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Chairman: Mr. YAMADA (Japan)

(Chairman of the Working Group of the Whole on the Elaboration of a Framework Convention on the Law of the Non-Navigational Uses of International Watercourses)

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Mr. Yamada (Chairman of the Working Group of the Whole on the Elaboration of a Framework Convention on the Law of the Non-Navigational Uses of International Watercourses) took the Chair.

The meeting was called to order at 10.10 a.m.

AGENDA ITEM 144: CONVENTION ON THE LAW OF THE NON-NAVIGATIONAL USES OF INTERNATIONAL WATERCOURSES (continued)

Elaboration of a framework convention on the law of the non-navigational uses of international watercourses on the basis of the draft articles adopted by the International Law Commission in the light of the written comments and observations of States and views expressed in the debate at the forty-ninth session (continued) (A/49/10 and A/49/335; A/51/275 and Corr.1 and Add.1)

Cluster II (articles 5-10) (continued)

1. Ms. GAO Yanping (China) noted that, according to paragraph 3 of the commentary to article 6, no priority or weight was assigned to the factors and circumstances listed in paragraph 1 of that article, the importance of which might vary from case to case. The proposal by the Finnish delegation to insert a reference to sustainable development in the chapeau to article 6 might give rise to misconceptions regarding the relative importance of those various factors and circumstances, and was thus not acceptable to her delegation.

2. Furthermore, the geographic, hydrological, climatic and ecological factors referred to in article 6, paragraph 1 (a), were of a widely disparate nature. A better solution would be to use a wording based on the language of article 5, paragraph 2, of the Helsinki Rules on the Uses of the Waters of International Rivers. Her delegation would provide the Secretariat with the text of the wording it wished to propose.

3. Mr. LAVALLE (Guatemala) said that his delegation had a number of problems with the text of article 7. To begin with, in the interests of stylistic clarity, the words "its utilization" in paragraph 2 (b) should be replaced by the words "the use in question". On the substance, paragraph 2 did not cover cases where the State causing the harm acknowledged that it had not exercised due diligence. That omission did not, however, give rise to difficulties, since, in such an unlikely eventuality, paragraph 2 would simply be inapplicable and the State suffering the harm would be entitled to compensation.

4. Paragraph 2 would of course be applicable if both States agreed that the State causing the harm had exercised due diligence and that the harm caused was significant. However, account must also be taken - as the chapeau of article 2 did only implicitly - of two cases in which there might be no such agreement. In the first case, a State suffering harm might reject the claim by the State causing the harm that it had exercised due diligence. In the second case, the view of the injured State that the harm was significant might not be shared by the State causing the harm. In both cases there was a dispute between the State causing the harm and the State suffering the harm, and article 7 would not be

applicable until it had been established, pursuant to article 33, that due diligence had been exercised or that the harm was significant.

5. For those reasons, his delegation considered that it might be appropriate to add an additional paragraph to article 7 which would read: "If there is disagreement between the State causing the harm and the State suffering the harm as to whether the former has exercised due diligence or as to whether the harm may be regarded as significant, this article shall not be applicable until it has been established through recourse to article 33 that due diligence has been exercised or that the harm must be regarded as significant, as appropriate".

6. However, the difficulties did not end there. It seemed that if, in utilizing the watercourse, the State causing harm had exercised due diligence, the utilization might still be deemed to have been "equitable and reasonable", according to paragraph 2 (a). As Mr. McCaffrey, former Special Rapporteur on the topic, had pointed out in a recent article, neither the text of article 7 nor the commentary made clear whether a showing that the use was equitable and reasonable would relieve the harm-causing State of its obligation under that article. His delegation found it hard to understand how, if an act was conducted in an equitable and reasonable manner, due diligence could not have been exercised. Paragraph 2 (a) should therefore be deleted.

7. Moreover, under paragraph 2 (b), the harm-causing State would owe compensation to the harmed State only if it had not exercised due diligence. Accordingly, the words "and where appropriate, the question of compensation" should be deleted from that paragraph.

8. With regard to paragraph 1, his delegation was somewhat concerned that a State negligently causing harm that was not significant would apparently be under no obligation to repair that harm. Under the terms of the paragraph, a riparian State deliberately causing slight harm to another State could claim that it was under no obligation to repair that harm. His delegation found that thesis questionable. Nor was there any automatic correlation between the degree of negligence and the harm caused; it was also difficult to determine the borderline between "significant" and "non-significant" harm.

