UNITED NATIONS **A**

General Assembly

Distr.
GENERAL

A/51/275
6 August 1996
ENGLISH
ORIGINAL: ENGLISH/FRENCH/SPANISH

Fifty-first session
Item 146 of the provisional agenda*

CONVENTION ON THE LAW OF THE NON-NAVIGATIONAL USES OF INTERNATIONAL WATERCOURSES

Draft articles on the law of the non-navigational uses of international watercourses and resolution on confined transboundary groundwater

Report of the Secretary-General

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I. INTRODUCTION

1. At its forty-sixth (1994) session, the International Law Commission adopted on second reading the draft articles on the law of the non-navigational uses of international watercourses and the resolution on confirmed transboundary groundwater and the commentaries thereto and recommended the elaboration of a convention by the General Assembly or an international conference of plenipotentiaries on the basis of the draft articles. 1/

2. At its forty-ninth session, the General Assembly considered the report of the International Law Commission on the work of its forty-sixth session containing the above-mentioned final draft and commentaries. By its resolution 49/52 of 9 December 1994, the General Assembly, taking note of the recommendation of the Commission, invited States to submit, not later than 1 July 1996, written comments and observations on the draft articles, and decided that, at the beginning of its fifty-first session, the Sixth Committee should convene as a Working Group of the Whole open to States Members of the United Nations or members of specialized agencies, for three weeks from 7 to 25 October 1996 to elaborate a framework convention on the topic on the basis of the draft articles adopted by the Commission in the light of the written comments and observations of States and views expressed in the debate of the forty-ninth session of the General Assembly. 2/

3. As at 30 July 1996, comments and observations had been received from the following States: Colombia, Ethiopia, Finland, Guatemala, Hungary, Portugal, Spain, Turkey, United States of America, Venezuela and Switzerland.

4. The written comments and observations received from States are reproduced in section II below. In order to facilitate their consultation by delegations, it has been deemed advisable to group them under three categories: (a) general comments and observations; (b) suggestions concerning a preamble to the draft articles; and (c) comments and observations relating to specific draft articles.

5. Further comments and observations received after the issuance of the present document will appear as addenda thereto.

1/ *Official Records of the General Assembly, Forty-ninth Session, Supplement No. 10* (A/49/10), para. 219.

2/ General Assembly resolution 49/52, paras. 2 and 3.

II. COMMENTS AND OBSERVATIONS RECEIVED FROM STATES

A. General comments and observations on the draft

FINLAND

[Original: English]

[17 June 1996]

The Government of Finland attaches great importance to the draft articles not only because the General Assembly resolution (2669 (XXV)) which recommended that the International Law Commission should take up the study on the non-navigational uses of international watercourses, resulted from a Finnish initiative, supported by the other Nordic countries as well as other countries, but also because of the importance of legal problems relating to the use of international watercourses. The growing impact on international watercourses caused by human activity, decreasing water resources as well as flooding and environmental catastrophes emphasizes the need to regulate the non-navigational uses of international watercourses. The Government of Finland is of the view that the adoption of the draft articles, with such amendments as may be necessary, would contribute considerably to the development of the international law concerning the non-navigational uses of international watercourses.

Finland welcomes the fact that the protection of international watercourses from the adverse effects of human activities has been addressed by the draft. In this connection Finland wishes to draw attention to the United Nations Conference on Environment and Development which adopted Agenda 21 at Rio de Janeiro in June 1992. Chapter 39, paragraph 1 of Agenda 21 provides, inter alia, that "the following vital aspects of the universal, multilateral and bilateral treaty-making process should be taken into account:

> "(a) The further development of international law on sustainable development, giving special attention to the delicate balance between environmental and developmental concerns;
>
> "...
>
> "(e) Future projects for the progressive development and codification of international law on sustainable development should take into account the ongoing work of the International Law Commission." 3/

In the view of Finland, the principle of sustainable development, which has become widely quoted and accepted since the Rio Conference, has not been adequately reflected in the draft articles. The concept of sustainable development can only be found in article 24 of the draft articles. Moreover,

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3/ Report of the United Nations Conference on Environment and Development, Rio de Janeiro, 3-14 June 1992 (United Nations publication, Sales No. E.93.1.8 and corrigenda), vol. I: Resolutions Adopted by the Conference, resolution 1, annex II, para. 39.1.

the general principles of the draft articles (part II) do not recognize the polluter-pays principle or the precautionary principle.

Finland agrees with the International Law Commission that the classic principles of equitable and reasonable utilization of water resources now codified in the draft articles are essential. The search for a balance between these principles is in accordance with the aim of sustainable development.

Finland would also like to draw attention to the two Conventions concluded within the United Nations Economic Commission for Europe (ECE), namely the Convention on the Protection and Use of Transboundary Watercourses and International Lakes signed at Helsinki on 17 March 1992 as well as the Convention on Environmental Impact Assessment in a Transboundary Context, signed at Espoo, Finland, on 25 February 1991. These Conventions deal partly with analogous legal problems, while their solutions are not necessarily consistent with the draft articles proposed by the International Law Commission. The first-mentioned Convention will enter into force in two months while the latter still requires a few more ratifications. It is the view of Finland that it would be necessary to pay attention to the harmonization of the draft articles with the above-mentioned Conventions in certain respects.

GUATEMALA

[Original: Spanish]

[28 June 1996]

The draft articles have some similarity with the Helsinki Rules. The only difference is that whereas in the draft articles the term "watercourse" is used, the Helsinki Rules use the term "basin". For this reason adoption of the draft articles might be detrimental to some countries.

Historically, concern over the use of an "international watercourse" related almost exclusively to navigation. There was little need to be concerned with any portion of the drainage basin other than the navigable channel of the stream.

As a result of the relatively recent development of multiple uses of "international watercourses", concern is no longer limited to the navigable portion of the "international watercourse", but embraces all the waters of the system comprising the international drainage basin.

The drainage basin is an indivisible hydrologic unit that must be viewed holistically so as to optimize the utilization and development of any portion of its waters. This conclusion is of particular significance when it is appreciated that a State, while not situated on the main stream of the basin, may nevertheless supply substantial quantities of water to the stream; such a State is then in a position to interfere with the supply of water through actions affecting the water flowing within its own territory.

Accordingly, with the aim of reconciling potential or actual conflicts in the event of the development of multiple uses and of providing for the optimum rational development of a common source to the benefit of each State in whose territory any part of the system is situated, it has become necessary to focus on the question of the concept of the drainage basin.

An international drainage basin is the entire area supplying both surface and groundwater to the main river, stream or lake, or other common terminus.

As a result of certain geological characteristics, groundwater may, in certain circumstances, flow in a different direction, or have a different outlet, to surface water in the same area. Moreover, in rare instances, groundwater may gather in underground bodies which are not readily differentiated.

Groundwater forming part of the drainage basin is that which contributes to its main river, a stream or lake, or other common terminus.

With respect to equitable and reasonable utilization and participation, these criteria are similar to those applicable to international hydrologic basins, since they reflect the key principle of international law in this domain, that in an international basin each State has the right to reasonable use of the waters of the drainage basin.

It is recognized that each State in the basin has rights which are equal in nature to and correlative with those of each of the other States of the basin. These equal and correlative rights of use among the States of the basin do not, of course, mean that each State will enjoy identical participation in the uses of the waters. That will depend on the weight accorded to the relevant factors.

Use by a basin State must take account of the economic and social needs of the other States of the basin in the use of the waters, and vice versa. As a result it may be that a basin State has the right to use water in greater quantities than its neighbours in the basin. The concept of equitable participation means maximizing the benefit for each State of the basin in the use of the waters while minimizing the detriment to each user.

To enjoy the right to protection a use must be "beneficial", that is, it must be economically and socially valid, in contrast, for example, to a diversion of water by a State solely for the purpose of pressuring another State.

A "beneficial use" need not be the most productive possible use of the water; nor need there be use of the most efficient means of avoiding wastage and ensuring maximum utilization of the water. With regard to the first point, to proceed in any other manner would dislocate national economies; as for the second point, the obvious imperfection of the solution adopted reflects the financial constraints affecting many States. Implementation of this concept is not intended to encourage wastage but to maintain States in a duty of efficiency in line with their financial resources. Of course, in this regard account will be taken of the ability of a State to secure international financing. Thus, an advanced and prosperous State using flooding as a means of irrigation may be

required to develop a more efficient, less wasteful system; on the other hand, a developing State using the same method may be granted additional time to obtain the resources needed for the required improvements.

The relevant factors provide specific and essential, but flexible, guidelines to ensure the protection of the "equal rights" of all the States of the basin in sharing the waters. Under the rules established, "all relevant factors" must be taken into account. It would not be possible to readily compile an exhaustive list of all the factors, since others might come into play in specific cases.

The relevant factors to be considered in determining what constitutes reasonable and equitable participation will be established.

In essence, no factor has a fixed weight and not all factors will be relevant in every case. Each factor is given a weighting reflecting its importance in relationship to all the others. And no factor occupies a pre-eminent position per se with respect to any other. Further, to be relevant, a factor must help to determine how to satisfy the social and economic needs of the States of the basin.

HUNGARY

[Original: English]

[25 June 1996]

Hungary commends the International Law Commission for the revised draft articles. It goes without saying that in view of its geographical situation Hungary has an overriding interest in a well-founded legal regime of an equitable and reasonable utilization of international watercourses for both navigational and non-navigational purposes. It is therefore worthwhile to recall that the Hungarian delegation was among the first delegations which resolutely supported the initiative of Finland to inscribe an item related to the various uses of international watercourses on the agenda of the General Assembly in 1970. During the last 25 years Hungary has always followed with keen interest the consideration of this item both in the International Law Commission and in the General Assembly. It has submitted written observations several times on this issue, quite recently in 1993 (A/CN.4/447/Add.2).

During the consideration of the report of the International Law Commission on the work of its forty-sixth session in 1994, the representative of the Republic of Hungary made a special statement on chapter III of the report, i.e. on the law of the non-navigational uses of international watercourses (1 November 1994). In his statement he emphasized that the latest developments in this field should be duly taken into account, such as, for example, the 1992 Helsinki Convention on the Protection and Use of Transboundary Watercourses and International Lakes, the relevant documents of the 1992 United Nations Conference on Environment and Development, the 1994 Sofia Convention on Cooperation for the Protection and Sustainable Use of the Danube River, and so forth.

In view of the above the comments and observations [which appear below] will only be confined to those issues which Hungary considers as being of major importance in the progressive development and codification of the law of non-navigational uses of international watercourses.

PORTUGAL

[Original: English]

[26 June 1996]

The regulation of international waters has assumed today a vital importance in the peaceful relations among human communities organized as States. This degree of importance becomes even more obvious as one realizes that water is a natural resource which is scarce and limited and whose quality has repercussions in the ecosystems of which it is the core, thus capable of harming the living conditions of both present and future generations. Undoubtedly, humanity has already faced this challenge. It demands the adoption of balanced and long-lasting measures capable of confronting the problems of pollution and over-exploitation of the essential resource that is water.

The fundamental guiding principles that will form the rules to be negotiated by States concerning the use and management of international watercourses must include those already adopted by the most modern instruments of international law and which reflect the demands of international legal scholarship.

Among others, we refer here to the Convention on Environmental Impact Assessment in a Transboundary Context, concluded at Espoo, Finland, in 1991, to the Convention on the Protection and Use of Transboundary Watercourses and International Lakes, concluded at Helsinki in 1992, to the Convention on Biological Diversity and to the United Nations Framework Convention on Climate Change, as well as to the Rio Declaration.

Faithful to its role as a co-participant in the elaboration of the principles referred to, Portugal believes that it should also defend them in the present framework and looks forward to contributing in this way to the improvement and coherence of the international legal system and to the trust that States must place in it.

The valuable proposal of the International Law Commission on the non-navigational uses of international watercourses, though it takes into account the need to balance the quality with the quantity of water to be shared, does not fulfil the expectations of the watercourse States which are, in fact, its main recipients.

The Framework Convention does show concerns for the protection and preservation of ecosystems and marine environment and the management of international watercourses (Part IV - Protection, preservation and management). Nevertheless, it is silent or has insufficient provisions regarding the concepts and provisions present in the most modern legal instruments.

