that the ultimate decision would depend on the quality of the Commission's work and that, if the draft articles were balanced and authoritative, they would inevitably commend themselves to the international community. Governments that had commented on the issue were divided, it was said, and many States which had transboundary waters on their territories had not as yet sent in their observations and may not be able to do so in the immediate future. The Special Rapporteur noted that a generally favourable comment on the draft by a Government should not necessarily be taken as a harbinger of future ratification.

(b) Dispute settlement

16. The Special Rapporteur noted that a number of Governments had urged the Commission to review the question of including dispute settlement provisions in its draft articles. He shared that view, as had the former Special Rapporteur, and believed that in the light of the nature of the issues involved, it would be an important contribution for the Commission to recommend a tailored set of provisions on fact-finding and dispute settlement should it decide to recommend a draft treaty and, arguably, even if it opted, instead, for model rules.

17. The question whether the draft articles should include dispute settlement clauses was answered positively by the majority of members. It was recalled that dispute settlement clauses providing for mandatory conciliation had been included by the previous Special Rapporteur in his sixth report (1991) and had not been pursued further only because of want of time for their consideration. The point was made that, as the needs of populations increased and water resources became even scarcer, disputes on the use of international watercourses were likely to proliferate and might assume serious proportions if were not resolved at the technical level. Attempts to politicize disputes were bound to be counterproductive.

18. Other members doubted the value of including dispute settlement clauses in the draft articles. The observations were made that watercourses were diverse and a specific dispute settlement machinery might be required in each case. The comment was made that the means of dispute settlement noted in Article 33 of the Charter would always be available to the parties concerned and disputes relating to the uses of watercourses under consideration could more effectively be resolved by political means, rather than by adjudication; as evidenced by the experience of the organization for the development of the Senegal River.

19. Some of the members who were of the view that dispute settlement clauses should be included in the draft articles considered that the Commission should first complete its work on the draft articles before turning to the question of dispute settlement.

20. As to the particular dispute settlement procedures to be considered, the observation was made that disputes with reference to uses of international watercourses were of a special nature and called for special settlement procedures. Attention was drawn in particular to disputes relating to: equitable and reasonable utilization of a particular watercourse, procedures for fact-finding, assessment and evaluation.

21. The view was expressed that the establishment of river-basin committees or other similar bodies was a general possibility and would be in accordance with a fairly widespread practice. Reference was made in this connexion to the recommendations formulated on the subject in 1972 by the United Nations Conference on the Human Environment and to the encouraging experience of the Niger Basin Authority, the Gambia River Basin Development Organization, and the International Commission for the Protection of the Rhine against

Pollution; and as well, to the machinery envisaged for the protection of the environment in the Danube basin. Thus, the draft articles could usefully provide certain general rules on regional cooperation.

22. According to another view, the draft should provide for binding arbitration and judicial settlement.

23. Another approach was to indicate at some point that there was an obligation to accept a third-party procedure, either conciliation, arbitration or judicial settlement.

(c) Other general comments

24. Many members agreed with the Special Rapporteur that the Commission owed a great deal to his predecessors, and in particular to Mr. McCaffrey, under whose guidance the first reading of the draft articles had been conducted within a relatively short time. While the draft articles were considered by a number of members as a remarkable achievement, resulting in a generally favourable response from Governments, and requiring only as the Special Rapporteur had put it, "fine-tuning", the remark was made that the task at hand was, in their view, a complex one. There were many international agreements relating to international water courses dealing with different situations, and each State would approach the draft articles from its own national perspective. There were accordingly various preferences that had been expressed about the way in which the draft articles should be finalized. There was also a view that the reaction to the draft articles from both Governments and the academic community seemed to advise a deep overhaul of the articles rather than "fine-tuning".