9. Mr. ŠMEJKAL (Czech Republic) said that his delegation had a number of problems with article 7. First, on the relationship between that article and article 5, it seemed an unsatisfactory solution to make the obligation flowing from the principle of sic utere tuo ut alienum non laedas parallel to and independent of the obligation flowing from the principle of equitable and reasonable utilization set forth in article 5. Each situation must be assessed by means of a single, global process taking simultaneous account of all relevant factors. It could be seen from the third report submitted by Mr. Schwebel, Special Rapporteur on the topic, in 1982 (A/CN.4/348), that the International Law Commission itself had initially favoured making article 7 subordinate to article 5. While the text adopted on second reading seemed clearly to have moved in the direction of an obligation of conduct rather than of result, his delegation still considered that article 7 should be either deleted or amended to make it subordinate to article 5.

10. Progress had also been made on the question of qualification of harm, which must now be regarded as "significant". There was a case for applying a stricter

standard of the sort to be found in many national legislative systems, some of which referred to "abnormal" harm, as opposed to the "normal" harm that was to be tolerated in a spirit of good-neighbourliness. That spirit should also obtain in international relations. His delegation would thus prefer the term "substantial", used in article X of the 1966 Helsinki Rules, or a term such as "serious" or "grave", to be found in many bilateral or regional conventions.

11. In his delegation's view, paragraph 2, article 7, should be deleted even if paragraph 1 was retained. Subparagraph (a) largely duplicated article 6, paragraph 2, while subparagraph (b) introduced matters relating to the regime of responsibility, which had no place in the framework convention. Where there was failure to comply with an obligation of equitable and reasonable utilization, there would obviously be responsibility for fault under a regime not governed by the framework convention. In the event of harm not caused by fault, as, for example, when a State met the criteria specified in articles 5 and 7, there could be objective responsibility. But, there again, the regime applying would be defined by customary law, taking account of factors such as the nature and extent of the harm and the nature of the activity. Compensation would not necessarily be in accordance with the principle of restitutio in integrum, but would vary depending on the specific features of the case. As a minimum, therefore, paragraph 2 should be deleted.

12. Mr. ISKIT (Turkey) said that article 7 gave rise to many problems. Regarding its relationship to article 5, his delegation believed that exercising due diligence for the purpose of not causing significant harm conflicted with the right of equitable and reasonable utilization set forth in article 5, for the exercise of that right should not be restricted if it caused no significant harm to the other parties. In other words, if a State made use of a watercourse in conformity with the principle of equitable and reasonable utilization, the exercise of that right should not be limited by a second criterion. The rule of equitable and reasonable utilization had been defined in articles 5 and 6, and if the utilization was in conformity with those articles, equality of rights should be regarded as having been achieved for the States concerned. Introduction of other restrictive elements would mean that the right of utilization by States was being limited twice.

13. One way of overcoming that contradiction would be to omit article 7 completely, as proposed by the observer for Switzerland and the representative of the Czech Republic, so that the evaluation of the right of utilization would become solely dependent on the criterion of equitable and reasonable utilization. If, however, it was decided to retain the article, another solution would be to subordinate the obligation to exercise due diligence so as not to cause significant harm to the principle of equitable and reasonable utilization. That could be achieved by the simple expedient of adding the phrase "without prejudice to the principle of equitable and reasonable utilization" to the end of paragraph 1. However, given the difficulty of deciding on the extent of the harm, and given that paragraph 2 duplicated paragraph 2 of article 6, his delegation's preference would be to omit article 7 entirely.

14. Mr. TANZI (Italy) noted that in its written observations contained in document A/51/275/Add.1, the Government of Italy had praised article 7 in general terms, thereby accepting in principle the transformation of the article

adopted in 1991 on first reading. Clearly, the no-harm rule had been considerably weakened. First, the introduction of "due diligence" had changed an obligation of result into one of conduct; second, by replacing the word "appreciable" with the word "significant", a higher threshold of tolerance had been introduced. His Government's acceptance of such changes was justified by the consideration that a formula that subordinated, in absolute terms, the equitable utilization principle to the no-harm rule would impair the development of less developed upstream countries. That being said, article 7 as currently worded left open some important problems of substance which, if not solved, might render the provision very weak indeed.