Therefore, one cannot find in the draft articles concepts such as water basin or integrated management. one can see sufficiently enshrined neither substantive principles such as sustainable development, precaution and preventive action nor their procedural corollaries: the requirement of environmental impact assessments, of transparency, of broadly informing and notifying the public and of consultation and negotiation on the impact of planned measures.

However, and in spite of these objections, Portugal will not question at this stage the fundamental structure of the Framework Convention, and therefore its contribution will assume the format of ad hoc proposed amendments.

SPAIN

[Original: Spanish]

[30 May 1996]

The Spanish Government has demonstrated its interest in this topic by making a number of oral interventions in the International Law Commission's work in this field in the Sixth Committee of the General Assembly. In its comments, the Spanish Government observed that the work in question represented a significant contribution to the development of a legal regime of the non-navigational uses of international watercourses. It also expressed the view that the main thrust of this work was satisfactory, a view which it now reiterates with respect to the draft articles that are the subject of the present comments and observations. Notwithstanding this general view, the Spanish Government wishes to make, in a purely constructive spirit, the specific comments [which appear below].

TURKEY

[Original: English]

[5 July 1996]

While the general approach of the draft articles seems to give prominence to the preservation of international watercourses and their environments, when it comes to formulating specific rules, they mainly focus their attention on preventing possible damage. However, the main purpose should be to achieve an equitable and reasonable arrangement regulating water utilization between the watercourse States. Any other approach turns the draft articles into a document which unilaterally restricts, in terms of both quantity and quality, the utilization rights of States in which watercourses originate. Upstream countries should also be treated in a more balanced way regarding both the protection and development of their environment as well as improving the living conditions of their population in the watercourse area. In this context, it would be appropriate to devise the draft articles according to the generally accepted concept of "sustainable development" which reconciles the protection of the environment with the requirements of economic development. Due attention

should also be paid to establishing an equitable balance of rights and obligations among all watercourse States. While these requirements were taken into account to a certain extent in the general principles set forth in section II of the draft articles, the same cannot be said of sections III and IV.

As mentioned, inter alia, in General Assembly document A/49/738 of 2 December 1994 and in the note of the Secretary-General dated 22 December 1994, the draft articles were devised to serve as a framework agreement (convention). The Turkish Government also considers them in this form. However, they clearly include provisions which go far beyond the scope of a framework document, which should be limited to enacting basic principles. Therefore, the draft articles should be confined to setting forth the conceptual framework and the principles regarding the law of the non-navigational uses of international watercourses. As to specific watercourses, bilateral or regional arrangements between watercourse States should be concluded which take into account the characteristics of each of them. In view of this, it would be necessary to rearrange sections III and IV of the draft articles so as to avoid too specific and detailed provisions.

Lastly, it appears that, in drafting the articles, jurisprudence concerning the law of the sea has been used to some extent as a model. This is particularly so in view of the fact that international jurisprudence is relatively sparse where international watercourses are concerned. Though the seas also consist of water and geography plays a role in both cases, too much emphasis should not be placed upon this similarity since the differences between the legal natures of these two fields are considerable. The jurisprudence of the law of the sea regulates and evaluates the rights and competences of States regarding a mainly international area. It is not conceivable that the same legal principles can be applied to watercourses over which the concerned States have full sovereignty within their territories.

The views of the Turkish Government on specific articles of the draft articles here below should be considered in the light of the above general observations.

UNITED STATES OF AMERICA

[Original: English]

[28 June 1996]

The United States of America is pleased to provide the following comments on the draft articles adopted by the International Law Commission on the law of the non-navigational uses of international watercourses, as requested by the Secretary-General in his communication of 22 December 1994. These are preliminary comments prior to the convening by the Sixth Committee of a Working Group of the Whole in October 1996 to elaborate a framework convention on this topic.

The United States wishes to express its appreciation to the International Law Commission for its efforts over a number of years in drafting articles on this important subject-matter. The legal regime covering management and uses of international watercourses is a crucial topic for the international community, and one which has an important bearing on the protection of the global environment. We believe that the International Law Commission, and in particular its Special Rapporteurs, have made an important contribution by virtue of their work on the law of the non-navigational uses of international watercourses. We are pleased that four distinguished American jurists have contributed to this achievement by serving as Special Rapporteurs.

The General Assembly supported the recommendation of the International Law Commission to elaborate a framework regime establishing rules and general guidelines for cooperation and dispute avoidance in the absence of existing watercourse agreements. The draft articles provide useful guidance for many specific contexts in which water use issues may arise between States. At the same time, the articles recognize that States may wish, by agreement, to adjust the rules to specific situations.

The International Law Commission approach is to create a framework of principles that are essentially residual in nature and are subject to variation in particular agreements.

The United States has entered into numerous and long-standing watercourse agreements with its neighbours, Canada and Mexico. Through bilateral commissions, watercourse issues are resolved among the United States, Mexico and Canada on the basis of openness, cooperation and mutual consent. We see such direct negotiations as the cornerstones of the International Law Commission approach to dealing with watercourse issues. For example, our agreements with Canada and Mexico may in some particulars differ from principles contained in the International Law Commission's draft, but these agreements are none the less consistent with the International Law Commission approach of respecting bilateral arrangements.

Maintaining this pervasive element of flexibility is essential to the success of these negotiations. In that regard, we will wish to review article 3 carefully, to ensure that it is clear that the new framework will not override existing cooperative arrangements, even where some issues dealt with in the International Law Commission articles are not also covered in the existing arrangements.

The United States also supports the emphasis given by the International Law Commission to cooperative efforts. Water is a finite resource. As populations grow and industrialization takes hold, the need for States to cooperate in the shared use of this resource becomes more critical.

VENEZUELA

[Original: Spanish]

[25 June 1996]

The approach adopted by the International Law Commission consists of preparing draft articles which set forth general principles and rules relating to all non-navigational uses of international watercourses. This draft can be further elaborated through specific watercourse agreements which take into account the characteristics of each watercourse and the needs of the respective States. From this standpoint, we find the draft satisfactory, and it appears to contain fairly adequate provisions on such complicated issues as those for which a coherent legal framework is sought.

The draft articles are intended, first of all, to prevent any environmental degradation and, at the same time, to establish rules of conduct; persons guilty of violating these rules would incur international liability. Thus, there is a close relationship between these articles and the Commission's current codification efforts with respect to the topic of international liability for injurious consequences arising out of acts not prohibited by international law.

The draft also reaffirms the principle of equitable use, in accordance with which all uses are subject to the obligation not to cause significant harm to other watercourse States.

It is clear that, in many cases, a set of legally binding rules with respect to international watercourses could help to specify and clarify the rights and duties of riparian States and thus facilitate international agreement concerning the use of such watercourses. As a matter of fact, the problems addressed in some of the draft articles have been dealt with in sufficient detail to permit their incorporation into a convention.

SWITZERLAND

[Original: French]

[2 April 1996]

The Swiss Government has once again been invited to express an opinion on the draft articles concerning the non-navigational uses of international watercourses. Switzerland has already produced written observations twice on this draft, 4/ and its representatives on the Sixth Committee of the General

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4/ Observations of 3 November 1993, Revue suisse de droit international et de droit européen (RSDIE), vol. 4, 1994, p. 609; observations of 10 January 1992, document A/CN.4/447, p. 44.

Assembly have commented on it on two occasions. 5/ The Swiss Government nevertheless intends to respond to this latest invitation, even though this may lead it to repeat opinions already expressed, in order both to show its interest in the subject dealt with by the draft and to recapitulate the main points of its position.

The work of the International Law Commission on the non-navigational uses of international watercourses has undeniably made a major contribution to the development of precise rules in an area long neglected by legal science despite its importance for everyday life. The draft articles resulting from the Commission's work have confirmed and clarified certain basic concepts such as the notion of international watercourse, the principles of equitable and reasonable utilization and the prohibition on causing significant harm. They also propose a set of rules to be followed when a State plans to use a watercourse for a new purpose. Finally, they formulate a number of rules for environmental protection. Given the advantages thus offered by the draft articles, the Swiss Government endorses their general thrust.

However, a number of points remain to be clarified before the draft can become a treaty. These points will be examined below, beginning with issues of a general nature, then the basic principles governing the use of watercourses and, lastly, institutional and procedural rules.

The work of the International Law Commission on the non-navigational uses of international watercourses, and the resulting draft articles, have enabled significant progress to be made in a shifting, grey area of international law. As a result, the Swiss Government cannot but welcome, in principle, the conclusion of a general convention which would put that progress into tangible form.

The observations made show that the Swiss Government does not believe that the text produced by the Commission can be adopted in its present form; some refinements are needed. There will have to be consultations and negotiations on the points dealt with in these observations, as well as those raised by other Governments, before a general convention can be adopted and opened for signature; otherwise, we would be left with an instrument which a number of States would be unable to accept. Ratification of the new convention by the overwhelming majority of international watercourse States seems essential, however, if only to ensure that a set of draft articles, in itself excellent and which has taken more than 20 years of work to produce, does not come to a dead end.

5/ Statement of 31 October 1994, RSDIE, vol. 5, 1995, p. 622; statement of 31 October 1991, ibid., vol. 2, 1992, p. 576.

B. Suggestions concerning a preamble to the draft articles

COLOMBIA

[Original: Spanish]

[10 July 1996]

The preamble to be drafted should include an express reference to principle 2 of the Rio Declaration on Environment and Development relating to the sovereign right of States to exploit their own resources provided that they do not cause damage to the environment or of areas beyond the limits of their national jurisdiction.

FINLAND

[Original: English]

[17 June 1996]

The preamble should include at least the following three paragraphs:

"Commending the work undertaken within the auspices of the International Law Association in the field of the non-navigational uses of international watercourses, and particularly the adoption, in 1996, of the Association's Helsinki Rules,

"Recalling the provisions and principles of the Rio Declaration on Environment and Development of 1992,

"Noting the provisions of the 1992 Economic Commission for Europe (ECE) Convention on the Protection and Uses of Transboundary Watercourses and International Lakes as well as the provisions of the 1991 ECE Convention on Environmental Impact Assessment in a Transboundary Context."

C. Comments and observations relating to specific draft articles

PART I. INTRODUCTION

Article 1. Scope of the present articles

FINLAND

[Original: English]

[17 June 1996]

In article 1 of the Convention, Finland would like to insert the word "protection" before the words "conservation and management" in order to better cover measures under part IV of the draft articles.

TURKEY

[Original: English]

[5 July 1996]

Article 1, which defines the scope of the draft articles, correctly leaves out the navigation issue. Nevertheless, the second paragraph of the article is at variance with this approach. That paragraph foresees that the navigation issue will be included within the scope of the draft articles if other uses of the water either affect or would be affected by navigation. This approach gives priority to the draft articles in respect of the application of rules related to mixed use which involve simultaneously navigation and other water uses. However, in practice, it would not be appropriate to make a ruling on a specific case concerning a mixed use on the basis of the draft articles without having a thorough knowledge of the specific characteristics of the watercourses in question, i.e. whether or not the watercourse is used for navigation and how the agreement relating to navigation would eventually be disposed of. To avoid any such complications, it is preferable either to exclude the navigation issue altogether or to ensure that the problems of mixed use mentioned in paragraph 2 do not fall solely within the scope of the draft articles.

VENEZUELA

[Original: Spanish]

[25 June 1996]

The term "use of international watercourses" utilized in draft article 1 can be broadly interpreted. However, the drafting of this provision is fairly satisfactory, in that it establishes a general concept of non-navigational uses, including uses of watercourses and of their waters and measures of conservation and management.

Article 2. Use of terms

COLOMBIA

[Original: Spanish]

[10 July 1996]

In article 2 (b), the reference to groundwaters should be deleted, as this matter is under the exclusive jurisdiction of the State which exercises sovereignty over the subsoil and is therefore not subject to international regulation.