25. The preliminary report of the Special Rapporteur was generally praised as succinct, yet reflecting a full understanding of the topic. For some members, the Special Rapporteur had rightly resisted the temptation to "tinker" except when absolutely necessary. For others, however, he had made proposals which went beyond fine-tuning and might ultimately upset the balance of the text adopted on first reading. According to yet another view, the draft should be reconsidered and brought up to date to reflect the most recent relevant developments. Attention was drawn in this context to the concept of sustainable development and the so-called holistic approach to protection of the environment integrating economic and social considerations with environmental issues, as reflected in principle 4 of the Rio Declaration 1992 and in chapter 18 of its Agenda 21 relating to the protection of the quality

and supply of freshwater resources, and the application of integrated approaches to the development, management and use of water resources. Mention was made in particular of: paragraph 18.8 of Agenda 21 (whereby "integrated water resources management is based on the perception of water as an integral part of the ecosystem, a natural resource and a social and economic good, whose quantity and quality determine the nature of its utilization"); of paragraph 18.9 (which stressed that "Integrated water resources management, including the integration of land- and water-related aspects, should be carried out at the level of the catchment basin or sub-basin"); and the requirement of an environmental impact assessment in principle 17 of the declaration, (which read: "Environmental impact assessment, as a national instrument, shall be undertaken for proposed activities that are likely to have a significant adverse impact on the environment and are subject to a decision of a competent national authority"). Reference was also made to the progress achieved in the 1992 Helsinki Convention on the Protection and Use of Transboundary Watercourses and of International Lakes, and the 1991 Convention on Environmental Impact Assessment in a Transboundary Context.

2. Issues relevant to specific articles 6/

(a) Issues relevant to Part I (Introduction) of the articles

Article 1

Scope of the present articles

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

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

26. On the basis of comments by Governments, the Special Rapporteur saw no reason for any changes in article 1. He noted that some Governments, in their comments, had reopened the question of the appropriateness of the term "watercourses". In the light of the fact that the term was the result of a compromise, he felt that it would not be prudent to change it. As regards the

---

6/ The views of the Special Rapporteur on specific articles are to be understood as being without prejudice to the question of form.

suggestion that the term "transboundary waters" be used because of its use in a recent convention, 7/ he found it a matter of drafting and found no substantive difference between that term and the one used in article 1.

27. A few members commented on article 1 with most supporting the existing text. The view was expressed by one member that article 1 did not reflect a proper balance in the relationship between navigation and other uses of international watercourses. As article 1 was drafted, and as the matter was explained in the commentary, the articles could, in his view, be also understood as covering navigational uses, which fell outside the scope of the draft articles. An attempt should be made to correct that imbalance in the course of the second reading of the draft articles.

28. The point was made that the concept of integrated water resources management, as recognized in paragraphs 18.8 and 18.9 of Agenda 21, should be incorporated in article 1, paragraph 1. To do so, the word "management" should be included before the word "conservation". A preference was also expressed by one member for "transboundary waters" instead of "international watercourses".

Article 2

Use of terms

For the purposes of the present articles:

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

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

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

29. The Special Rapporteur raised two issues in relation to article 2. First, he recommended that the phrase "flowing into a common terminus" in subparagraph (b) be deleted. In his view the notion of "common terminus" did not seem to add anything to what was already covered by the rest of the subparagraph and could be confusing. If retained, the phrase risked the

---

7/ See Convention on the Protection and Use of Transboundary Watercourses and International Lakes, supra note 5.

creation of artificial barriers to the scope of the draft articles. Second, he was inclined to include "unrelated confined groundwaters" in the topic. If the Commission was receptive to that idea (see para. ... below), he would then propose relevant changes in article 2. He did not think that such change would require major changes in any other articles. He recommended that, subject to the two issues he raised, the Commission should treat article 2 as a valid working hypothesis for the second reading and revert to it only to the extent that work on subsequent articles revealed an unexpected need to re-examine article 2. He further recommended that the definition of the term "pollution" currently contained in article 21 be transferred to article 2. Such a shift, he found helpful to what he was proposing for article 7 (see para. 76 below) but it was not essential, and acceptance of such a shift in no way implied agreement to or enhanced the utility of any change in Part I or Part II of the draft.

30. Several members commented on article 2 and their comments concerned two issues: the reference to "flowing into a common terminus" in paragraph (b) and the possible inclusion of confined groundwaters in the scope of their articles.

31. As to the reference to "flowing into a common terminus" in paragraph (b) of article 2, several members disagreed with the Special Rapporteur’s proposal for its deletion. In their view, this requirement had been included to introduce a certain limitation upon the geographic scope of the articles: the fact that two different drainage basins were connected by a canal would not make them part of a single "watercourse" for the purposes of the articles. In a State where most of its rivers were connected by canals, the absence of the requirement of common terminus would turn all those rivers into a single system and would create an artificial unity between watercourses. A common terminus criterion would, moreover, help to distinguish between two watercourses flowing alongside each other. Deleting the words "flowing into a common terminus" would expand the scope of the articles and make it more difficult to implement them in practice.

