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THE LAW OF THE NON-NAVIGATIONAL USES OF INTERNATIONAL WATERCOURSES

Comments and observations received from States

Addendum

CONTENTS

ARGENTINA

[Original: Spanish]

[15 March 1993]

1. Parties to watercourse agreements

Article 4 as drafted by the International Law Commission (ILC) sets out that:

> "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 ...
>
> "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."

In both cases, that is to say, in agreements affecting the entire watercourse and in those affecting only a part thereof, a third riparian State "is entitled" to take part in the negotiations and to become a party to the agreement or project in question.

The Argentine Government considers that this article unduly favours the third riparian State. Therefore, we consider it advisable to replace article 4 with an article making accession to the treaty a possibility rather than a right, in view of the fact that the rights of third parties are protected in other draft articles, for example, those concerning equitable and reasonable utilization of watercourses (articles 5 and 6), and concerning the obligation not to cause appreciable harm (article 7), to cooperate (article 8), and to exchange information on planned measures (articles 11 ff.) and data (article 9).

The Argentine Government suggests that article 4 should be replaced by the following text:

> "1. Every watercourse State may become a party to a watercourse agreement that applies to the entire international watercourse, subject to the terms and conditions to be agreed on between the said State and the States Parties to the agreement. The latter shall negotiate in good faith with the former the terms and conditions of its accession to the agreement.
>
> "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 may become a party to the same to the extent that its use of the water is affected by that agreement or by that particular project, programme or use, subject to the terms and conditions to be agreed on between the said State and the States Parties to the Agreement or to the particular programme or use. The latter shall

negotiate in good faith with the former the terms and conditions of its accession."

2. Subsidiarity of the articles on non-navigational uses of watercourses

In order to ensure that the draft articles do not affect pre-existing agreements on the uses of watercourses, it is recommended that an article be included to establish beyond any doubt that the future treaty on non-navigational uses of watercourses will be supplemental in nature and will not apply to watercourses governed by a convention unless the States parties to that convention agree otherwise.

CANADA

[Original: English]

[30 March 1993]

Introduction

The Government of Canada commends the International Law Commission on the elaboration of the draft articles, an effort that has spanned two decades and has required considerable compromise. This effort has attempted to resolve the inevitable differences in opinion with respect to the appropriate international legal framework for rivers and lakes that cross and form political boundaries. None the less, we have some questions to raise and comments to make on the draft articles.

As an introductory comment, the Government of Canada recognizes that the draft articles deal with the traditional concerns of international water law, which are uses and pollution. However, it would be appropriate that post-UNCED concepts with respect to sustainable development be integrated into the document wherever possible.

Framework agreement

Generally we are in favour of a framework of residual rules legally binding when watercourse States do not otherwise agree on a governing regime. A concern that arises is how the residual rules might apply to a bilateral regime where a portion of the watercourse may be subject to a bilateral regime but other parts of it may not be. Similarly, questions of the applicable legal regime may arise where an existing bilateral arrangement covers certain but not all of the matters governed by the articles.

Canada recognizes that the international management of water resources must apply to various geographic situations susceptible to different solutions. Thus in some cases, the rules contained in a set of general articles may not produce the desired result. Recognizing that the most durable solutions are often those achieved through bilateral negotiation by the States involved, and mindful of the general obligation in international law to seek to resolve differences by

negotiation, we strongly support article 3 permitting States to adjust the provisions of the draft articles. An issue arises however as to the status of existing agreements dealing with water management or aspects of it.

This issue is of considerable concern to Canada as the international legal regime governing Canada's transboundary rivers and lakes consists essentially of a number of bilateral treaties and practices between Canada and the United States of America. We wish to ensure that these agreements could be continued within the framework of the draft articles without any further action by parties to the agreements. Therefore it is important that it be explicitly stated that the draft articles do not take precedence over existing agreements.

Articles 5 to 7

Canada wishes to express serious reservations regarding the formulation of the general principles contained in articles 5 to 7. We acknowledge that there is a great deal of support for the doctrine of reasonable and equitable utilization. However, we would emphasize, as we have seen in certain international conventions or as has evolved in certain regional practice, that equitable utilization can be equal utilization. Indeed, we note that the practice in Canadian-United States water management has generally been based on the principle of the equal apportionment of waters and has provided a sound basis for the management of bilateral water issues.