ETHIOPIA

[Original: English]

[28 June 1996]

Ethiopia does not agree with the formulation of draft article 2 (b) in its present form as it applies to all the hydrographic components of international watercourse. We hold that watercourse should be treated as having a "relative international character". A definition of a watercourse, embracing "a system ... constituting by virtue of their physical relationships a unitary whole" will create the effect of extending the scope of international regulation to cover the entire territory or a major part of the territory of a State which falls within the scope of its sovereignty. This could result in excessive interference by States in each other's legitimate internal affairs. Hence, it is essential to limit the scope of the subparagraph to the notion of the relative international character of a watercourse in order to serve as a guarantee against excessive or improper broadening of the scope of application of the draft article.

A proper balance of the interests of all States should be created and any attempt to shift natural priorities or accord unacceptable rights of interference to one or more States in the sovereign domain of another State should be avoided. An international watercourse should be treated as a system only in the limited sense of its uses causing significant harm or material injury to co-riparian States.

FINLAND

[Original: English]

[17 June 1996]

Finland recalls the observations submitted by the five Nordic countries - Denmark, Iceland, Norway, Sweden and Finland - in 1992 to the draft articles adopted provisionally on first reading by the International Law Commission. The term "international watercourse" remains somewhat unclear and ambiguous and Finland submits that in the further elaboration of the draft articles an alternative expression "transboundary waters" be still considered. This expression is used in a very similar context in the ECE Convention on the Protection and Use of Transboundary Watercourses and International Lakes.

HUNGARY

[Original: English]

[25 June 1996]

In Article 2 (Use of terms) the term "watercourse" is used. Although Hungary would have preferred to have references to "the drainage basin", or to "the international catchment area" in subparagraph (b), we are able to accept the definition of the watercourse as a "system of surface waters and groundwaters" as a compromise. We wish, however, to stress the importance of the catchment/drainage area approach, which is being used in a number of legal instruments, such as in the 1992 Helsinki Convention and in the 1994 Sofia Convention.

PORTUGAL

[Original: English]

[26 June 1996]

Article 2 (b) should be amended to read as follows:

> "(b) 'watercourse' means a system of surface waters and groundwaters and related ecosystems constituting by virtue of their physical relationship a unitary whole and normally flowing into a common terminus".

The reasons for the proposed amendment to article 2 (b) are the following:

The proposed text aims at minimizing the flaws of the expression "international watercourse" without, however, opting for the preferable expression "water basin", since such an expression would go against fundamental choices made by the drafters of the original text.

The addition of the expression "and ecosystems" corresponds to the fundamental choice underlying Portugal's comments: that of an "ecosystemic" and "environmentalist" perspective which sets legal conditions on the admissible uses of water both of water basins and of international watercourses.

With such an addition, Portugal would like to underline that it believes the relations between the water and the "adjacent" or "complementary" environmental elements - the surrounding land, the air - are unitary and must be taken into consideration as such.

TURKEY

[Original: English]

[5 July 1996]

In article 2, dealing with the use of terms, subparagraph (a) stresses merely that if parts of a watercourse are situated in different States, it is considered an "international watercourse", and no mention is made of the relations between these parts. This issue is very important, however. While a watercourse may constitute a border between two or more States, it may also be a transboundary watercourse crossing from the territory of one State to the other. In the case of a transboundary watercourse, each of its parts are situated clearly and distinctly in the territories of different States, whereas in the case of a watercourse forming a boundary, it is virtually impossible to separate the watercourse definitely and utilize its waters independently from the other riparian States. Given the fundamental differences between these two types of international watercourses, especially in respect of the utilization of their waters, to make no distinction between watercourses forming a boundary and transboundary watercourses and then subject these two categories to the same legal rules is unrealistic as well as against the legal principle of equitable utilization. Therefore, it is necessary either to add a new paragraph to article 2 spelling out the distinction between these two types of international watercourses or to include this concept in subparagraph (a). Obviously, once this distinction is mentioned in article 2, it should be appropriately reflected in the other relevant provisions of the draft articles.

With regard to the definition in subparagraph (b) of article 2, although in hydrological terms it can be understood that surface waters and groundwaters constitute a unitary whole, such a unity cannot be taken as a basis for determining the rights of utilization. The draft article’s approach to this matter does not correspond also to existing international practice, where many bilateral agreements do not take groundwaters into account. Therefore, groundwaters should be excluded from the scope of this article.

VENEZUELA

[Original: Spanish]

[25 June 1996]

Article 2 is one of the key articles of the draft. During the years in which the Commission discussed this topic, the most hotly debated question was the definition of the term "international watercourse". From the outset, the so-called traditional, or restrictive, definition of the term (which originated with the Congress of Vienna in 1815), one limited to watercourses that form or cross boundaries, conflicted with the broad interpretation, in which international watercourses are identified with drainage basins (the term currently used is "international water catchment area") or international water systems, as in the Treaty of Paris, under the influence of the Helsinki Rules on the Uses of the Waters of International Rivers.

The aim of the draft is to define not only the term "international watercourses", but also the territorial scope of the draft rules. The working assumption used by the Commission in 1980 was designed to resolve the conflict between the two concepts through the introduction of a functional term derived by combining the international nature of a watercourse with its transboundary effects. In other words, if a measure adopted with respect to a water system has consequences for the territory of another watercourse State, then what is involved is an international watercourse; in the absence of such consequences, the watercourse is not an international one.

In the view of the Government of Venezuela, this draft article - the product of consensus in the Commission - is acceptable as drafted, except that the order of subparagraphs (a) and (b) should be reversed.

Lastly, in the view of the Government of Venezuela, it is essential to amend the draft articles in order to clarify the terms used in the text, and particularly the equivalence between the terms used in the English and French versions and those used in the Spanish text.

Article 3. Watercourse agreements

COLOMBIA

[Original: Spanish]

[10 July 1996]

The wording of article 3, paragraph 3, should be made clearer; as currently drafted, it appears to imply that the opinion of a single watercourse State regarding the need to adjust or apply the provisions of the draft articles can place other watercourse States under an obligation to enter into negotiations for the purpose of concluding an agreement or agreements.

Furthermore, the reference to "good faith" should be deleted from the paragraph; it is unnecessary to reaffirm this principle in every text negotiated within the framework of the Organization, as it is embodied in the Charter of the United Nations, in the preamble to the Vienna Convention on the Law of Treaties, 6/ which notes that it is universally recognized, and in article 26 of that Convention, which stipulates clearly that "every treaty in force is binding upon the parties to it and must be performed by them in good faith."

6/ United Nations, Treaty Series, vol. 1155, No. I-18232, p. 331.

ETHIOPIA

[Original: English]

[28 June 1996]

With regard to paragraph 1 of article 3 and the form of the future legal instrument to be adopted on non-navigational uses of international watercourses, Ethiopia opts for the approach of a framework agreement rather than model rules as this will have the advantage of a legally binding instrument. The framework agreement will provide for watercourse States general principles and rules governing the uses of international watercourses and set guidelines for negotiation of future agreements. Ethiopia, therefore, endorses the approach of adopting a framework agreement generally followed in this respect.

However, once this mechanism is adopted, there is no need to resort to the use of the word "adjust" in the same paragraph as this will create more complications and put a limit on the freedom of the parties to apply the general principles and guidelines in any manner they see fit to their particular international watercourse. The insertion of the word "adjust" will unduly prejudice future negotiations on watercourse agreements in favour of some watercourse States which hold preconceived notions that an international watercourse has unique and historical characteristics simply to assert long-standing claims. Watercourse agreements should be left to watercourse States to negotiate and to voluntarily reach agreement, on the basis of the framework agreement, without prejudging whether they have to adjust or modify it to fit the particular needs of the international watercourse. Therefore the words "and adjust" should be deleted from paragraph 1 of article 3.

For the reasons given with regard to article 3, paragraph 1, Ethiopia maintains that there is no particular need for the inclusion of subparagraph 3 in article 3, which refers to characteristics of a particular international watercourse, and the whole paragraph should be deleted.

The general nature of the framework agreement should be maintained and any adjustment or application of the present articles to the needs of a particular international watercourse should be left to the parties to negotiate and agree by themselves. There should not be undue interference in the freedom of the parties to negotiate in good faith to conclude a watercourse agreement.

FINLAND

[Original: English]

[17 June 1996]

Article 3 takes into account the possibility of watercourse States entering into watercourse agreements. In the view of the Government of Finland, the question of the relationship between these draft articles and watercourse agreements remains, however, unclear. Further consideration should be given to possible provisions which would regulate this relationship more precisely.

The provisions of article 3 are not designed to apply to situations where a regional agreement is of a similar nature and purpose to that of the draft articles. For example, the ECE Convention on the Protection and Use of Transboundary Watercourses and International Lakes is rather a parallel to the draft articles than an agreement which is required because of the characteristics and uses of a particular international watercourse. The commentary to this article implies that agreements of this kind are not even intended to be covered by these provisions. This leaves the relation of such parallel agreements unclear.

Existing agreements between some watercourse States may include provisions the relation of which to the provisions of the draft articles would similarly remain unclear. It might be advisable to clarify the wording of this article so that it would be clear whether watercourse agreements referred to in this article also apply to already existing agreements.

The International Law Commission's commentary to article 3 recognizes that optimal utilization, protection and development of a specific international watercourse are best achieved through an agreement tailored to the characteristics of that watercourse and to the needs of the States concerned. It is easy to agree with such conclusions. This approach should also be better reflected in the text of this article. Therefore it should further be considered whether article 3 could encourage or even require States parties to conclude more specific agreements on certain aspects of the non-navigational uses of their international watercourses.

PORTUGAL

[Original: English]

[26 June 1996]

Article 3 should be amended as follows:

"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 in accordance with the principles of international law.

"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 particular project, programme or use, provided that the agreement does not adversely affect, to a significant extent, the use by one or more other watercourse States of the waters of the watercourse. Such agreement shall, when the need arises, take into consideration an environmental impact assessment.

"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, States shall consult with a view to negotiating in good faith for the purpose of concluding a watercourse agreement or agreements in accordance with the principles of international environment law aiming at an enhanced protection of the watercourse and its ecosystems."

The reasons for the proposed amendment to article 3 (2) are as follows:

The aim of this amendment is to provide the watercourse States with a concrete goal that might enable them to negotiate in an objective and useful manner. This purpose is linked to environmental considerations and thus places in perspective the possible gains to be obtained by the uses foreseen for the river.

The inclusion of an environmental impact assessment reflects the importance given by Portugal not only to the substantive norms but also to the procedural rules of modern international law of the environment. It is, furthermore, an example of coherence of the international position taken by Portugal.

Nevertheless, the proposed requirement is not an absolute one, since there might be situations in which no need arises for an environmental impact assessment. However, when the environmental impact assessment is already provided for by regional or other multilateral agreements, this requirement must be fulfilled. Within the framework of the draft articles on the law of the non-navigational uses of international watercourses, an assessment should be also done if one party requests it.

The reasons for the proposed amendment to article 3 (3) are as follows:

This amendment introduces a substantive guideline for the consultations and negotiations between States, that of adapting the existing regimes to the innovative principles of the evolving international law of the environment.

Moreover, it further clarifies the objective: the enhanced protection of the watercourse and of its ecosystem. The prohibition of regression in the substantive regulation of a particular situation is also implicit in the text now proposed.

This text, partly inspired by the Helsinki Convention, also allows a solution for the delicate question of the compulsory nature of consultations and negotiations because, although such an obligation is not expressly foreseen, it only takes the unilateral position of an interested State to trigger the procedure.

SPAIN

[Original: Spanish]

[30 May 1996]

Between the alternatives proposed by the Special Rapporteur of the International Law Commission of a framework convention or model rules, the Spanish delegation in its statements to the Sixth Committee of the General Assembly in 1993 and 1994 expressed strong support for a framework convention. In its commentary on article 3 of the draft articles, the International Law Commission expressed the view that what is envisaged is a framework convention. Nevertheless, the Spanish Government believes that doubts may arise as to the exact nature of the instrument. The fact of the matter is that, despite the assertion in the above-mentioned commentary that the provisions of the draft "are essentially residual in character", this article lacks a provision which clearly and specifically states that the articles of the draft are applicable on a subsidiary basis, that is to say, not only when specific agreements are silent on the matter but also in the absence of such agreements. All of this, naturally, is without prejudice to the possibility that some provisions of the draft articles may already be mandatorily and directly applicable as deeply rooted customary norms of general scope. This is true, in particular, of the important article 5 on equitable and reasonable utilization and participation.