32. A few members reserved their positions pending further careful examination of the issue by the Special Rapporteur.

33. A comment was also made that the term "watercourse" should be more precisely defined to indicate whether it includes only surface water or more.

It was noted that the draft did not properly deal with the diversion of waters, for example, by canals. Further examination of the issue was necessary.

34. As regards the issue of confined groundwaters, many members expressed the view that it would be illogical to include in the concept of "watercourse" unrelated confined groundwaters. They did not see how "unrelated" groundwaters could be envisaged as part of a system of waters which constituted "by virtue of their physical relationship a unitary whole". And if there was no physical relationship, how could such waters be part of a unitary whole? They agreed that the question of confined waters deserved regulation, but it called for a different set of rules. In their view, few if any of the articles, other than those embodying general principles, could be applied to confined groundwaters.

35. According to the same view, international watercourses had been regulated for thousands of years, but the use of confined groundwaters was a relatively new phenomenon. The argument of diversity, which had led to the adoption of the framework agreement approach for watercourses, was less compelling in the case of confined groundwaters. Moreover, the law relating to groundwaters was more akin to that governing the exploitation of natural resources, especially oil and natural gas. The best course was to treat the topics of international watercourses and the law of confined groundwaters separately, in the way in which the Commission had dealt with the law of treaties in regard to State succession. Separate treatment was warranted particularly in view of the fact that groundwaters in some parts of the world, such as Africa, a continent with vast desert areas, were very important.

36. Another reason mentioned by those members who did not agree with the proposal to include confined groundwaters in the draft was that such an inclusion would require considerable redrafting of the articles; that would delay the Commission’s goal of completing the second reading of the articles by next year.

37. Several members of the Commission reserved their position until such time as they had been able to consider, next year, the further study to be undertaken by the Special Rapporteur. They felt that such a study should include, for example, the physical conditions governing confined groundwaters,

the relationships between the different parts of what might be a system of transboundary groundwaters, and the role played by groundwaters in the general water cycle.

38. Many members supported the Special Rapporteur's proposal to move the definition of "pollution", now contained in article 21, paragraph 1, to article 2 and agreed with the Special Rapporteur that the change in no way implied agreement to any change in Parts II or III of the current draft.

39. The point was made that, however, in principle, when a term occurred only once in the articles, it should be defined in that particular place. Accordingly there was no need for the move.

Article 3

Watercourse agreements

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

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

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

40. The Special Rapporteur referred to the comments made and reasons given by some Governments, for replacing the word "appreciable" by the word "significant". The Special Rapporteur stated that he was persuaded by those reasons. They included, among others, the practice to date in roughly comparable instruments. The Special Rapporteur advanced two arguments in support of such a change. First, in his view, the word "appreciable" had two quite different meanings: (a) capable of being measured; and (b) significant. Second, since the commentary made it clear that "appreciable" was to be understood as "significant", he found it preferable for the article, itself, to so state; rather than for it to be necessary to read the commentary in

order to understand the meaning of the term. Such a change to article 3, he suggested should be understood as implying such a change throughout the draft articles. In his view, the complexity and risk of confusion of using one term in, for example, articles 3 and 4 and another term in article 7 far outweighs any benefit that might be derived from an attempt at hyper-refined tuning. He noted that the change in article 3 would require changes in articles 7, 12, 18 (1), 21 (2), and 28 (2).

41. The Special Rapporteur found the suggestion by some Governments to the effect that article 3 should include the notion that it did not affect existing watercourses agreements problematic and unnecessary. In his view, the Commission was not in a position to know with any certainty whether all the bilateral or multilateral agreements, or whether even some of those agreements, were inconsistent with the fundamental premises of the draft articles. He found nothing in the present articles which would rule out any subsequent agreement, whether or not consistent with the current text. It seemed to him excessive, however, to presume the continued validity of some lex posterior inconsistent with the current draft, absent some indication of intent by the State or the States concerned. He thought that a better solution for avoiding uncertainty would be for States, upon deciding to become party to these articles, to state their intention with regard to the application of the articles to all, or some of the existing agreements to which they are party. In that regard he also drew attention to paragraph 3, and suggested the possibility of adding to "characteristics and uses" the notion of agreements, thus making the paragraph read:

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

42. The Special Rapporteur also referred to the comments made by some Governments expressing preference for moving articles 8 and 26 ahead of article 3 on the ground that the draft articles were, first and foremost, a framework for cooperation; and agreements entered into between watercourse States to that end. He did not believe movement of articles would change the

substance of the draft, but it would make the flow of the articles more logical. He, therefore, recommended that articles 8 and 26 be placed before article 3.