15. The first problem, concerning paragraph 1, related to the question whether utilization of an international watercourse that caused significant harm could still be considered equitable. In his delegation's view, the answer should, in principle, be in the negative. A text proposed by the Expert Consultant in his first report provided a clearer solution to that question, albeit with some limitations. Even if one accepted the Commission's position that, in certain circumstances, equitable and reasonable utilization of an international watercourse might still involve significant harm to another watercourse State, a further question, which should be resolved in the course of the current exercise, would still arise: if a watercourse State that had caused significant damage succeeded in proving that the utilization from which the damage had arisen was still equitable and reasonable, how would article 7, paragraph 2, apply? Would paragraph 2 (b) apply in such a case so that the diligent harm-causing State would be obligated to consult over the question of adjustments and compensation? The answer should be in the affirmative, and that should be reflected in the text by indicating that the obligations under paragraphs 2 (a) and 2 (b) applied jointly. That aim could be achieved by inserting the word "and" after the semicolon at the end of paragraph 2 (a).

16. With regard to a concern expressed by the representative of Guatemala, he believed that article 7 was absolutely without prejudice to the general rule that a State causing damage in breach of due diligence would be internationally responsible for violation of an obligation of conduct. He also agreed with the representative of the Czech Republic that harm caused by a diligent State would give rise to a regime of absolute liability. He did not consider, however, that anything in article 7 ran counter to that provision.

17. Lastly, he agreed with the observer for Switzerland that the logic of the convention should not be interpreted as implicitly allowing downstream States to utilize their portion of the watercourse without concern for the global ecosystem. In his delegation's view, that concern was already covered under general law; nevertheless, he had no objection to the inclusion of a safeguard clause to that effect.

18. Mr. MANNER (Finland) said that the reference to "due diligence" in article 7, paragraph 1, confused questions of liability with preventive duties. The question of the standard of liability, whether fault or strict liability, arose only at a subsequent stage. In the case of some uses, strict liability might seem appropriate, while in other cases, fault liability would suffice.

19. As noted earlier in relation to articles 3 and 4, the reference to "significance" was inappropriate. The comments made on that issue by the

representative of Guatemala were of particular interest. An express mention of "significance" had only the adverse consequence of legitimizing harm that seemed "non-significant". His delegation therefore proposed that the references to "due diligence" and "significance" should be deleted.

20. Mr. AL-ADHAMI (Iraq) said that, in view of the importance of the obligation not to cause harm, article 7 should not be deleted. While the wording of the article was generally acceptable, the term "significant" was ambiguous; for that reason, either it should be deleted, or appropriate criteria should be used to qualify the harm that might be caused to other watercourse States. His delegation proposed that a new paragraph should be added, defining "significant harm" as that which caused the water level to fall below the natural drainage level of a watercourse or the water quality to fall below internationally recognized standards. It was important that the qualification of harm should not be left to the discretion of the upstream State, since that might lead to its being exempted from the obligation to eliminate or mitigate harm.

21. Mrs. DASKALOPOULOU LIVADA (Greece) said that the current wording of article 7 represented a radical departure from the previous version drafted by the International Law Commission in two respects: "appreciable harm" had been changed to "significant harm" and the notion of "due diligence" had been introduced. Those changes could easily be interpreted as raising the threshold of tolerance. Harm must now be not only appreciable, or measurable, but significant as well. That was an unfortunate development, especially in the light of the concept of due diligence, which introduced a subjective criterion. An upstream State could cause significant harm to a downstream State, provided that it could show that it had exercised due diligence. Her delegation therefore believed that it was necessary to abandon the concept, without, however, deleting article 7.

22. Mr. SÁNCHEZ (Spain) said that the letter and spirit of article 7 addressed two different eventualities: one in which a watercourse State did not exercise due diligence in order to avoid causing significant harm to other watercourse States and harm was actually caused and one in which due diligence was in fact exercised, yet significant harm was caused. In the first case, the watercourse State was automatically liable, even though the activity which caused the harm might have met the criteria of equitable and reasonable utilization. In the second, the only obligation imposed upon the State which caused the harm was to initiate consultations with the affected watercourse State. In other words, the regulation provided in article 7 was satisfactory neither to the State planning a new activity nor to the State suffering harm from that activity.