In conformity with paragraph 1 of the above-mentioned article 3, "watercourse States may enter into one or more agreements ... which apply and adjust the provisions of the present articles", which seems to indicate that these specific agreements may derogate from the rules of the future convention. But the primacy of specific agreements over the future convention is clear only where such specific agreements are subsequent to the entry into force of the convention. Under the general rules of the law of treaties, however, the convention would take precedence over previously concluded specific agreements. This drawback would be avoided if the future convention includes a provision to safeguard the force of specific agreements which are concluded prior to the entry into force of the convention.

VENEZUELA

[Original: Spanish]

[25 June 1996]

Draft article 3 is based on sound premises, supported by precedents and bolstered by theoretical assumptions, which indicate that the best way of regulating international relations in the area of the non-navigational uses of international watercourses is for the watercourse States to conclude international bilateral or multilateral agreements, which the draft refers to as "watercourse agreements".

This formulation reflects two aspects of regulation: the first aspect concerns watercourse agreements, and the second concerns the general principles and norms codified in the draft.

In accordance with the approach taken in the draft articles, the purpose of watercourse agreements is to apply general principles and norms and to adapt them to specific situations. There is ample scope for this, since such principles and norms, which are used as guidelines, must be taken into account when specific agreements are concluded.

It should, however, be noted that, by definition, general principles and norms have a variable content, meaning that their importance changes over time. It would seem appropriate, therefore, to include in the draft a norm which anticipates developments attributable to significant changes in circumstances or which, at any rate, stipulates the need to adapt existing treaties, or those which may be concluded, to new circumstances.

Accordingly, it is proposed that a new paragraph be included in article 3 which would read as follows:

> "The watercourse agreements to be adopted by States shall stipulate that such agreements may be adapted or modified if a significant change occurs in the circumstances which gave rise to the negotiation of the agreement in question."

SWITZERLAND

[Original: French]

[2 April 1996]

The first general issue arising from the draft articles is that of the juridical nature of the proposed rules. According to article 3, paragraph 1, watercourse States may enter into "watercourse agreements" which "apply and adjust" the provisions of the draft articles. This formulation is somewhat ambiguous and seems to allow the parties to waive the rules contained in the draft articles. Two other points are left unclear: whether some or all of the provisions of the draft articles are intended to codify customary rules and what is to become of earlier watercourse agreements.

While this is not stated in the draft, it is clear that some of its provisions, such as the rule of equitable and reasonable utilization and the prohibition on causing significant harm to other watercourse States, reflect and clarify existing general rules. It is equally clear that other rules, such as the one dealing with the settlement of disputes, to name but one, are purely of a treaty nature. Indeed, this duality in the nature of international norms is also found in other conventions aimed at the progressive development and codification of international law, such as the 1969 Vienna Convention on the Law of Treaties, where the instrument itself does not specify which of its rules belong to one category or the other. In the field of international watercourses, characterized as it is by a lack of normative clarity, any attempt

at classification might in any case have given rise to endless arguments which could have threatened the success of the Commission's work. The Swiss Government can and must therefore support the proposed solution, which is to make no distinction between provisions which codify existing law and those which develop it.

On the second point, namely, what is to become of the vast number of existing watercourse agreements, the situation is different. We have seen that article 3, in speaking of "adjusting" the provisions of the draft articles in future watercourse agreements, appears to assume that such agreements will be able to depart from those provisions. This seems to ensure the primacy of future watercourse agreements over the general convention which will result from the present draft, but what of existing agreements? There might be a temptation to argue that they will be wholly or partly abrogated by the general convention, since the latter will be more recent, and that they would therefore have to be adjusted to it. To guard against such an interpretation, which would destabilize the entire body of international treaty law on the subject, the Swiss Government reiterates its suggestion that a clause expressly safeguarding existing watercourse agreements should be inserted in the future general convention. 7/

Article 4. Parties to watercourse agreements

ETHIOPIA

[Original: English]

[28 June 1996]

Ethiopia is in agreement with the principle laid down in article 4, paragraph 1, of the draft articles that all watercourse States are entitled to participate in the negotiation, consultation or in becoming a party to an agreement relating to the entire international watercourse. There would be no justifiable ground to exclude a watercourse State from participation in the agreement. This clause provides protection from the risk of a few watercourse States appropriating a disproportionate amount of water to the exclusion of others. Any such action would run counter to the fundamental principle of equitable and reasonable utilization of the watercourse.

However, the principle of equitable and reasonable utilization will not be properly served if participation in consultation, negotiation or in becoming a party to an agreement by a "watercourse State whose use of an international watercourse may be affected to a significant extent" in paragraph 2 of article 4 is meant to apply only to a quantitative use of the waters of an international watercourse. The proviso must take into account factors other than the quantitative use that adversely affects the equitable use of the waters of a watercourse. Any action taken with respect to use of waters in an international watercourse under an agreement in any particular territory is bound to produce effects beyond that territory. For example, an agreement between two lower

7/ Statement of 31 October 1994, RSDIE, vol. 5, 1995, p. 623.

riparian States appropriating a disproportionate amount of the waters of an international watercourse for themselves could cause adverse effects to a significant extent on the use of waters by an upper riparian State. There is no doubt that over the long term, such use could have a significant effect on the equitable and reasonable use of the waters by an upper riparian State.

Ethiopia therefore maintains that the expression "adversely affect to a significant extent" should be construed broadly to include factors other than actual reduction in the quantitative use of waters. It should not be applied to exclude one or more States from participating in agreements that affect their right in the use of the international watercourse. The right of all watercourse States to participate in the negotiation, consultation or in becoming a party to an agreement and the obligation, of either the upper or the lower riparian States, to refrain from concluding agreements which apply only to part of the watercourse in order not to unduly prejudice the rights of other watercourse States should equally be protected in all its aspects. Otherwise the paragraph will negate the general principle laid down in paragraph 1 of article 3.

GUATEMALA

[Original: Spanish]

[28 June 1996]

Article 4, paragraph 2, should be made clearer and more concise regarding the mechanism governing how to become a party to a watercourse agreement and how to participate in consultations, as well as regarding whether a State which deems itself to be affected may initiate such consultations.

SWITZERLAND

[Original: French]

[2 April 1996]

Article 4, paragraph 1, of the draft articles gives all the States of an international watercourse the right to participate in the negotiation of and to become parties to any agreement that applies to the entire watercourse. This seems perfectly normal, since the fate of the entire watercourse is at stake and all the States are therefore concerned. If one of the watercourse States decides to stay out of the agreement in question, the agreement will remain a _res inter alios acta_ for that State, since it cannot be bound by an instrument to which it is not a party. In addition, the watercourse States which are parties to the agreement will be responsible _vis-à-vis_ the State which is not a party for any harm which it might suffer as a result of the implementation of that instrument.

Article 4, paragraph 2, is more questionable; it gives international watercourse States the right to participate in any negotiation leading to the conclusion of an agreement that applies only to a part of the watercourse, as

well as the right to become parties to the agreement in question if it is likely to affect them to a significant extent. In practice, as the Swiss Government has already pointed out, 8/ this means that a watercourse State will be entitled to become a party to any agreement, even partial, concerning that watercourse. That State would thus be able to restrict the freedom, as provided for by treaty, of the other watercourse States which had no intention of entering into a relationship with it. The Swiss Government considers that, in this case, the correct solution is to be found in the rules on the international responsibility of States: the States parties to the partial agreement are responsible, vis-à-vis the third State, for any harm which it may suffer as a result of the implementation of the agreement. The foregoing shows that article 4, paragraph 2, is detrimental to the freedom of States as provided for by treaty and should therefore be deleted.

PART II. GENERAL PRINCIPLES

Article 5. Equitable and reasonable utilization and participation

COLOMBIA

[Original: Spanish]

[10 July 1996]

In paragraph 1 of article 5, the word "utilize" should be replaced by the phrase "seek to utilize", which is more realistic and legally correct. The text would read as follows:

> "1. Watercourse States shall in their respective territories seek to utilize an international watercourse in an equitable and reasonable manner ..."

It would also be appropriate to introduce in article 5 the concept of "growth and sustainable development of resources", as this language is widely accepted by the international community.

ETHIOPIA

[Original: English]

[28 June 1996]

With regard to paragraph 1 of article 5, basic consideration should be given to "equitable and reasonable" use in relation to harm. If watercourse States adhere to the principle of "equitable and reasonable" use, the danger of causing "significant" harm to an international watercourse will thereby be eliminated. "Equitable and reasonable" use should, therefore, be the overriding

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8/ Statement of 31 October 1994, RSDIE, vol. 5, 1995, p. 624.

consideration and "significant" harm should be subordinated to it. Article 7, which imposes on States an obligation to "exercise due diligence", provides sufficient protection from harm.

Paragraph 2 of article 5, which imposes the obligation on watercourse States to "participate in the use, development and protection of an international watercourse in an equitable and reasonable manner", should be deleted, since the right to equitable participation is no more than a right of cooperation, which is elaborated in article 8, dealing with cooperation.

FINLAND

[Original: English]

[17 June 1996]

It has been pointed out in the Government's general comments that the aim of sustainable development is not adequately reflected in the "General principles" of the draft articles. Finland proposes that it be inserted under part II, ideally in article 5 dealing with equitable and reasonable utilization and participation or alternatively in article 6 dealing with factors relevant to equitable and reasonable utilization. The aim of sustainable development would in any case have to be taken into consideration in the search for balance between these factors.

HUNGARY

[Original: English]

[25 June 1996]

The relationship between article 5 on equitable and reasonable utilization and participation and article 7 on the obligation not to cause significant harm is problematic and does not strike the appropriate balance between the rights and concerns of downstream and upstream States. On first reading (1991 draft articles) the Commission had taken the view that the right of a State to utilize an international watercourse in an equitable and reasonable manner was limited by the obligation not to cause "appreciable harm" to other watercourse States. The modifications introduced on second reading (1994 draft articles) suggest that the equitable and reasonable utilization of an international watercourse might still involve significant harm to another watercourse State. While the 1991 draft articles accorded primacy to the no-harm rule, the present wording of article 7 apparently raises the threshold of harm from "appreciable" to "significant", and introduces a due diligence test and the right to compensation for lack of proper due diligence by a State. It acknowledges that in some circumstances a use which causes significant harm can nevertheless be equitable. This is an unacceptable approach. There should never be any circumstance where significant harm to a downstream State can be reasonable and equitable and therefore endorsed by international law. Under general principles of international law, as codified in various international instruments, States have

the sovereign right to exploit their resources pursuant to their own environmental policies but this right is limited by the obligation to ensure that activities within their jurisdiction or control do not cause damage to the environment of other States. This approach is reflected in customary international law (principle 21, Stockholm Declaration; principle 2, Rio Declaration). Accordingly, as presently drafted, the relationship between articles 5 and 7 is unacceptable and does not accurately reflect existing customary international law. In order to achieve the acceptable balance, article 7 should reflect the wording of the 1991 draft articles or be otherwise appropriately amended.

Specifically with regard to the principle of equitable and reasonable utilization (article 5), the methods of implementing the principle will need to be clarified, in particular with references to the terms "equal access" and "non-discrimination" and the use of joint commissions as a mechanism to assist with the control of flow allocation. Further, the concept of optimal utilization should be explained by reference to the principle of sustainable development.

PORTUGAL

[Original: English]

[26 June 1996]

Article 5 should be amended as follows:

> "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 conditioned by the protection of the watercourse in respect to the principle of sustainable development."

The reasons for the proposed amendment to article 5 (1) are as follows:

The original text lent itself to an interpretation that was far too "economicist" or "utilitarian" and revealed an insufficient regard for environmental, ecological and ecosystemic considerations.

Therefore, it was possible to envision situations that, although equitable and reasonable, would not be compatible with an ecosystemic outlook. This outlook increasingly assumes the role of a structural principle of international law of the environment and is reflected, among others, in the principle of sustainable and durable development.