Another concern is that the draft articles have not resolved the inherent conflict between article 5 and article 7, as formulated. Under article 5 the resolution of competing uses of international watercourses is achieved through a balancing of the interests of the parties concerned on the basis of a full understanding of all relevant factors. However, the proposed article 7 appears to preclude that balancing of interests once it is established that appreciable harm is likely to occur. The position of the ILC as stated in the commentary seems to be that the conflict between article 5 and article 7 can be made to disappear by adopting non-rebuttable presumption that a utilization of the waters of an international watercourse system that causes appreciable transboundary harm is ipso facto unreasonable and inequitable and this would be unlawful under both article 5 and article 7. However, we note that the Commission in its commentary has recognized that in some cases the attainment of equitable and reasonable utilization will depend on the toleration by one or more watercourse States of a measure of harm. In these cases the ILC suggests that the necessary accommodation could be reached through specific agreements. Yet it is in precisely these situations that the inclusion of a no-harm rule will make agreement difficult to reach. The Government of Canada is concerned that the doctrine of reasonable and equitable use set out in articles 5 and 7 will not permit a balancing of interests of States.

Further, the adoption of the no-appreciable-harm rule would seem to revive the principle of prior appropriation (first in time, first in right), for it would prevent an upstream State from undertaking any development that would cause appreciable harm to undertakings in a downstream State.

The conflict between article 5 and article 7 might be resolved in various ways. We wonder whether article 7 is necessary as a separate article in that the causation of harm would seem to be implicitly included in the weighing and

balancing of the factors found in article 6, with respect to any particular utilization of an international watercourse.

Alternatively, we note that a previous formulation of the principles of equitable use and of no appreciable harm prepared by the ILC in the third report of Mr. Stephen M. Schwebel balanced the two principles as follows:

> "The right of a system State to use the water resources of an international watercourse system is limited by the duty not to cause appreciable harm to the interests of another system State, except as may be allowable under a determination for equitable participation for the international watercourse system involved." 1/

We therefore consider that the interrelationship of these two principles should be further reviewed.

With respect to article 6, it is important that the appropriate considerations be taken into account to arrive at a reasonable determination of equitable use. From the perspective of the management of Canada's international waters, it is essential that past uses and apportionment practice, as developed through bilateral relations with the United States be recognized and taken into account. While accepting that article 6 is not an exhaustive or exclusive list of considerations, we would suggest that the ILC consider the addition of others that would reflect our concerns. Possible formulations would be to add references to "regional State practice", "historical uses" and "traditional access".

Pollution

With respect to the obligation not to cause harm by pollution as formulated in paragraph 2 of article 21 of the draft articles, however, the Government of Canada believes a strong argument can be made that pollution which causes appreciable harm is *prima facie* unreasonable and inequitable. We are mindful that not all harm is proscribed: rather the prohibition is on appreciable harm. In these circumstances, Canada agrees that with respect to pollution the principle not to do appreciable harm should be accorded primacy.

Notification and consultation

Canada supports the process of notification and consultation with respect to the use of international watercourses. We note, however, that in the event States continue to disagree after consultation, there is no provision for dispute resolution in the articles. As a result, should States fail to agree, once the delay period for consultations has been respected, the articles provide no further assistance. A provision to deal with dispute resolution would be a welcome addition to the draft articles.

1/ *Yearbook ... 1982*, vol. II (Part One), p. 103, document A/CN.4/348, para. 156 (art. 8, para. 1).

Currently article 16 provides that notifying States, proceeding in accordance with their obligations under the articles, in the absence of a response from the notified States may proceed with a planned measure, but subject to obligations under articles 5 and 7. The possibility exists that a notified State which chooses not to respond to notification can still raise its objections and possibly claim for compensation at a later stage. As a result a State complying with the notification section of the articles may find itself alleged to be in breach of the basic principles of the articles without having been provided with the opportunity to consult about the proposed measures. It is important that an informed State not be able to benefit from intentional delaying measures. One possible resolution would be to interpret the silence as acquiescence to the proposed measures, preventing the notified State which has failed to respond from raising objections later. We believe the ILC should revisit this issue.