23. Article 7 contained both subjective and objective statements. On the one hand, the concept of significant harm was highly subjective. On the other hand, the notion of due diligence, while it might appear subjective, was well established in all legal systems. The text of article 7 would be significantly improved if it included a provision stipulating that the prohibition from causing significant harm was subordinate to the right to equitable and reasonable utilization provided for in article 5. An alternative solution would be to stipulate that the regime provided for in article 7 would apply only where significant harm was caused to the environment, in which case the article should be placed in Part IV of the draft articles ("Protection, preservation and management").

24. Mr. VORSTER (South Africa) said that, while his delegation was generally satisfied with the approach taken in the draft articles, it wished to raise several issues.

25. Following the Helsinki Rules, the principle of equitable and reasonable use had gained prominence in the draft; in contrast to those Rules, however, existing and potential uses were granted equal status as factors determining such utilization. Under the Helsinki system, past and existing uses had to be balanced against the economic and social needs of each State, not merely against potential uses. In the case of the convention, that balance should be restored by making it clear that the potential use referred to in article 6, paragraph 1 (e), was not merely speculative use, but that the likelihood of its implementation should be anticipated with a reasonable measure of certainty. Possible future use could be brought into the balancing process by way of the factors contemplated in article 6, paragraphs 1 (b), 1 (c), 1 (d) and so on. If that was not feasible, then the words "and potential" in paragraph 1 (e) should be deleted.

26. The position adopted by Switzerland was premised on the historical perception that the obligation not to cause significant harm had fulfilled its role under conditions in which adequate supplies of water had been available. The increasing use of water during the early decades of the century had made it necessary to address the quantitative aspects of harmful effects; to that end, the concept of equitable and reasonable use had come to the fore as a normative standard.

27. The observer for Switzerland had argued that the obligation not to cause harm should be restricted to environmental effects and dealt with in Part IV of the convention, that article 7 should be deleted and its content subsumed under article 6, paragraph 1, and that any activity which caused harm should not be regarded as constituting equitable and reasonable use. In his delegation's view, that approach would imply that existing uses took precedence over new uses, a consequence that might not have been intended. Furthermore, the amendments proposed by Switzerland (A/C.6/51/NUW/WG/CRP.5) appeared to conflict with one another; it was suggested, on the one hand, that the harm caused by one watercourse State to another should be included as a factor determining equitable and reasonable utilization, and, on the other hand, that a use causing significant harm could never be regarded as a reasonable use.

28. As to the proposed deletion of article 7, his delegation shared the Commission's view that article 5 alone did not provide sufficient guidance in cases of significant harm caused to one or more watercourse States by another watercourse State, and that there might be scope for article 7, paragraph 1, which established standards of conduct pertaining to equitable and reasonable use.

29. However, his delegation continued to have difficulties with article 7, paragraph 2. Rather than establishing a regime of strict liability, the Commission had eventually settled on due diligence as the standard of liability. Nevertheless, in situations where significant harm arose despite the exercise of due diligence, the State causing the harm was not entirely immune to liability, and could not easily avoid adjusting its use or paying compensation. Hence, the difference between the liability regime established in article 7, paragraph 2,

and a strict liability regime would be reduced considerably in practice. Accordingly, that paragraph should be examined carefully in the Drafting Committee; if the problems could not be solved, it should be deleted.

30. Mr. CASTRO (Portugal) concurred with the views expressed by the representatives of Finland, Italy and Greece, and specifically with the Finnish proposal that article 7 should stipulate an obligation not to cause harm or appreciable harm. That would reflect the dominant trend in international law and would satisfy an underlying concern of his delegation, namely, preserving the consistency of the international legal order.

31. Mr. PRANDLER (Hungary), reviewing the history of the drafting of article 7 in the International Law Commission, recalled that the text adopted by the Commission in 1991 had embodied the concept of appreciable harm. In 1994 the Commission had introduced the notion of significant harm. During the discussions in the Sixth Committee at the forty-ninth session of the General Assembly, a number of delegations had expressed doubt as to whether that development reflected the overall trend in international law; moreover, the commentary on article 7 in the Commission's report (A/49/10) showed that the Commission itself was divided on the question. The current wording had been arrived at by means of a vote, which was not the Commission's usual procedure.