The original text reflects a particular moment in this evolution, of which the expression "optimal utilization", with no further qualifiers, is a good example. On the other hand, the text now proposed by Portugal allows for a balance of various relevant criteria (this balance will become clearer in the comments to article 6) and unifies them under a general principle, that of

sustainable and durable development. This principle gives meaning to the whole Convention, as proposed by Portugal.

SPAIN

[Original: Spanish]

[30 May 1996]

In the view of the Spanish Government, the basic principle with regard to the non-navigational uses of international watercourses is the one laid down in article 5 of the draft articles, concerning the equitable and reasonable utilization of international watercourses. This is a principle which, unquestionably, already has the force of a customary norm of general scope. And it is precisely within the framework of that principle that the obligation not to cause significant harm to which article 7 of the draft articles refers, should be viewed. Consequently, it is the principle of equitable and reasonable utilization and not that of the prohibition against causing significant harm which should be retained in order to justify any new activity relating to the watercourse.

TURKEY

[Original: English]

[5 July 1996]

The most fundamental principle of the draft articles is enshrined in article 5. The principle of equitable and reasonable utilization set forth in the first sentence of the first paragraph is already a widely accepted notion at the international level. It is necessary that equitable and reasonable utilization should be understood and interpreted in the light of the fundamental principle of the sovereign rights of States over their territory. It should also be applied by taking fully into account all the particularities of the watercourses, including the distinction of whether they are transboundary by nature or form a boundary between States.

While the second sentence of article 5, paragraph 1, mentions the necessity of attaining "optimal" utilization, it appears to link this concept solely with the adequate "protection" of the watercourse. The Turkish Government naturally agrees with the aim of protecting a watercourse. However, it believes that the notion of "optimal utilization" should not be restricted to protection only but should be seen also as comprising the concept of "efficient use". In other words, the principle of "optimal utilization" should aim both at protecting the watercourse and at optimizing the interests of riparian States in a way which avoids water waste. Therefore, the second sentence of the first paragraph of article 5 should be understood as including both these aims.

The second sentence of paragraph 2 of article 5 envisages that the watercourse States are bound to cooperate in its protection and development. It

also foresees that the modalities of this cooperation will be stipulated in other articles of the draft. The Turkish Government believes that it would be more suitable for these modalities to be laid down between the watercourse States in specific agreements or arrangements. Therefore, the words "as provided for in the present articles" at the end of paragraph 2 should be deleted and the following sentence should be added instead: "The nature and details of such cooperation shall be laid down in watercourse agreements between the concerned States."

UNITED STATES OF AMERICA

[Original: English]

[28 June 1996]

The keystone of the articles is article 5. Article 5 recognizes that States within their own territories are to have a reasonable and equitable share of the uses and benefits of an international watercourse. At the same time, States must not deprive other watercourse States of their right to equitable utilization.

The second paragraph of article 5 stresses the importance of cooperation between States through participation in measures, works and activities aimed at attaining optimal utilization consistent with sustaining the availability of the resource through "the duty to cooperate in the protection and development" of the watercourse. The aim of attaining optimal utilization is fully responsive to the growing need for water; the duty to protect is consistent with the objective that benefits be sustainable.

Most of the remainder of the articles can be seen as the road-map for States to attain and maintain the balance struck in article 5.

In the context of article 5, we will need to consider not only the protection of watercourses, but also the protection of associated ecosystems, including the coastal ecosystems into which most watercourses flow. The United States supports the emphasis given by the International Law Commission to the protection and preservation of ecosystems affected by the utilization of inter-State waters. The quality and availability of water resources is also vital to the existence and preservation of species and habitats.

VENEZUELA

[Original: Spanish]

[25 June 1996]

The principle of equitable and reasonable utilization laid down in article 5 has an axiomatic element: it declares that, while the right of a State to utilize the waters of an international watercourse in its own territory is an attribute of sovereignty, the inherent limit on that right, which must be

spelled out in watercourse agreements, is the equal and concomitant right of other watercourse States to utilize and benefit from that watercourse.

A stipulation to that effect should be included in the draft articles.

Article 6. Factors relevant to equitable and reasonable utilization

COLOMBIA

[Original: Spanish]

[10 July 1996]

The following changes should be made to article 6:

In paragraph 1 (c), the word "population" should be in the plural, i.e., "the populations dependent on the watercourse ...".

In paragraph 1 (f), "and the profit which the non-exhaustive use by a State of the respective watercourse represents" should be added, so that the text would read as follows:

"(f) conservation, protection, development and economy of use of the water resources of the watercourse, the costs of measures taken to that effect and the profit which the non-exhaustive use by a State of the respective watercourse represents".

FINLAND

[Original: English]

[17 June 1996]

The principle of equitable utilization and optimal use are open-ended. Balancing them requires a contextual assessment of what seems significant in each situation. Article 6 aims to give some indication of how such balancing is to be undertaken in the form of a non-exhaustive list of "factors and circumstances". However, as presently drafted, the factors stand in no particular hierarchical relationship to each other. We do not know which of the factors to prefer. It is therefore doubtful if the list is really helpful. The article seems to rely on a spirit of cooperation and community among States or their affected populations which is not necessarily present if a problem arises. To some extent this may be taken care of by providing for a system of compulsory third-party settlement. Finland proposes that article 33 be amended accordingly. However, it is here proposed also to give indications as to the relative value of the "factors and circumstances" to be balanced.

First, it would be useful to insert in the chapeau of article 6 a general statement to the effect that such balancing should be undertaken with a view to attaining sustainable development of the watercourse as a whole.

Secondly, a combination of the reference to "vital human needs" in article 10 with the factors in article 6, and particularly subparagraph (c) of paragraph 1, brings out what is already an implicit preference in the draft. This could be spelled out more clearly by indicating in the chapeau that in balancing the factors "special regard should be given to the requirements of vital human needs, and particularly of the dependency of the population on the watercourse".

Thirdly, it should be spelled out that any cost-effect calculation should include also taking account of the needs and interests of future generations.

PORTUGAL

[Original: English]

[26 June 1996]

It is proposed to amend article 6 as follows:

"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 in the framework of sustainable development, including:

"...

"(g) the availability of alternatives, equally valuable, 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 and negotiations in a spirit of cooperation."

The reasons for the proposed amendment to article 6 are as follows:

Besides the comments expounded above for article 5, which are also valid here, Portugal would like to stress that fundamental substantive results might be obtained with this proposed amendment at a minimum cost for the listing and the (re)definition of the factors in question. These factors become functional to an ultimate purpose within a framework in which they acquire new meaning.

In article 6 (1) (g), the criteria should be that of quality, taking into account ecosystemic considerations, rather than "economicist" or "utilitarian" ones.

Article 6 (2) is also reinforced through the insertion of the obligation to negotiate, thus providing the whole procedure with unquestionable usefulness.

As regards article 6 (1) (e), Portugal would like to stress the difference between the uses of water for purposes that reduce the overall flow of the

stream and those that do not reduce it, such as production of electricity, since the former are more harmful for downstream countries.

TURKEY

[Original: English]

[5 July 1996]

Article 6, which gives a more precise definition of and substance to the principle of equitable and reasonable utilization, is in principle acceptable to the Turkish Government. However, as touched upon in our observations regarding article 5, paragraph 1, second sentence, the word "optimal" should be added to its heading. Also for precision's sake, the following matters have to be added or clarified regarding this article:

- The word "pedology", covering also the structure and quality of soil, should be added to subparagraph (a) of paragraph 1.

- The contribution of water by riparian States to the watercourse should be specifically mentioned in an additional paragraph similar to subparagraph (b), paragraph (2), of article V of the 1966 Helsinki Rules.

- Concerning the alternative opportunities mentioned in paragraph 1, subparagraph (g), a clarification should be made to the effect that these alternatives are only those which are available within the basin of the relevant watercourse as water resources. An opposite approach would take into account all watercourses existing in a watercourse State, bringing with it the risk of enabling a lower riparian State to claim rights on other national (or transboundary) watercourses of the upper riparian States.

Article 7. Obligation not to cause significant harm

COLOMBIA

[Original: Spanish]

[10 July 1996]

In paragraph 2 of article 7, the phrase "by a State in the use of a watercourse" should be added, so that the text would read as follows: "Where, despite the exercise of due diligence by a State in the use of a watercourse, significant harm is caused ..."

ETHIOPIA

[Original: English]

[28 June 1996]

Ethiopia supports the change of the term "appreciable" to "significant" harm in article 7, paragraph 1, as it explains something that is not negligible and yet does not necessarily rise to the level of "substantial" harm. In our view the word "appreciable" does not indicate the intended threshold. It does not designate the point where the line should be drawn for a State before causing harm. We believe the line is crossed when "significant" harm is caused, i.e. exceeding the parameters of what was usual in the relationship between the States that relied on the use of the waters for their benefit. Ethiopia therefore agrees with the present draft, which replaces "appreciable" with "significant".

Article 7, paragraph 1 as it stands imposes severe obligations on watercourse States to exercise due diligence to utilize an international watercourse in such a way as not to cause significant harm to other watercourse States.

Paragraph 2 of the same article further reinforces this obligation by requiring the State causing harm to consult with the watercourse States suffering the harm with a view to reaching agreement.

In our view these two concurrent obligations on the State causing the harm provide sufficient protection to the interests of the watercourse State which significantly suffers from the harm.

In the light of these considerations, additional subparagraphs (a) and (b) in paragraph 2 will be unnecessary as they impose further onerous obligations on upper riparian States. In a situation where there are competing interests for the waters of an international watercourse, to cast the paragraph in its present form will give more preference to lower riparian States. As such, the paragraph has the effect of substantially reducing or diminishing the right of equitable and reasonable use guaranteed under article 5 of the draft. The paragraph therefore needs balance that would take care of the interests of all watercourse States.

The means to rectify the harm caused should be left to the affected watercourse States to consult, negotiate and reach agreement between themselves. If agreement cannot be reached, the States concerned have to resort to the dispute settlement mechanism available in the draft articles. It will be difficult to provide for all steps that the watercourse States have to follow in the negotiation process.

It is proposed therefore that subparagraphs (a) and (b) in paragraph 2 be deleted.

FINLAND

[Original: English]

[17 June 1996]

The present reference to "due diligence" confuses questions of liability with the preventive duties that the article deals with. It is sufficient to use the simple formula that also appears in article 21 and to reword the article in a more straightforward fashion: "Watercourse States shall utilize an international watercourse ..." The question of the standard of liability - whether fault or strict liability, what standard of care should be followed - are issues that arise only at a subsequent stage and can only be determined contextually by reference to the particularities of the situation. In respect of some uses, strict liability might then seem appropriate (particularly if it is a question of hazardous activity) while in other ("normal") cases, fault liability suffices.

Secondly, the reference to "significance" is also inappropriate. In the normal law of neighbourly relations, the notion of a "threshold harm" is written into the relevant principles themselves, the duty to suffer (non-intentional) insignificant harm being a part of the general principles in this field. This was clearly enunciated by the arbitration tribunal in the classic Lac Lanoux case, for instance. It is true that some of the classic environmental cases referred to the expression "significant harm" by way of an obiter dictum. However, those dicta do not shed light on where to draw the line in a concrete case.

An express mention of "significance" has only the adverse consequence of legitimizing harm that seems "non-significant" in a fashion that is politically undesirable. However, if that seems necessary, a third paragraph might be written into the article according to which the occurrence of insignificant harm should not preclude the carrying out of beneficial uses.

GUATEMALA

[Original: Spanish]

[28 June 1996]

With regard to article 7, paragraph 2 (b), harm, and cases where compensation is appropriate and what that should comprise, should be clearly established.