43. The comments on article 3 concerned two issues: replacement of the adjective "appreciable" with "significant" and the question of how to deal with existing watercourse agreements.

44. As to the replacement of the adjective "appreciable" with "significant", two different views were expressed.

45. One view, expressed by many members, was that it would be preferable to replace "appreciable" with "significant", since it was apparent that, in all cases, adverse effects or harm went beyond the mere possibility of "appreciation" or "measurement"; and it was clear that what was really meant was "significant" in the sense of something that was not negligible but which yet did not necessarily rise to the level of "substantial" or "important". In paragraphs (13) to (15) of its commentary, the Commission had not been entirely successful in its attempt to clarify the matter. "Appreciable", according to the commentary, contained two elements: the possibility of objective appreciation, detection or measurement, and a certain degree of importance, ranging somewhere between the negligible and the substantial. The problem was that "appreciable" could be understood as containing only the first of those elements. Anything that could be measured would be deemed to be "appreciable". According to this view, both elements had to be present in any qualifications of harm.

46. In addition, according to this view, the word "appreciable" did not indicate the intended threshold. In most cases, "appreciable" could be taken to mean "not negligible" and did not designate the point at which the line should be drawn. That line was crossed when significant harm was caused - harm exceeding the parameters of what was usual in the relationship between the States that relied on the use of the waters for their benefit. For that reason they agreed with the Special Rapporteur’s proposal to replace "appreciable" with "significant".

47. It was also noted that the threshold set by the word "significant" was a standard that had been approved by States in their endeavours to set an agenda for the protection and preservation of the environment at the Rio Conference. Also, the establishment of an adequate threshold was crucial, if worldwide acceptance of the draft articles was to be secured.

48. Those members who did not agree with changing "appreciable" to "significant" felt that such a change went further than the necessary distinction between inconsequential harm that could not be even measured, on the one hand, and consequential harm, on the other. The change, in their view, would raise the threshold. The subjectivity inherent in the term "significant", they felt, would leave the potential victim State defenceless, contrary not only to its interests but to protection of the watercourse itself. The result would be to ignore the cumulative effects of lesser harm, which could be substantial, especially in combination with other elements. The change took no account of the particular conditions of each watercourse, and the history of its use, which could mean different degrees of tolerance and vulnerability to harm.

49. The observation was also made that in the law relating to watercourses, the applicable threshold seemed, in general, to have been established at a level lower than that implied by the term "significant". In a number of early and contemporary treaties, 8/ the terms used were closer to the English "appreciable" ("ouvrage qui pourrait sensiblement modifier"; "entraves sensibles"; "changement sensible du régime des eaux"; "perjuicio sensible"; and "projet susceptible de modifier d'une manière sensible").

50. The view was also expressed that the word "appreciable", denoted something that could be established by objective evidence and also conveyed the notion of "significant" and "substantial". There were instances in the articles, however, where it was not the extent of the harm that was decisive for the interests of the watercourse States. That was why the word "appreciable" was often used in treaties, though the word "significant" occurred twice in the Rio Declaration, in principles 17 and 19, respectively. Consequently the matter was not as clear-cut as it might appear. The Commission should consider, once again, the relative merits of the two words before taking a final decision.

8/ Such as the 1891 Treaty between the United Kingdom and Italy, the 1905 Treaty between Norway and Sweden, the 1931 agreement between Romania and Yugoslavia, the Act of Santiago of 26 June 1971 between Chile and Argentina, the 1972 Convention on the Status of the Senegal River, and the Agreement of 26 February 1975 between Argentina and Uruguay.