32. During the past 40 years there had been much discussion of the content and hierarchy of the principle of equitable and reasonable use, embodied in article 5, and the no-harm principle, embodied in article 7. While the Helsinki Rules adopted by the International Law Association in 1966 had given emphasis to the first principle, the Association had subsequently reversed itself and confirmed the equal importance of both rules. His delegation endorsed that position and believed that the two principles should be applied in a way that reflected their interrelationship.

33. During the 1980s and 1990s, the Commission had tended to give primacy to the no-harm rule. The reasons for that decision, as explained by the former Special Rapporteur in an article published in 1990, were the unambiguity and ease of application of the no-harm rule as compared with the principle of equitable and reasonable use, the protection that rule afforded to the weaker (downstream) State, and the lesser effectiveness of the equitable and reasonable use principle in solving problems related to environmental pollution. For those reasons, his delegation believed that article 7 should be strengthened along the lines of the Finnish proposal and the comments made by the representatives of Greece, Portugal, Italy and Guatemala, among others.

34. Mr. NGUYEN DUY CHIEN (Viet Nam) said that his delegation, too, believed that the no-harm rule should be strengthened, and shared the views expressed by the representatives of Portugal, Hungary and Greece. The current wording of article 7, which included the concept of significant harm, was difficult for his delegation to accept, as damage that appeared to a rich country to be insignificant might seem tremendous to a poor country. In order to make it clear that States must avoid causing harm to other States, the word "significant" should be deleted.

35. Mr. ROSENSTOCK (Expert Consultant) said that the term "significant" had generated a disproportionate amount of discussion. In all the legal precedents,

the notion of harm was always qualified as substantial, serious, and so forth; it was not meant to apply to the trivial or de minimis. The word used in the draft that had been adopted on first reading was "appreciable"; however, in English, that word meant "capable of being measured". As scientific and technological capacity increased, it was becoming possible to measure changes that were undeniably of a de minimis nature. As the Commission's records made abundantly clear, the change from "appreciable" to "significant" had not been intended to alter the threshold, but to avoid a circumstance in which the threshold could be lowered to a clearly de minimis level. Paragraph 15 of the commentary on article 3 (A/49/10) made it clear that an adverse effect upon another watercourse State need not rise to the level of being substantial in order to be considered significant.

36. As to the conflict between articles 5 and 7, to which several delegations had referred, he drew attention to paragraph 1 of the commentary on article 7 (A/49/10).

37. Mr. NEGA (Ethiopia) said that the effect of the Finnish proposal was to revert to the Commission's earlier draft, which accorded primacy to the no-harm rule. That would render meaningless the right to equitable and reasonable utilization established in articles 5 and 6 and would disrupt the balance of the draft articles. His delegation opposed such a move. Once rights to equitable and reasonable utilization existed, all the watercourse States could exercise the same rights, and that would amount to exercising due diligence. Article 7 should therefore be deleted or at least made consistent with articles 5 and 6; in other words, the notion of significant harm must be made subordinate to the principle of equitable and reasonable utilization.

38. Mr. HAYES (Ireland) said that Ireland had no direct interest to defend in the present discussion, but it supported the codification and progressive development of international law and appreciated the work done by the Commission. His delegation did not properly understand the relationship between articles 6 and 7 and tended to share the Finnish view that the issues fell largely within the scope of liability. It was not clear, either, why the issues dealt with in article 7 had been separated from article 6. For example, the provisions on consultation and compensation contained in article 7, paragraph 2, could be taken care of in article 6. In any event, compensation was certainly a question of liability, and it would be better to deal with such matters under other topics considered by the Commission rather than in the context of the watercourse convention.

39. Mr. MAZILU (Romania) said that the main purpose of article 7 was to find the best way of using an international watercourse so as not to cause significant harm to other States. While it was true that in some circumstances equitable and reasonable utilization might involve significant harm to another watercourse State, the principle of such utilization must remain the chief criterion. The simplest solution would be to delete article 7. If that was not possible, the article must be amended: Romania would submit its proposed amendments to the Secretariat.