HUNGARY

[Original: English]

[25 June 1996]

The relationship between article 5 on equitable and reasonable utilization and participation and article 7 on the obligation not to cause significant harm is problematic and does not strike the appropriate balance between the rights and concerns of downstream and upstream States. On first reading (1991 draft articles) the Commission had taken the view that the right of a State to utilize an international watercourse in an equitable and reasonable manner was limited by the obligation not to cause "appreciable harm" to other watercourse States. The modifications introduced on second reading (1994 draft articles) suggests that the equitable and reasonable utilization of an international watercourse might still involve significant harm to another watercourse State. While the 1991 draft articles accorded primacy to the no-harm rule, the present wording of article 7 apparently raises the threshold of harm from "appreciable" to "significant" and introduces a due diligence test and the right to compensation for lack of proper due diligence by a State. It acknowledges that in some circumstances a use which causes significant harm can nevertheless be equitable. This is an unacceptable approach. There should never be any circumstance where significant harm to a downstream State can be reasonable and equitable and therefore endorsed by international law. Under general principles of international law, as codified in various international instruments, States have the sovereign right to exploit their resources pursuant to their own environmental policies but this right is limited by the obligation to ensure that activities within their jurisdiction or control do not cause damage to the environment of other States. This approach is reflected in customary international law (principle 21, Stockholm Declaration; principle 2, Rio Declaration). Accordingly, as presently drafted, the relationship between articles 5 and 7 is unacceptable and does not accurately reflect existing customary international law. In order to achieve the acceptable balance, article 7 should reflect the wording of the 1991 draft articles or be otherwise appropriately amended.

PORTUGAL

[Original: English]

[26 June 1996]

Article 7 should be amended as follows:

"1. Watercourse States shall exercise due diligence <u>in order to prevent, control and reduce any significant harm caused to another watercourse State and to anticipate its causes, taking into account, therefore, when the need arises, an environmental impact assessment making use of the best available techniques and technologies</u>.

"2. Where, despite the exercise of due diligence, significant harm is caused to another watercourse State, the State whose use causes the harm shall, in the absence of agreement of such use, consult and enter into negotiations with the State suffering such harm over:

"(b) The question of ad hoc adjustments to its utilization, designed to eliminate or mitigate any such harm caused and the question of compulsory compensation if circumstances so warrant".

The reasons for the proposed amendment to article 7 are as follows:

The present draft article 7 has been the object of criticism by international scholars and international practitioners. Summarizing their arguments, one could remark that:

- The obligation of due diligence, besides being redundant, since it is always presupposed in relations among States, weakens the obligation of result, i.e. the lack of harm or of appreciable or significant harm, namely because its content is vague and difficult to specify;

- The raising of the threshold of tolerable damage, from "appreciable" to "significant" harm is undesirable;

- The disregard for the most modern principles of international law of the environment, namely those which refer to the ecosystem and should be guiding factors in this Convention, such as the principles of prevention, precaution and of sustainable development;

- The lack of consideration for the effects over time; and

- The lack of reference to the corresponding procedural corollaries: the need for an environmental impact assessment and to use the best technology available.

Sensitive to these criticisms, Portugal presented an alternative version of article 7 above, taking into consideration that it would not be timely to substantially revise the original text of this article, and thus keeping the expressions "due diligence" and "significant harm".

SPAIN

[Original: Spanish]

[30 May 1996]

The letter and spirit of article 7 address two different eventualities: first, that the watercourse State did not exercise due diligence in such a way as not to cause significant harm to other watercourse States, and the harm is actually caused; and, second, that due diligence was in fact exercised, despite which significant harm was caused. In the first case, the watercourse State is automatically liable, even though the activity which caused the harm may have

met the criteria of equitable and reasonable utilization. In the second, the only obligation imposed on the State which causes the significant harm is to initiate consultations with the affected watercourse State. In other words, the regulation provided in article 7 is satisfactory neither to the State planning a new activity (since it will be held liable for any harm caused even though the activity may constitute equitable and reasonable utilization) nor to the State suffering harm from this activity (which is entitled only to consultations if the first State has exercised due diligence).

Consequently, in the view of the Spanish Government, article 7 should include a provision that the prohibition from causing significant harm is subordinate to the right to equitable and reasonable utilization provided for in article 5. An alternative solution would be to state expressly that the regime provided for in article 7 would apply only where significant harm is caused to the environment, in which case the article should be placed in part IV of the draft articles ("Protection, preservation and management").

TURKEY

[Original: English]

[5 July 1996]

Article 7 gives rise to many problems. First of all, exercising "due diligence" for the purpose of not causing "significant harm" conflicts with the right of equitable and reasonable utilization in article 5 because, if a right is being used, this use should not be restricted if it does not cause significant harm to the other parties. In other words, if a State is making use of a watercourse in conformity with the principle of equitable and reasonable utilization, we believe that the use of this right should not be limited with a second criterion. The rule of equitable and reasonable utilization has been defined in articles 5 and 6, and if the utilization is in conformity with those articles, equality of rights should be regarded as having been achieved for the concerned States. Introducing other restrictive elements produces the result that the right of utilization by States (in practice the upstream States) is limited twice over. One way to overcome this contradiction is to omit article 7 completely so that the evaluation of the right of utilization becomes solely dependent upon the criterion of equitable and reasonable utilization as foreseen in articles 5 and 6. Another way would be if the obligation not to cause "significant harm" by exercising "due diligence" were considered essential as a second criterion to explicitly give priority to the principle of equitable and reasonable utilization in case of a conflict between these two criteria. However, the Turkish Government prefers the first option, i.e. omitting article 7, so that the principle of equitable and reasonable utilization which ensures by itself the equality of rights among watercourse States is retained as a single criterion.

UNITED STATES OF AMERICA

[Original: English]

[28 June 1996]

The International Law Commission has taken into account the many competing interests of watercourse States as expressed in the comments of States on prior drafts of the articles. The balance struck between equitable and reasonable utilization and participation (article 5) and the obligation not to cause significant harm (article 7) is a good one, and worthy of widespread endorsement and application. The issue of compensation, touched on in article 7, is a very complex one which will require careful consideration in the Working Group's deliberations.

VENEZUELA

[Original: Spanish]

[25 June 1996]

Article 7, which provides that "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", is based on the principle of "equitable" use. If there is no agreement among the watercourse States concerned, then this rule must be based on respect for the principle of the sovereign equality of States.

As we have seen, the above-mentioned factors determine the relationship between the principle of reasonable and equitable utilization and the rule against causing harm. At first glance, it might appear that what is involved is twin norms that the parties concerned are free to select as necessary. However, it would be much more effective to include in the draft articles not only an obligation relating to conduct, but also a binding obligation for watercourse States to produce a specific result.

It is therefore proposed that an obligation to provide compensation or make reparation for harm caused through the failure of either State to act with due diligence be included in article 7.

SWITZERLAND

[Original: French]

[2 April 1996]

In its earlier observations and in the statements by its representatives to the Sixth Committee of the General Assembly, the Swiss Government has explained why it would have difficulty in endorsing a solution whereby the rule which prohibits causing significant harm to a watercourse State would take precedence

over the principle of equitable and reasonable utilization: such a solution would mean that any existing use would prevail over new activities, since in most cases the latter would be detrimental to the status quo. In other words, the principle of equitable and reasonable utilization would no longer be independent in scope, because the proposed regulation would for the most part preserve existing situations. The Swiss Government considers that the principle of equitable and reasonable utilization should remain the cardinal principle and that the rule which prohibits causing harm should be applied only in situations where maintaining the status quo constitutes an equitable and reasonable allocation of uses. On the other hand, if the new activity is justified on the basis of the principle of equitable and reasonable utilization, it should be allowed.

In the second version of the draft articles, the Commission attempted to take these considerations into account. Article 7, paragraph 1, of the draft now calls upon watercourse States to "exercise due diligence" to utilize the watercourse in such a way as not to cause significant harm to other watercourse States. Article 7, paragraph 2, specifies that where, despite the exercise of due diligence, such harm is caused, the State which causes it shall consult with the State suffering such harm in order to determine the extent to which such use is equitable and reasonable and to identify the adjustments to be made to its utilization in order to eliminate or mitigate the harm and, "where appropriate", the compensation to be paid.

The new draft of article 7 is complex and difficult to grasp. It makes a distinction between cases where the harm could have been avoided and where the offending State is of course responsible for the harm, and cases where the State concerned has taken all necessary measures to avoid it and will have to consult with the injured State. This solution, however, does not affect the prohibition on causing significant harm; it simply creates a distinction between the consequences of non-observance of that prohibition according to whether or not the State causing the harm exercised due diligence. In the first case, that State answers fully for the harm suffered, whether or not it resulted from equitable and reasonable utilization; the prohibition on causing significant harm thus continues to take precedence over the principle of equitable and reasonable utilization. In other words, whenever a new activity deliberately undertaken or permitted by a watercourse State causes significant harm to other watercourse States, the obligation to make reparation will result. Only if the harm is not attributable to any negligence on the part of the State which caused it is the latter’s obligation limited to a duty to consult; this, we may add, is hardly satisfactory for the injured State, which will gain little or nothing from this solution.

It follows that the new rules proposed in article 7 are unsatisfactory both for the State which is planning to undertake a new activity and for the States that will suffer from it. At best, it might apply in cases where the significant harm is caused to the environment. Consequently, the scope of the new article 7 should be restricted to that particular area and the provision itself could be incorporated into part IV of the draft articles ("Protection, preservation and management").

Article 8. General obligation to cooperate

FINLAND

[Original: English]

[17 June 1996]

The general obligation to cooperate under article 8 aims to attain optimal utilization and adequate protection of an international watercourse. This task of reconciliation between two opposing ends sums up the core question in international environmental law. Finland realizes the difficulty in solving this dilemma by means of drafting. It is, however, a general shortcoming that in part II of the draft articles the considerations of environmental protection are not reflected in an equal manner with those of the optimal utilization.

HUNGARY

[Original: English]

[25 June 1996]

In general, article 8 is acceptable, with two qualifications:

First, as to its place in the draft articles, this article could be the first one in part II on "General principles". This suggestion, in our view, could be supported, among others, by the wording of paragraph 2 of article 6, which says:

> "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" (emphasis added).

Secondly, as to the wording of this article, it is suggested that the principle of good faith be included, concurrent with the principles of sovereign equality, territorial integrity and mutual benefit. Hence the first two lines would read as follows: "Watercourse States shall cooperate on the basis of sovereign equality, territorial integrity, mutual benefit and in good faith in order to attain ...". We submit that the inclusion of this principle is very important in itself. It should also be recalled that the good faith principle is also referred to in other draft articles, for example in paragraph 3 of article 3, paragraph 2 of article 17 and, implicitly, also in article 18.

PORTUGAL

[Original: English]

[26 June 1996]

Article 8 should be amended as follows:

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

The reasons for the proposed amendment to article 8 are as follows:

The objective for the proposed amendment is to broaden the list of applicable principles, stressing the importance of the principle of cooperation that should underline the relationship between watercourse States.

VENEZUELA

[Original: Spanish]

[25 June 1996]

This is one of the most important provisions in the draft; it should play a prominent role in order to strike a balance between the rights and obligations of States using international watercourses. For this reason, the Government of Venezuela believes that it should be maintained as drafted.

Article 9. Regular exchange of data and information

COLOMBIA

[Original: Spanish]

[10 July 1996]

In paragraph 1 of article 9, the word "geomorphological" should be added, so that the text would read as follows:

"1. Pursuant to article 8, watercourse States shall on a regular basis exchange readily available data and information on the condition of the watercourse, in particular that of a hydrological, meteorological, geomorphological, hydrogeological ...".

In paragraph 2, last line, of the Spanish version, the word "reunión" should be replaced by "recolección", so that the text would read as follows:

"... pero podrá exiqir que el Estado solicitante paque los costos razonables de la recolección y, en su caso, elaboración de esos datos e información".

ETHIOPIA

[Original: English]

[28 June 1996]

Article 9, paragraph 2, stipulates that provision of data not readily available may be conditioned upon payment. However, as there should be no reason to make costs of data collection as sunk costs, provision of any kind of data including those readily available should be compensated by payment.

FINLAND

[Original: English]

[17 June 1996]

Finland proposes that water quality be inserted in the list of items of information on the condition of the watercourse to be provided by watercourse States on a regular basis.

VENEZUELA

[Original: Spanish]

[25 June 1996]

Draft article 9 addresses an important question, namely the "exchange of data and information" among watercourse States with a view to the protection and optimal utilization of the watercourse. However, paragraph 2 of the article weakens the obligation imposed on a State by including the phrase "shall employ its best efforts".

It would undoubtedly be more appropriate to specify the obligation of States to provide the necessary information where it is readily available. The same applies to paragraph 3 of the article.