51. It was also noted that the translation issues involved compounded the problem of the meaning of the two terms. While many agreements 9/ used the Spanish word "sensible" to refer to the threshold of harm, the English word "significant" was currently being translated as "importante" in Spanish and as "sensible" in French. Whatever the Commission's final decision about replacing the word "appreciable" by "significant" in the English text of article 3, the word used in the Spanish text could not be "importante". Another word, indicating a lower threshold needed to be used. Perhaps the Spanish word "sensible" could be used so that the Spanish and French versions would correspond.

52. The comment was also made that whatever the term used in the articles, the same term should also be used in the draft articles on International liability for injurious consequences arising out of acts not prohibited by international law, since the two topics dealt with similar problems. Some members, however, did not agree with this view and felt that the choice of wording should be determined by the Commission's approach to a particular topic.

53. Most members who addressed the question of existing agreements did not favour the Special Rapporteur's suggestion. (See para, 41 above). They expressed the view that the matter should be left to be governed by the law of treaties. In their view, there was no doubt that watercourse agreements which would be concluded in the future and which were expressly contemplated in the articles would take precedence over the articles. Given the residual character of the articles, States were free to include in watercourse agreements to be concluded any provision they regarded as an adjustment to the provisions of these articles, provided that third States were not affected. The question was, perhaps more problematic when it came to watercourse agreements already in force. Would those agreements supersede the articles? As a solution to the problem, the Special Rapporteur had suggested that, when States became parties to the articles, they should indicate their intent or understanding with regard to some or all of their existing agreements. While that seemed to be a logical solution, a problem would remain if the parties to

---

9/ Ibid.

an existing agreement did not all take the same position. The Special Rapporteur might wish to consider the problem further and propose a provision with a view to avoiding future difficulties.

54. As regards the proposal to place articles 8 and 26 ahead of article 3, some members found it reasonable and felt that it would improve the structure of the text. Some other members wondered whether that move would not affect the logic of the order of the articles. Those two articles dealt with cooperation and management and did not fit into the "Introduction", which dealt essentially with the scope of the draft. According to one view, article 26 in part II ("General principles") should not be moved, but the Drafting Committee might wish to consider the possibility of elaborating a general principle on the integrated approach, on the basis of Principle 4 of the Rio Declaration, leaving the part on management in article 26 as drafted.

55. Other suggestions were made regarding the movement of articles: it was suggested that the articles of Part VI, ("Miscellaneous provisions") might be moved to other parts of the draft; article 31 ("Data and information vital to national defence or security") could be attached to article 9 ("Regular exchange of data and information"); and article 32 ("Non-discrimination") could be transferred to Part II ("General principles").

Article 4

Parties to watercourse agreements

> 1. Every watercourse State is entitled to participate in the negotiation of and to become a party to any watercourse agreement that applies to the entire international watercourse, as well as to participate in any relevant consultations.
>
> 2. A watercourse State whose use of an international watercourse may be affected to an appreciable extent by the implementation of a proposed watercourse agreement that applies only to a part of the watercourse or to a particular project, programme or use is entitled to participate in consultations on, and in the negotiation of, such an agreement, to the extent that its use is thereby affected, and to become a party thereto.

56. The Special Rapporteur found article 4, as drafted, appropriate. He felt that the term "applies to" in paragraph 1 related to the scope of the agreement and was not synonymous with and did not serve the same function as "affects appreciably". He felt that the deletion of paragraph 2, as suggested in the comments of some Governments, would result in putting additional undue

burdens on lower riparian States. Merging the two articles would not be impossible, but he did not recommend it, because it would make the text heavier and more difficult to comprehend.

57. A few members commented on article 4.

58. Some of those commenting agreed with the Special Rapporteur's view that no change was necessary in article 4 and that any ambiguity was dispelled by the Commission's commentary to the article.

59. A different view was also expressed, to the effect that article 4 should be re-examined. It was stated by one member that, under the article, the entitlement of a watercourse State to become a party to agreements, whether those agreements applied to the whole or only part of the watercourse, was an exception to the fundamental principle whereby States enjoyed freedom to choose their treaty partners. That exception had to be narrowly construed. A watercourse agreement, even one which applied to the entire watercourse, might conceivably cause no harm, or virtually no harm, to the interests of another watercourse State. Uses by third States could and should be protected against adverse effects arising out of the conclusion by other watercourse States of watercourse agreements, but by some means less restrictive than that envisaged in the article. For instance, States contemplating the conclusion of an agreement could be required to enter into consultations with third watercourse States to ensure that their uses would not be affected by the conclusion of the agreement in question.