Management and implementation

Canada supports the use of joint management mechanisms for international watercourses as provided for in article 26. The International Joint Commission, established as a quasi-independent body to deal with a number of Canada-United States water issues, may provide a model for consideration elsewhere. The scope of the term "management" as provided in article 26 seems limited, and may benefit from further revision. Canada regrets the absence of stronger emphasis in the articles on the organizational aspects of implementing all of the relevant articles to achieve the management envisaged in article 26.

In general, the articles on management and implementation do not go far enough in developing legal rules on what, in daily practice, is the most important aspect of the utilization of international watercourses. Although the minimal rules proposed in the articles do not create difficulties for Canada, it would be desirable to have clear rules on procedures and remedies in the case of an insoluble dispute.

Other concerns

Article 22 dealing with the introduction of new species obliges States to take "all measures necessary to prevent the introduction of a new species". As this duty could be interpreted in an unduly expansive way, it might be appropriate that it be limited.

Article 31 provides for a limited exception (national defence and security) with regard to a State's obligation to provide information under the notification and consultation procedures and procedures dealing with the exchange of information. As in many States, Canada's domestic legislation and its legal practices require that certain documents and confidences not be divulged. Therefore article 31 should include a phrase stating that the obligations in the draft articles would be subject to national laws on the protection of information.

Article 32, concerning access on a non-discriminatory basis to domestic judicial systems, reflects a growing realization by States that judicial systems often do not permit those harmed by transboundary pollution to seek redress because non-citizens and non-residents do not have equal access to judicial

systems. Indeed, a similar and farther-reaching provision was agreed to in principle 10 of the Rio Declaration, which states that effective access to judicial and administrative systems, including redress and remedy, is to be provided by States. In Canada, jurisdiction over water issues is shared between the provincial and federal levels of government. Thus, although access to the courts in certain federal matters and before certain federal administrative tribunals may be provided by the federal level of government, changes at the provincial level must be undertaken by the provinces. Accommodation of this issue could be considered by the ILC.

A gap in the draft articles that is of concern to Canada is the absence of any reference to the principle of sharing downstream benefits. Article 27, paragraph 2, provides that:

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

There is no mention of sharing of the benefits accruing downstream from works in an upstream State. This issue should be considered.

A number of the terms used in the draft articles are susceptible to varying interpretations. We would suggest that the articles be reviewed to ensure that those terms that would benefit from clarification are defined within the articles themselves. We suggest that at least the following be defined:

> "vital human needs" in article 10, "appreciable adverse effect" in article 12 and "harm" and "appreciable harm" in articles 7 and 21.

Similarly, we suggest that these terms be reviewed to ensure consistency with usage in other international environmental agreements.

Conclusion

Finally, in view of the debate surrounding the draft articles, we urge the ILC to consider whether it may not be preferable to pursue the development of the draft articles as a set of principles or guidelines, rather than pursuing the goal of a multilateral convention that may or may not receive widespread support.

CHAD

[Original: French]

[10 March 1993]

Chad is an entirely land-locked country and its geo-climatic circumstances are such that its watercourses are not navigable all year round. Most of its watercourses are temporary, save for the Chari and its affluent, the Logone, which are permanent and semi-navigable.

In the main, Chad's watercourses and those which it shares with neighbouring countries, known as international watercourses, can be used only for other purposes, such as irrigation, water supply, small dams, etc. Unfortunately, however, since independence, various problems due to civil wars, have served to delay the country's development, making it impossible to undertake projects for the reasonable utilization of watercourses.

The conservation measures dealt with in these draft articles should attract much more attention from the State, since Chad is a Sahelian country where the shortage of water is acute, and where what little water there is needs to be conserved and protected.

The country has not yet reached the stage of having industrial waste pollution, but it is necessary to start thinking now about implementing protection measures against possible future pollutants. Consideration could also be given to protection measures against natural pollutants. Chad could agree to a convention with its southern neighbour, the Central African Republic, with a view to regulating the flows of watercourses and preventing floods.

It would be desirable for the State to take account of the provisions of articles 3, 4 and 5 of the introduction, concerning international watercourse agreements, principally in the framework of the Lake Chad Basin Commission. In Part II of the draft articles, it should also take account of recommendation 51 [of the Action Plan for the Human Environment], concerning the creation of international river commissions, in order to supervise the equitable utilization of international watercourses and the implementation of agreements between States, bearing in mind that such agreements should concern only those watercourses which extend over several States as stipulated in article 1 of that recommendation.