Article 10. Relationship between different kinds of uses

COLOMBIA

[Original: Spanish]

[10 July 1996]

Paragraph 1 of article 10, which reads "... no use of an international watercourse enjoys inherent priority over other uses", clearly violates the basic human right to survival. It should therefore be reformulated as follows:

> "... only the use of an international watercourse to meet human needs has priority over other uses, including planned uses in the State in which the watercourse originates, if such uses are not for the purpose of meeting human needs".

PART III. PLANNED MEASURES

General comments and observations on part III

HUNGARY

[Original: English]

[25 June 1996]

At the heart of this section we find articles 11 and 12 and here we are compelled to single out the special importance of article 12 on the "Notification concerning planned measures with possible adverse effects".

UNITED STATES OF AMERICA

[Original: English]

[28 June 1996]

The notice requirements contained in part III of the draft with their provision for consultation and negotiation "with a view to arriving at an equitable resolution of the situation" are a further noteworthy component of the draft and likely to facilitate cooperation and dispute avoidance or management.

SWITZERLAND

[Original: French]

[2 April 1996]

Part III of the draft articles ("Planned measures") sets out the procedure to be followed when a watercourse State or persons under its jurisdiction plan to undertake a new activity or to expand an existing activity "which may have a significant adverse effect upon other watercourse States". While the Swiss Government subscribes to the object of this procedure, which is to prevent a watercourse State from engaging in activities which do not come under the heading of equitable and reasonable utilization, it wonders whether the proposed procedure will enable that object to be achieved. First of all, it has some doubts as to whether the risk of "significant harm" should in fact trigger this procedure. For the reasons given above in the examination of the relationship between articles 5 and 7 of the draft, the Swiss Government believes that the procedure should be activated when it is feared that the planned activity may not constitute equitable and reasonable utilization. Secondly, the refusal of a watercourse State to give the required notification or to engage in consultations should have legal consequences for that State. Thirdly, there should be some provision ultimately for the final, binding settlement of any disputes that might arise as to the legal qualification of the planned activity (is it likely to contravene the principle of equitable and reasonable utilization?) or as a result of a breakdown of consultations between States. Article 33 ("Settlement of disputes") of the draft articles prepared by the Commission will not always permit such an outcome, however, since the only course that the States concerned are obliged to follow is that of fact-finding. The article should be expanded to provide for compulsory arbitration or judicial settlement in cases where recourse to diplomatic means of settlement has failed to produce a solution. Indeed, international practice has shown the dangers of allowing disputes to go on indefinitely, particularly when they concern the utilization of watercourses which are precious, vital resources for the populations concerned.

Article 11. Information concerning planned measures

COLOMBIA

[Original: Spanish]

[10 July 1996]

The phrase "as appropriate" should be added, so that the text would read as follows: "Watercourse States shall, as appropriate, exchange information and ...".

PORTUGAL

[Original: English]

[26 June 1996]

Article 11 should be amended as follows:

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

The reasons for the proposed amendment are the same as those given for article 7.

TURKEY

[Original: English]

[5 July 1996]

As pointed out in section II.A above on general comments and observations, although the draft articles are envisaged as a framework agreement (convention), detailed procedural arrangements are foreseen in part III. This approach goes far beyond the original purpose of the draft articles. Since each international watercourse possesses different and specific characteristics, it is also in conflict with the necessity of developing mechanisms of cooperation appropriate to these characteristics. Consequently, the dispositions of part III should be reduced to a minimum necessary to set forth certain general principles regarding planned measures. In the light of the above, it is considered that the provision of exchange of information and consultations only in the case of water utilization liable to cause significant harm would be sufficient in respect of satisfying the criteria of equitable and reasonable utilization of international watercourses. Beyond this general rule, the most suitable way for watercourse States to resolve their problems is to devise appropriate mechanisms, through bilateral or regional agreements, which take into account the specific characteristics of the watercourses and of the region concerned.

Article 12. Notification concerning planned measures with possible adverse effects

COLOMBIA

[Original: Spanish]

[10 July 1996]

In article 12, the phrase "which it believes may have a significant adverse effect" should be included, so that the text of the first sentence would read as follows:

"Before a watercourse State implements or permits the implementation of planned measures which it believes may have a significant adverse effect upon other watercourse States, it shall provide those States with timely notification thereof."

ETHIOPIA

[Original: English]

[28 June 1996]

This article, in combination with articles 13 to 18, which set out procedures for notification, does not do justice to States that have not developed their water resources vis-à-vis those that have already done so. If a watercourse State has already developed its part of a watercourse, it can halt the other States that have not yet developed theirs by the application of the provisions of this article and articles 13 through 18. Therefore, a method of differential treatment should be developed to separate obligations of notification for States that have already developed their part of the watercourse, as against those which have not yet done so.

Notification is usually considered an obligation of an upstream State which is in a position to decrease the flow of water downstream and to cause harm to the water.

The fact that a downstream State can cause harm by over-utilization of a watercourse should not be neglected. Article 12 should therefore make clear that a downstream State has an obligation to notify as well.

HUNGARY

[Original: English]

[25 June 1996]

As presently drafted, article 12 on notification concerning planned measures with possible adverse effects requires notification of a planned measure only in circumstances where the watercourse State wishing to implement planned measures deems that such measures may have significant adverse effects upon other watercourse States. The requirement to notify planned measures should not be limited by the criterion of "significant adverse effects", which leaves it to the notifying State to decide what amounts to significant adverse effects. While in its commentary to the draft articles the Commission states that the threshold established by this standard is intended to be lower than that of "significant harm" under article 7, the requirement to notify and consult should extend to all planned measures affecting international watercourses irrespective of the threshold of possible harm.

PORTUGAL

[Original: English]

[26 June 1996]

Article 12 should be amended as follows:

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

The reasons for the proposed amendment to article 12 are as follows:

The objective is to stress the conditions and the consequences which are inherent to the substantive principles of the original text, by referring to one of their most well-established corollaries. In particular, the goal is to make the relations between watercourse States as objective and as useful as possible.

Article 14. Obligations of the notifying State during the period for reply

COLOMBIA

[Original: Spanish]

[10 July 1996]

The phrase "and shall not implement or permit the implementation of the planned measures without the consent of the notified States" in article 14 should be deleted, since the purpose of the article is to establish the obligation to notify. It is not clear why the execution of a project should be conditioned upon the consent of other States if there is an initial presumption of good faith, as recognized in Article 2 of the Charter of the United Nations.

HUNGARY

[Original: English]

[25 June 1996]

As presently drafted, article 14, which requires the notifying State to refrain from implementing the planned measures only during the "reply to notification period" leaving the notifying State free to do so after the said period expires and irrespective of whether agreement has been reached between all concerned watercourse States, is unacceptable. Planned measures affecting international watercourses should only be allowed to proceed with the consent of all affected watercourse States, such consent not to be unreasonably withheld.

In the event that consent is unreasonably withheld, it may be possible to proceed, but in any event subject to the obligation not to cause transboundary harm.

Article 16. Absence of reply to notification

COLOMBIA

[Original: Spanish]

[10 July 1996]

In paragraph 2 of article 16, the phrase "where appropriate" should be inserted at the beginning of the sentence, so that the text would read: "Where appropriate, any claim to compensation by a notified State which has failed to reply may be offset ...".

Article 17. Consultations and negotiations concerning planned measures

PORTUGAL

[Original: English]

[26 June 1996]

Article 17, paragraph 3, should be amended as follows:

> "3. During the course of the consultations and negotiations, the notifying State shall, if so requested by the notified State at the time it makes the communication, refrain from implementing or permitting the implementation of the planned measures until the end of the consultation and negotiations for a period not exceeding the procedure for fact-finding, mediation or conciliation, as provided for in article 33 or, in the case of non-use of the above-mentioned procedure, for a period not exceeding six months".

The reasons for the proposed amendment to article 17 (3) are as follows:

This proposal has a double goal: it allows for the deferral of the implementation of the planned measures until the end of the diplomatic and political procedure of inquiry, mediation or conciliation, while preserving the possibility of a fixed deadline in situations where the States involved showed good faith and a real commitment to cooperation. This deadline is believed to foster discipline in the diplomatic efforts and encourage their timely conclusion.

The need for this amendment stems, in Portugal's view, from the fact that the original text does not take sufficiently into consideration the real possibility of a dispute concerning planned measures or consultative or negotiating behaviour that are in good faith.

Furthermore, it seems that, if so much attention is given in article 33 to a political-diplomatic mechanism for the solution of a dispute by appealing to a third party, one cannot see how the immediate usefulness of such a decision should not be sought as well.

On the other hand, it was thought that it would be excessive to apply the proposed regime to situations where judicial powers were involved, mostly because the possibility occurs then for the request of provisional measures.

Article 18. Procedures in the absence of notification

COLOMBIA

[Original: Spanish]

[10 July 1996]

In paragraph 1 of article 18 of the Spanish version, the word "sensible" should be replaced by "significativo", so that the text would read as follows:

"1. Todo Estado del curso de agua que tenga razones graves para creer que otro Estado del curso de agua proyecta tomar medidas que pueden causarle un efecto perjudicial significativo podrá pedir ...".

Paragraph 3 should be deleted for the purposes of consistency with the approach adopted in article 17, paragraph 3.

PORTUGAL

[Original: English]

[26 June 1996]

Paragraph 3 of article 18 should be amended to read as follows:

"3. During the course of the consultations and negotiations, the State planning the measures shall, if so requested by the other State at the time it requests the initiation of consultations and negotiations, refrain from implementing or permitting the implementation of those measures until the end of the consultations and negotiations, for a period not exceeding the procedure for fact-finding, mediation or conciliation, as provided for in article 33 or, in case of non-use of the above-mentioned procedure, for a period not exceeding six months".

The reasons for the proposed amendment to article 18, paragraph 3, are the same as for article 17, paragraph 3.

Article 19. Urgent implementation of planned measures

HUNGARY

[Original: English]

[25 June 1996]

The reference in article 19 to the immediate implementation of planned measures subject to a formal declaration of the urgency of the measures in order to protect "public health, public safety or other equally important interests" without the incorporation of specific criteria for determining public health, public safety and other equally important interests, is unacceptable. Even with the inclusion of specified criteria, express reference should be made to the duty to notify and reach agreement on such planned measures.

Moreover, the obligation on every State to carry out an environmental impact assessment prior to the initiation of any planned measures affecting international watercourses should be expressly stated.

PORTUGAL

[Original: English]

[26 June 1996]

Paragraph 1 of article 19 should be amended to read as follows:

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

The reasons for the proposed amendment to article 19 (1) are as follows:

The proposed amendment stresses the exceptional character of the arguments for the immediate execution of planned measures and takes into account the contents of article 10, paragraph 2.

PART IV. PROTECTION, PRESERVATION AND MANAGEMENT

Article 20. Protection and preservation of ecosystems

ETHIOPIA

[Original: English]

[28 June 1996]

Article 20 provides for protection and preservation of ecosystems of international watercourses. Preservation could mean that the existing ecosystem, whether good or bad, should be maintained. It is possible that the existing situation may have to be reversed for the better even though the status quo may be favourable to some watercourse States. Where a watercourse has deteriorated, the watercourse States should regenerate it by individual or joint efforts.

HUNGARY

[Original: English]

[25 June 1996]

Article 20 introduces the concept of the protection and preservation of ecosystems of international watercourses. The phrase "ecosystems of international watercourses" will need to be defined in article 2 on use of terms. In its commentary, the Commission defines the term "ecosystem" generally as "an ecological unit consisting of living and non-living components that are interdependent and function as a community". A suitable comprehensive definition of the phrase "ecosystem of international watercourse" will need to be established. A reference should also be made to the preservation and protection of the freshwater systems against any kind of misuse of the water resources.

PORTUGAL

[Original: English]

[26 June 1996]

Article 20 should be amended to read as follows: "Watercourse States shall, individually and jointly, protect and preserve the ecosystems of international watercourses."

The reasons for the proposed amendment to article 20 are as follows:

Once more, the aim is to stress the importance of an integrated approach to the watercourse as a whole.

VENEZUELA

[Original: Spanish]

[25 June 1996]

These provisions take into consideration the norms and principles of customary international law that have arisen in the field of environmental protection and anti-pollution measures.