60. Yet a further reason advanced for reviewing article 4 was that article 30, which had been adopted after article 4, contemplated a situation in which the obligations of cooperation provided for in the draft articles could be fulfilled only through indirect channels. Such a latitude, which reflected an approach similar to the one adopted in Part XII of the Convention on the Law of the Sea, was a realistic acknowledgement that the mere fact that a watercourse passed through the territories of two or more States, while arguably creating a community of interests of some sort, was not the sole factor of which the law should take cognizance.

61. It was also stated that, article 4, would not presumably, apply to cases in which a watercourse State entered into an agreement with a non-watercourse State, or with an international financial institution, with a view to initiating new works on the watercourse. In such cases, the relationship would be governed by general rules of the law of treaties relevant to the

interests of third States. There was no reason why the rules governing agreements between watercourse States should differ from general rules of the law of treaties, including the fundamental rule of pacta sunt servanda.

(b) Issues relevant to Part II (General Principles) of the articles

(i) Comments on Part II as a whole

62. In the view of the Special Rapporteur, the relationship between articles 5 and 7 were, as indicated in comments by some Governments, unclear. Some comments had expressed a preference for eliminating article 7 or subordinating that article to article 5 and making "equitable and reasonable" virtually the sole criteria for use. Other comments indicated that appreciable or significant harm in all cases was evidence of inherently inequitable or unreasonable use and implicitly or explicitly subordinated article 5 to article 7. While these issues, in particular the nature of the responsibility of the affecting State, were, in the view of the Special Rapporteur, clarified to some extent by the commentary, he recommended that necessary changes be made in the text of article 7 for which he proposed a text (see paragraph 76 below). That revision would make "equitable and reasonable use" the determining criterion, except in cases of pollution, as defined in the draft articles. In the case of pollution, article 5 would be subordinated to article 7, the subordination being defeasible by a clear showing of extraordinary circumstances; in effect, a rebuttable presumption.

63. Regarding the proposal to make the concept of equitable and reasonable utilization and participation clearer, the Special Rapporteur explained that he could see no way of adding detailed guidance to article 5 that would make sense in a framework agreement. He noted, for example, that, in some cases, territorial apportionment was agreeable to the watercourse States, in some others periodic rotation, or sharing the benefits of a hydroelectric facility, apportionment or allotment of uses, compensation arrangements, etc., were agreeable. Each of these applications of reason and equity were specific to the facts of the particular situation and thus did not seem susceptible to generalization and recommendation as being of general utility in a framework treaty. He felt that, perhaps, the commentary to article 5 could be expanded to provide a somewhat lengthier description of the possibilities States could consider in reaching equitable and reasonable results. He further noted that

this was clearly a major area in which problems could be alleviated by providing for third-party involvement, should the States concerned be unable to reach a mutually acceptable solution.

64. Several members commented on the relationships between articles 5 and 7 and the concepts of "equitable and reasonable utilization", on the one hand, and appreciable or significant harm, on the other. They noted that the Special Rapporteur had rightly stated that articles 5 and 7 constituted an essential component key element in the entire set of draft articles yet the two were not without ambiguity. The ambiguity, however, in their view, arose out of the compromise between: on the one hand, those who believed that "equitable and reasonable" use, as provided for in article 5, should be the main consideration, implicit in which might be the right to cause some harm; and, on the other, those who gave predominance to harm on the ground that no use could be regarded as "equitable and reasonable" if it resulted in harm to another State. The Special Rapporteur's proposed redrafting of article 7 would impose on States only an obligation to "exercise due diligence", not an obligation not to cause appreciable or significant harm. Thus, where the use was equitable and reasonable, some harm would be allowable, with the result that equitable and reasonable would become the overriding consideration. By way of an exception to the general principle, only harm resulting from pollution would render a use inequitable and unreasonable, although, even then, the harm might be permitted if there was no imminent threat to human health and safety. The Special Rapporteur's proposed redrafting would, in their view, completely upset the delicate balance achieved on first reading. The concept of sic utere tuo ut alienum non laedas would become subordinated to the imprecise notion of "equitable and reasonable" use, which did not offer an objective standard; and thus could not be accepted, by itself, as the basic principle for regulating problems arising out of the uses of watercourses that might cause transboundary harm. The fact that the concept of equitable and reasonable utilization was supported by many authorities and appeared in many international instruments did not make it a good substitute for the basic principle that the overriding consideration was the duty not to cause significant harm to other States. It was noted that many members had agreed to article 5, as adopted on first reading, on the understanding that article 7, as now formulated, would be included in the draft articles.