40. Mr. EPOTE (Cameroon) said that his delegation could not agree to the deletion of article 7. The clarification of the semantics of the term "significant harm" given by the Expert Consultant ought to enable the Working

Group to make progress. Of course, it was difficult to assess the critical threshold of harm; repeated minor harm, for example, could have serious long-term effects. The qualification "significant" could be retained, but it must be made clear that the problem was one of State responsibility. It was perfectly correct to emphasize the need for consultation and cooperation among the riparian States, for that would minimize the risk of harm.

41. Mr. CALERO-RODRIGUES (Brazil) said that the International Law Commission had been right to include both the principle of equitable and reasonable utilization and the no-harm rule in the draft articles and to try to establish a balance between the two. The notion of equitable and reasonable utilization was based on the ancient concept of "equitas", which was somewhat vague and had been applied to watercourse law only recently. It was a useful concept but implied acceptance of some degree of harm or harm agreed upon by the States concerned. The list of factors given in article 6 was not exhaustive, and it was not clear how decisions would be taken if the States concerned did not agree. The simple application of the principle would not prevent what mattered to a State - acts of other States causing harm in its territory. The no-harm rule was accepted in international law and should be included in the draft articles. It would be desirable for both notions to be included, but if a choice had to be made, the no-harm rule must prevail. It would not be an acceptable solution to include that rule in article 6, for States needed means of recourse to stop harm or obtain compensation.

42. His delegation could not accept the deletion of article 7 or the elimination of the no-harm rule. The notion that the rule's application would restrict equitable and reasonable utilization was particularly infelicitous. Were delegations to understand that the right to cause harm to a neighbouring State was an element of the right to equitable and reasonable utilization?

43. Mr. ROSENSTOCK (Expert Consultant) urged the members of the Working Group to take a broad view of the inclusion of the notion of compensation: it was not merely a reflection of the State responsibility doctrine but a recognition that compensation in its various forms might involve, for example, payment for benefits received or a "balancing of the equities" - the term used in the commentary.

44. Mr. TOMKA (Slovakia) said that article 7 required a realistic approach, and the Commission had certainly struck a fine balance between the competing interests of different groups of States.

45. Obligation usually meant an obligation between two States. But to which other States could a coastal watercourse have an obligation? Not to the upstream States, because they would not be affected by the coastal State's activities. In such a situation the upstream States could argue for very strict criteria, for the criteria would not be applicable to them.

46. His delegation endorsed the explanation of the meaning of "significant" given by the Expert Consultant. To take one example, a State might use water from an international watercourse to cool a nuclear reactor. The water was returned to the watercourse, unpolluted but slightly warmer, and then flowed through the territory of another State. Strict applications of the no-harm rule would prohibit such common situations.

47. Ms. MEKHEMAR (Egypt) said that, while article 5 was the cornerstone of the future convention, article 7 was the strategic article of the whole exercise. However, in its present wording article 7 did not address her delegation's concerns and stood in contradiction with article 5. Any harm would affect a watercourse State's right of equitable and reasonable utilization. Moreover, the terms "significant" and "due diligence" were vague and subjective. The article should not be deleted but amended to complement article 5. Her delegation's suggestions to that end would be submitted to the Secretariat.

48. Ms. LADGHAM (Tunisia) said that, as a general principle, Tunisia was in favour of the inclusion of any provision which strengthened protection of the environment. Article 7 should be retained but the obligation not to cause harm should be stated in stronger terms. Her delegation supported the Finnish proposal to delete the word "significant".

49. Ms. FERNÁNDEZ de GURMENDI (Argentina) said that her delegation agreed with the delegation of Brazil and other delegations on the importance of including the no-harm rule in article 7. A reordering of the articles in order to make that rule the first principle of the future convention would be welcome. Only if no harm was caused could the utilization of a resource be acceptable. The notion of due diligence weakened the no-harm rule and introduced a subjective criterion. It also undermined the principle of equitable and reasonable utilization, for whenever harm was inflicted on another State the utilization could be neither equitable nor reasonable. Her delegation therefore supported the Finnish proposal for the deletion of "due diligence". The article should also be amended to ensure that the consultations were conducted before any harm was caused. In particular, the word "causes" in paragraph 2 should be changed to "may cause".