The Government of Venezuela is of the view that the terms utilized are appropriate, and therefore that the term "ecosystems" used in article 20 should be maintained.

Article 21. Prevention, reduction and control of pollution

FINLAND

[Original: English]

[17 June 1996]

Finland notes that in paragraph 2 of Article 21 a threshold between unlawful injury and tolerable injury is determined by using the term "significant harm". The same threshold appears also in articles 3, 4 and 7. The reference to "significant harm" has been addressed already under article 7. Furthermore, Finland is of the view that instead of legitimizing the causing of pollution by States up to the limit of significant harm, the purpose of the draft articles should be to prevent pollution and other harm from occurring.

The crux of the matter lies in the distinction between environmental protection and compensation for damage. With regard to responsibility and liability, it is generally considered that a victimized State should tolerate at least insignificant harm. However, from the point of view of environmental protection one should endeavour to prevent pollution and harm. Thus there is no need to use the term "significant". For example, it can be noted that the United Nations Convention on the Law of the Sea refers to the prevention of marine pollution without any restriction on the basis of the term "significant harm".

Therefore, Finland suggests that articles 3, 4, 7 and 21 should refer merely to harm instead of significant harm. Such provisions would be based on environmental protection and would not prejudge any issues of responsibility.

HUNGARY

[Original: English]

[25 June 1996]

The principle of sustainable development endorsed by the international community at the United Nations Conference on Environment and Development, held at Rio de Janeiro in June 1992, is not adequately reflected in the 1994 draft articles. Chapter 18 of Agenda 21, for example, deals with the protection of the quality and supply of freshwater resources and refers to integrated approaches in the management and use of international watercourses, and the obligation to carry out an environmental impact assessment. It may be appropriate to include reference to the precautionary principle in the context of uncertainty surrounding the potential harm to an international watercourse as a result of a planned measure. Article 21 of the 1994 draft articles should incorporate the polluter-pays principle by virtue of which costs of pollution prevention, reduction and control measures shall be borne by the polluter. Article 21 should also make express reference to the precautionary principle.

In accordance with recent developments in international environmental law, the concepts of "best available technology" and "best environmental practices" introduced and defined by the 1992 Helsinki Convention on the Protection and Use of Transboundary Watercourses and Lakes should be incorporated with respect to the specific obligations incumbent on riparian States.

PORTUGAL

[Original: English]

[26 June 1996]

Article 21, paragraph 2, should be amended to read as follows:

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

The reasons for the proposed amendment to article 21, paragraph 2, are as follows:

The proposed amendment encompasses the principles of prevention and precaution and is based on the following texts:

- Preamble to the Convention on Biological Diversity of 1992;

- Article 3 (3) of the United Nations Framework Convention on Climatic Change of 1992;

- Principle 15 of the Rio Declaration;

- Article 7 of the ECE Bergen Declaration of 16 May 1990 on Sustainable Development.

UNITED STATES OF AMERICA

[Original: English]

[28 June 1996]

With respect to article 21, the commentary thoughtfully explains the idea of preventing, reducing or controlling pollution of a watercourse that "may" cause significant harm as amounting to a "due diligence" standard. Under article 21, States would need to take appropriate steps to prevent significant harm from occurring. We consider that this provision is consistent with the intent of pollution control laws of the United States to prevent harm to human health and the environment.

VENEZUELA

[Original: Spanish]

[25 June 1996]

The obligation envisaged in article 21 to prevent, reduce and control pollution should be maintained, and the obligation to provide compensation or make reparation for harm caused to a watercourse State as a result of polluting activities in another watercourse should be established.

Article 23. Protection and preservation of the marine environment

PORTUGAL

[Original: English]

[26 June 1996]

Article 23 should be amended to read as follows:

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

The reasons for the proposed amendment to article 23 are the same as those for articles 20 and 21.

TURKEY

[Original: English]

[5 July 1996]

Article 23 should be omitted since it deals mainly with the subject of the marine environment, which falls outside the scope of the draft articles.

Article 24. Management

COLOMBIA

[Original: Spanish]

[10 July 1996]

The following should be added at the end of paragraph 1 of article 24:

"... for which the watercourse States shall establish an operating fund, whose financing sources shall be based on equitable and reasonable criteria as defined by the watercourse States".

GUATEMALA

[Original: Spanish]

[28 June 1996]

In article 24, paragraph 1, there is a need to specify the composition of the "joint" body referred to therein. Its nature must be clarified, as well as whether it has any relationship with the Fact-Finding Commission provided for under article 33.

TURKEY

[Original: English]

[5 July 1996]

In paragraph 1 of article 24, the word "shall" should be replaced by "may" and the phrase "at the request of any of them" should be deleted, since a cooperation mechanism of this kind can only be achieved if the States concerned have the will to do so and should not be imposed ex ante in a framework agreement.

VENEZUELA

[Original: Spanish]

[25 June 1996]

The Government of Venezuela believes that this article, which refers to a management mechanism, is an essential provision of the draft articles, and should therefore be maintained and further clarified.

SWITZERLAND

[Original: French]

[2 April 1996]

Article 24 is the only truly institutional provision in the draft articles. The first paragraph requires watercourse States, at the request of any of them, to enter into consultations concerning the management of the watercourse and, more particularly, the establishment of a joint management mechanism. Paragraph 2 specifies that the term "management" refers, in particular, to planning the sustainable development of the watercourse and the implementation of any plans adopted, and otherwise promoting the utilization, protection and control of the watercourse.

The Swiss Government considers that this provision says either too much or too little. It would be acceptable if it simply stipulate the obligation to enter into consultations concerning the management of the watercourse and, in particular, the establishment of a joint body. It would also be acceptable if paragraph 2, instead of remaining vague about the functions of the joint management mechanism, were to list them in detail (data collection, project design and implementation, approval of activities planned by individual States, exercise of regulatory power, peaceful settlement of disputes and exploration of potential sources of financing, to name but a few). After all, this paragraph should provide guidance to States in determining the content of their watercourse agreements. The Swiss Government therefore considers that paragraph 2 of article 24 should be either deleted or clarified.

Article 25. Regulation

TURKEY

[Original: English]

[5 July 1996]

The matters dealt with in articles 25 deal with issues which should rather be considered within the concept of "management" dealt with in article 24. The article should therefore be omitted from the draft.

VENEZUELA

[Original: Spanish]

[25 June 1996]

The word "equitable" as used in paragraph 2 of article 25 is deemed to be ambiguous, and it is therefore proposed that other terms be added to clarify the undertaking provided for in the paragraph, such as the word "reasonable" or any other term that may be considered appropriate, in keeping with the obligations assumed by each watercourse State.

PART V. HARMFUL CONDITIONS AND EMERGENCY SITUATIONS

Article 27. Prevention and mitigation of harmful conditions

COLOMBIA

[Original: Spanish]

[10 July 1996]

The following should be included to article 27: "to the extent possible and consistent with the level of economic development of the States concerned". The text would read as follows:

> "Watercourse States shall, individually or jointly, to the extent possible and consistent with the level of economic development of the States concerned, take all appropriate measures to prevent or mitigate conditions ..."

TURKEY

[Original: English]

[5 July 1996]

Since article 5 already foresees that the utilization of an international watercourse should be carried out in an equitable and reasonable manner, in case this criteria is fulfilled, additional restrictive criteria for utilization should not be introduced according to the reasons already given above under article 7.

Article 28. Emergency situations

HUNGARY

[Original: English]

[25 June 1996]

The wording of this article is generally acceptable to us. At the same time it would be helpful to further elaborate the list of the causes of an emergency in paragraph 1, adding, for example, causes such as the failures of large dams or flood levee breaches.

TURKEY

[Original: English]

[5 July 1996]

The scope of the concept of "emergency" as defined in article 28 appears too extensive. It would be appropriate to restrict it to the framework of utilization.

PART VI. MISCELLANEOUS PROVISIONS

Article 29. International watercourses and installations in time of armed conflict

UNITED STATES OF AMERICA

[Original: English]

[28 June 1996]

Further consideration will need to be given to article 29, to ensure that it reflects fully the relevant rules of international humanitarian law.

Article 32. Non-discrimination

COLOMBIA

[Original: Spanish]

[10 July 1996]

The word "directly" should be added, so that the text would read as follows:

> "Unless the watercourse States concerned have agreed otherwise for the protection of the interests of persons, natural or juridical, who have

suffered or are under a serious threat of suffering significant transboundary harm as a result of activities directly related to an international watercourse ..."

UNITED STATES OF AMERICA

[Original: English]

[28 June 1996]

The United States continues to stress the importance of public participation in making decisions and resolving disputes related to watercourses, and welcomes the incorporation of this concept in articles 32 and 33, and elsewhere in the convention. We support article 32's emphasis on facilitating public participation in proceedings relating to threats to an international watercourse. As is clear from the text of article 32 and underscored by the commentary, this article in no way dispenses with national law standing requirements applicable to all potential plaintiffs.

Article 33. Settlement of disputes

FINLAND

[Original: English]

[17 June 1996]

It is unavoidable that substantial provisions of the draft articles remain quite general in nature. In order to reach a reasonable balance it would be of great importance for the draft articles to include a binding clause on the settlement of disputes. With reference to our comments under article 6, it is the view of Finland that arbitration or other judicial settlement under paragraph (c) of article 33 should not be made subject to further agreement between the States concerned. Finland proposed therefore that paragraph (c) of article 33 be amended to read as follows:

"... the States have been unable to settle the dispute, they shall at the request of any of them have recourse to arbitration or other judicial settlement having jurisdiction in the dispute."

The provisions of article 33 concerning judicial settlement procedures may need to be further supplemented in a manner which enables States to accept, at the time of signing, ratifying or acceding to the Convention, by means of written declaration, the jurisdiction of other judicial settlement procedures. Had parties not accepted the same procedures, a dispute could always be submitted to arbitration.

GUATEMALA

[Original: Spanish]

[28 June 1996]

Subparagraph (b) (ii) of article 33 should indicate where the Fact-Finding Commission is to meet or whether that is one of the points that the Commission itself will decide in determining its own procedure.

HUNGARY

[Original: English]

[25 June 1996]

It is commendable that the revised draft articles provide for a settlement of disputes mechanism, which was not the case with the previous draft. That is definitely an improvement. The centrepiece of this settlement procedure is the establishment of a Fact-Finding Commission which could also be initiated unilaterally. The report of the Commission, however, is not obligatory to the parties concerned and all the other traditional methods of dispute settlement could also be resorted to only by the consent of the States concerned. It is our view that a recourse to arbitration or judicial settlement should be made mandatory in the draft articles.

TURKEY

[Original: English]

[5 July 1996]

It would be more appropriate not to foresee any compulsory rules as regards the settlement of disputes, and to leave this issue to the discretion of the States concerned. The Turkish Government believes that if, in the absence of an applicable agreement, the States concerned agree with the principle of having recourse to a dispute settlement mechanism, it should also be up to those States to determine the rules of procedure. A framework agreement should not attempt to set forth detailed rules in this respect, since it is virtually impossible to respond to the exigencies of specific and more often than not complex cases of water disputes. Therefore, article 33 should either be omitted or replaced by a general provision on settlement of disputes.

UNITED STATES OF AMERICA

[Original: English]

[28 June 1996]

The United States commends article 33 on settlement of disputes. The article offers a simple and flexible approach that will assist States with watercourse disputes. The fact-finding mechanism in particular reflects the laudable approach of the International Law Commission of seeking cooperative and widely acceptable solutions to watercourse problems.

VENEZUELA

[Original: Spanish]

[25 June 1996]

Venezuela believes that the dispute settlement mechanisms provided for in this article, including preliminary consultations and negotiations, unilateral recourse to impartial fact-finding, agreed recourse to mediation or conciliation and the possibility of submitting the dispute, by mutual agreement, to a jurisdictional procedure (arbitration or judicial settlement) if a final settlement has not been arrived at within the stipulated period, appear to be complete and sufficient to enable the parties to a dispute to settle in good faith, and with the greatest of good will, any issue that may arise between them.

It therefore believes that the text should be maintained as drafted.