65. There were further reasons advanced by those members who did not agree with the proposed redrafting of article 7.

66. First, it was said, the rule of equitable utilization was highly subjective. Presumably, the Special Rapporteur hoped to mitigate the adverse effects of that rule by means of dispute settlement procedures. While it was not known whether such procedures would include binding judicial settlement, it was very important to ensure certainty in the substantive rules. The task of those called upon to decide what constituted appreciable or significant harm would be complicated still further if the rule of no appreciable or significant harm was subordinated to the rule of equitable utilization.

67. Second, the Special Rapporteur proposed an exception to that exception in cases where there was a clear showing of special circumstances indicating a compelling need for an ad hoc adjustment and the absence of any imminent threat to human health and safety. Apart from the uncertainty likely to arise in the interpretation of that rule, pollution was so widely defined under article 21 as to render virtually academic any distinction between activities that caused appreciable or significant harm and activities that caused pollution.

68. The comment was also made that the proposed redrafting by the Special Rapporteur was not without difficulties. When he stated that "a use which causes significant harm in the form of pollution shall be presumed to be an inequitable and unreasonable use unless there is ... (b) the absence of any imminent threat to human health and safety", the merits of such a limitation could be questioned. One had only to imagine, for example, the significance for certain riparian States of pollution which resulted in the death of all the fish in the watercourse system.

69. Some members expressed the view that article 7 could be deleted. In their view the content of the principle of equitable and reasonable utilization set out in articles 5 and 6, would be determined by States. It would be helpful, therefore, if article 5 were to propose model forms of utilization; e.g., concerning, for example, the division of a watercourse among States, for that would facilitate the settlement of disputes. Article 7 would then become redundant because it would constitute an exception to the principle of utilization of private property without harming others. In addition, article 7 laid down a standard, already reflected in a number of articles and designed to trigger various procedures, such as those relating to

notifications, consultations and negotiations. It was also stated that the requirements contained in article 7 could be placed in article 5 and article 7 could be deleted.

70. Some other members indicated a readiness to accept the explicit reference to due diligence in the Special Rapporteur's proposal while not supporting the rest of his suggestions on article 7.

(ii) Comments on specific articles of Part II

Article 5

Equitable and reasonable utilization and participation

> 1. Watercourse States shall in their respective territories utilize an international watercourse in an equitable and reasonable manner. In particular, an international watercourse shall be used and developed by watercourse States with a view to attaining optimal utilization thereof and benefits therefrom consistent with adequate protection of the watercourse.
>
> 2. Watercourse States shall participate in the use, development and protection of an international watercourse in an equitable and reasonable manner. Such participation includes both the right to utilize the watercourse and the duty to cooperate in the protection and development thereof, as provided in the present articles.

71. The Special Rapporteur recommended no changes in article 5.

72. In addition to the comments made in paragraphs 64 to 70 above, some members made additional comments addressed specifically to article 5. The comment was made that the entitlement of a State to equitable and reasonable utilization of international watercourses was subject to the State's obligations to promote the optimal utilization and consequent benefits consistent with adequate protection for the watercourse. In that sense, the concept of optimal utilization embraced that of sustainable development. The commentary to the article was generally acceptable, though it was questionable to suggest in paragraph (3) that optimal utilization did not imply "maximum" use by any one watercourse State consistent with efficient or economical use, but rather the attainment of maximum possible benefits for all watercourse States. Such an interpretation was not a proper reflection of the practice of most States which, in the absence of express agreement to the contrary, relied on their own capabilities and resources to maximize benefits, subject always to the requirements of economy as well as to the need to protect the watercourse and to avoid causing significant harm to other co-riparian States.

All of this was neatly encapsulated in the criterion of equitable and reasonable utilization of a watercourse. In addition, article 5 should concentrate on the basic principle of equitable and reasonable use as more clearly reflected in article IV of the International Law Association's Helsinki draft on uses of waters of international rivers of 1966, which set forth the concept of entitlement of watercourse States in more positive terms than did paragraph 1 of article 5.