Another factor to be considered is that watercourses are gifts of nature, and the latter did not take equity into account when distributing them among States. Consequently, it would not be very logical for a State having a large part of a watercourse to have to agree to equitable utilization with other States which only have a small part of that same watercourse (cf. art. 5).

These draft articles are well conceived and could serve as a basis for regulations concerning international watercourses, as well as for collaboration between watercourse States.

Bearing in mind the observations regularly made in our country, it would be desirable, in the framework of article 9, paragraph 3, to add the following:

> "Riparian States should at all times permit temporary installations, such as stakes, buoys, etc. ... for the purpose of taking measurements of international watercourses."

POLAND

[Original: English]

[29 March 1993]

The draft of the law of the non-navigational uses of international watercourses is an abstraction of a very high level. Therefore, it is a typical "framework agreement" which clearly takes into consideration the concluding of detailed agreements between the countries of watercourses. The practical significance of the above-mentioned control seriously decreased for Poland, and for Europe, after the changes which occurred in this part of the world after 1989. In the new situation in Europe as a result of the initiatives of the Conference on Security and Cooperation in Europe (CSCE) there were three vital conventions signed under the auspices of the European Economic Community (EEC) and the United Nations conventions which to a greater extent specify the subject-matter of the draft of the law on non-navigational use: (1) Convention on environmental impact assessment in a transboundary context (1991); (2) Convention on transboundary effects of industrial accidents (1992); (3) Convention on the protection and use of transboundary watercourses and international lakes (1992). To a lesser territorial extent, a more detailed cooperation is included in the new convention on the protection of the sea environment of the Baltic Sea (1992).

The draft of the law on non-navigational uses consists of 32 articles, divided into 6 parts.

Part I (Introduction) consists of four articles. Article 1 outlines the subject-matter of the draft, which actually concerns everything except navigation, unless it (navigation) influences the non-navigational use of water, which is often the case of small and middle-sized rivers used for transport (such as, for example, the Oder). The most significant, but also the most controversial part of this part is article 2, which defines "international watercourse" and "watercourse". The latter is understood as surface and underground waters which are in physical relationship and have the same terminus. This type of understanding of watercourse in an international context means that the basins of the Vistula ("Vistula - national river") and of the Oder constitute international watercourses. Apart from the main subject-matter of the draft, there is a particular type of underground waters - those which are not in relationship with the surface water. Such an approach of the ILC seems questionable for at least two reasons: (1) the significance of underground waters near the borders is continuously increasing; (2) identity or similarity of principles and procedures concerning this type of underground waters to the principles adopted for the waters which are the subject of the regulations of the draft. Taking into consideration the conflict-evoking element which is the unsolved problem of the underground waters, and the ILC's slow working (there were suggestions in the commentary that this issue could be a subject for the separate work of the Commission), the adopted solution is not very satisfactory.

Regulations included in part II (General principles) constitute the foundation on which the whole draft has been based. Its key elements are articles 5 and 7. In article 5 it is stated that the watercourse countries on their own territory use the international watercourse in an equitable and

reasonable manner. Such a policy should be accompanied by an active attitude towards the proposals of cooperation put forward by other countries of the watercourse. The attempt to give more details on the principle of equitable and reasonable use was made in article 6. Actually, it is an open list of elements and circumstances which should be considered when assessing given behaviour and "weighing" the interests of the watercourse countries. Those two articles reflect quite faithfully the emerging practical aspect of the treaty, and the relatively well-established opinions of the doctrine.