73. Some members also suggested the deletion of paragraph 2 of article 5, since the right to equitable participation was no more than a right of cooperation, which was elaborated in great detail in article 8, on cooperation.

Article 6

Factors relevant to equitable and reasonable utilization

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

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

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

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

(d) existing and potential uses of the watercourse;

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

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

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

74. As regards article 6, the Special Rapporteur referred to the changes suggested by some Governments but found them unnecessary in the light of: the contents, inter alia, of the existing articles, including in particular the logic of the entire draft and article 6 (d) concerning existing uses;

article 21 (1) concerning the quality of the water; and article 6 (c), 6 (f) and article 10 (2) and the suggested revised article 7 so far as situations of particular dependence are concerned. He noted that, of course, those comments were without prejudice to the consideration of article 6, in connection with the substance of article 26, upon which he was not ready to comment upon at this time. He also opted for the retention of paragraph 2 of article 6, even though articles 8 and 10 (2) arguably imposed a similar obligation. Moreover, if the Commission decided to include third-party dispute settlement in this part of the draft, in his view paragraph 2 should be retained.

75. With regard to article 6, it was pointed out that the list of factors in paragraph 1 was not exhaustive, but all six categories were very pertinent. The article should, therefore, be maintained in the proposed form. The comment was also made that the concept of "existing uses" had gained some currency in State practice as an important factor in measuring significant or substantial harm. However, the need to reconcile that factor with the equally important consideration of the development needs of States should be given the same priority.

Article 7

Obligation not to cause appreciable harm

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

76. Pursuant to the comments made above (see paragraphs 62, 63) the Special Rapporteur proposed the following redraft for article 7:

> "Watercourse States shall exercise due diligence to utilize an international watercourse in such a way as not to cause significant harm to other watercourse States, absent their agreement, except as may be allowable under an equitable and reasonable use of the watercourse. A use which causes significant harm in the form of pollution shall be presumed to be an inequitable and unreasonable use unless there is: (a) a clear showing of special circumstances indicating a compelling need for ad hoc adjustment; and (b) the absence of any imminent threat to human health and safety."

77. In addition to the comments made by members which appear in paragraphs 64-70 above, it was noted that it would be useful to incorporate the concept of "due diligence" and the principle of precaution in article 7.

Article 8

General obligation to cooperate

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

Article 9

Regular exchange of data and information

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

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

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

Article 10

Relationship between uses

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

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

78. The Special Rapporteur noted that, at the present time, he was not inclined to recommend changes in these articles. He was sympathetic to the concern expressed by some Governments about the generality of article 8. He stated that he would continue to reflect on ways to make the article more precise without detracting from the ability of the draft articles as a whole to serve as a framework relating to many varied situations. He noted further that in his view it would not be prudent to attempt to apply the principle of

good faith expressly to part of an agreement or to one particular provision of an instrument such as this draft. In any event, he did not believe that such additions would appreciably decrease the generality of the article.

79. Some members who addressed article 8 agreed with the Special Rapporteur that no change was required in the article. Regarding the possibility of making the text more precise, a view was expressed to the effect that any more precision of the article might be at the cost of sacrificing its general nature.

80. Some members agreed with the Special Rapporteur that the concepts of "good faith" and "good neighbourliness", though salutary in themselves, had no place in the articles. Moreover, it was said, a duty to cooperate might not always be realistic for watercourse States, many of which were bedevilled by disputes. For that reason, the words "endeavour to" should be added before the word "cooperate" in article 8 to underline the importance of cooperation; without making it obligatory for States to cooperate.

81. Another view was also expressed to the effect that achievement of the goals of watercourse utilization and management depended on the obligation to cooperate, set forth in article 8. Those goals had to be sought not only on the basis of sovereign equality, territorial integrity and mutual benefit, as provided for in the article, but also, as noted in the commentary, with due regard for good faith and good neighbourliness. Cooperation could not be imposed: it could only be cultivated on a reciprocal basis. The common interest inherent in the process of the utilization of water resources would promote this cooperation; the multiple and often conflicting uses perforce called for an integrated approach.

82. A few comments were made on articles 9 and 10 stressing their importance. As regards article 10, paragraph 2, which dealt with the question of a conflict between uses of an international watercourse, it was suggested that it would perhaps be advisable, with a view to the implementation of that provision, for the Commission to prepare some flexible system of consultation.