The difficulties start in article 7, which puts the watercourse countries under an obligation to use the international watercourse in a way which will not cause "appreciable harm" on the territory of other countries of this watercourse. According to the major part of the doctrine the acceptance of the "appreciable harm" threshold is a step backwards in the development of international law, and a departure from a famous principle expressed in the Latin maxim, "Sic utere tuo ut alienum non laedas". The issue is complicated because in practice countries tolerate "appreciable harm" (as opposed to substantial harm) as the inevitable consequences of the neighbourhood, but the acceptance of it in as document of this significance, which is the draft under discussion, would mean more than just passive tolerance of the harm done by the neighbour. What is more, the lack of objective criteria for the "appreciable harm" seems to create new, "legal" possibilities of ignoring the interests of other countries. It also seems that such assessment lessens the preventive value of the principle of equitable and reasonable use. Poland, being in the majority of cases a country located in the lower watercourse, exposed to high pollution, should solicit for the reduction of the "appreciable harm" threshold. The demand of "non-harm behaviour" fails to meet the sense of realism. So, the golden mean should be found. The author of this opinion does not have a ready solution. When searching for the golden mean one should not forget one thing, namely, that article 7 is a certain security network for article 5 - that is, situations in which negotiations fail.

Part III, concerning planned activities, is of a procedural character and as such raises fewer doubts. In the case of Poland and its neighbours, these issues will be settled in a better way by the provisions of the above-mentioned Convention on environmental impact assessment in a transboundary context (the Convention did not come into force because it was not ratified by the minimum number of countries, that is, 16; Poland has so far not ratified the Convention although it is in its interest to do so: the Convention is a basic instrument for the creation of ecological security in the areas near the borders). The provisions of this part (article 7 of the draft) could be completed with public participation in the consultations concerning the planned activities which influence its interests. It does not seem that this issue could be the subject of the regulation of article 32 (Non-discrimination). The institution of public participation is making a career in treaty practice, and is a sign of the democratization of international law. It should be expected that such an initiative in the forum of the United Nations should be supported by the majority of countries.

Article 18, concerning the procedure in case of lack of notification, should be completed in paragraph 2: the precisely given time-limit for the reply (for example, one month); otherwise there will be a lack of balance on the

side of the country which makes the investments without prior consultations because it could delay too much the reply, and the consultations.

Parts IV, on environmental protection and maintenance, and V, on hazardous conditions and dangerous situations, are free from objections. From the point of view of Poland's interests these issues will be settled by the above-mentioned conventions (the remark that Poland did not ratify the Convention on the estimations of the influence on environment applies also to the Convention on trans-border consequences of industrial damages).

Part VII (Miscellaneous provisions) was added at the last moment and attracts attention due to the lack of a central idea, or internal logic, which does not mean that the regulations included are meaningless. Of greater interest is article 27 of the draft, which concerns the cooperation of countries of the watercourse in the field of flow regulation, and particularly in the field of building and maintaining the water structures, or an appropriate division of costs. In practice the expression used in paragraph 2 of this article can raise the question whether the country which did not participate in the investment on the watercourse, but which turned out to benefit from it, will be obliged to cover part of the costs of this investment. The answer to this question can only be negative, unless the countries had an earlier agrement on the division of costs. It seems that paragraph 2 should be reformulated, in a way that would indicate that the agreement be the base for the calculations.

Article 32 (Non-discrimination) is one of the most significant provisions of the draft. It concerns the giving of warranties to foreign legal and natural persons assuring access to courts, and proceedings before other institutions on compensation, and prevention from damage. The acceptance of such a provision will be a great step forward in international practice. It is a kind of civil-legal substitution for international responsibility of the State responsibility and strict liability type. There are objections to the title of the article. The notion of "non-discrimination" in international practice has a much broader sense; besides, it is associated with the material norm. It seems that the expression "Access to judicial and other procedures" would be more adequate to the content of the article.

The draft does not have even general regulations concerning the transfer of water between the basins. Having as a base the general principles of the draft is not sufficient.

To sum up, it should be stated that the law under discussion will be mainly of significance in those regions of the world where the degree of treaty regulation is small or non-existent. This basically concerns the areas with the most conflicts, where the water deficit has occurred many years ago. This is mainly the case in the Middle East (Turkey, Syrian Arab Republic, Iraq, Iran (Islamic Republic of)), but also in Asia (Bangladesh and India), and Africa (Ethiopia, Sudan, Egypt). The passing of this law and its implementation in the above-mentioned areas would improve the situation in the world and decrease the number of armed conflicts.

In general, the proposed draft deserves Poland's support. It constitutes a rather faithful reflection of the state of international law in whose development Poland actively participated. It seems that the provisions of the

Convention make a good start for negotiating more detailed international instruments, when formulating new treaty bases of the cooperation on border waters with the new neighbouring countries.