50. Mr. WELBERTS (Germany) said that, read together, articles 5 and 7 took account of the competing interests of watercourse States and struck a balance between equitable and reasonable utilization and the obligation not to cause harm. The deletion of article 7 would destroy that balance. His delegation preferred the original wording of article 7 and shared the doubts of the Finnish delegation about "due diligence". Despite the explanation given by the Expert Consultant, he thought the adjective "significant" superfluous. The law of neighbourly relations already contained the notion of threshold harm, from which flowed the obligation to suffer insignificant harm, as in the example cited by the representative of Slovakia. His delegation therefore supported the Finnish proposal.

51. Mr. ROSENSTOCK (Expert Consultant) said that it would be limiting the protection afforded by the text as a whole to emphasize the need for consultations when there was harm. Matters of consultation and notification were better dealt with, in more general terms, in the subsequent articles. The commentary to article 7 clearly established the burden of proof, which was an important element in the balancing of equities between articles 5 and 7. It was doubtful whether the issue was one of State responsibility.

52. In the existing instruments on watercourses and related topics the obligation was one of due diligence - an obligation States were prepared to accept - rather than an obligation of result. The Working Group would be creating a difficult situation if it deleted "due diligence" and implied that it

was doing so in order to change the obligation from one of conduct to one of result. In the Commission's earlier draft articles and commentary the obligation was also, implicitly, one of due diligence. The difference in the present text was that the obligation of due diligence was made express.

53. Mr. RAO (India) said that equitable and reasonable use was the basic principle of watercourse regimes, even though the no-harm rule had been gaining ground in recent times. His delegation could accept the inclusion of the rule in article 7 and thought that any change in the delicate balance struck by the Commission would give rise to an interminable debate on the issue. The Commission worked in the context of the views expressed by States, and a repetition of all the arguments would not produce a useful result in the Sixth Committee. The need now was to move ahead towards a framework convention.

54. The provisions of article 7 had been rightly described as a process, of which consultation was only the beginning. The article did not stand alone, but must be read in conjunction with the other articles. In any event, the concept of due diligence was not vacuous but was acquiring considerable weight in the context of the principles of liability produced by the Commission and of environmental law.

55. In short, watercourse law could not be isolated from the general principles of international law concerning sovereign equality, permanent sovereignty over natural resources, and environmental protection. His delegation therefore urged the Working Group to take article 7 in the right spirit as the beginning of a broad spectrum of cooperation among States. It must also be remembered that, if cut to the bone, the draft articles would impose obligations on only one group of States.

56. Mr. OBEID (Syrian Arab Republic) said he did not believe that significant harm could be caused while the utilization of watercourses remained equitable and reasonable. Freedom was threatened when sovereign rights were ignored, and any harm at all was unacceptable, whether it was considered "appreciable" or "significant". The word "significant" should therefore be deleted. To determine whether any harm had been caused, international standards were needed which laid down specific criteria. He agreed that compensation was in order when harm was caused. Nevertheless, despite its shortcomings, article 7 should not be deleted, since article 5 alone did not contain adequate safeguards to ensure equitable utilization and did not give adequate protection to downstream countries.

57. "Due diligence" was too ambiguous a term to prevent countries exercising their sovereign rights from causing harm to third countries. A very specific threshold of harm needed to be determined. Article 7, paragraph 2, was very important because it clearly required consultations and provided for possible compensation in the event that significant harm was caused to another watercourse State despite the exercise of due diligence. Unfortunately, there was no agreement as to what constituted "significant" harm, which was incompatible with equitable utilization in any event. The concept of due diligence weakened the principle of no harm and undermined the concept of the equitable and reasonable utilization of international watercourses.

58. Mrs. FLORES LIERA (Mexico) said that article 7 should be retained. The International Law Commission had presented a realistic and balanced text, based on the reasonable criteria of no harm and due diligence. Unlike some previous speakers, she believed it was useful to qualify harm as "significant"; otherwise, almost any activity connected with watercourses would be prohibited.

59. There was no indication in article 7, paragraph 2, of what should happen in the event that the State causing harm did not consult with the State suffering such harm. She therefore proposed adding a new paragraph to the effect that when a State causing harm did not carry out the consultations referred to in paragraph 2, the State suffering harm could invoke the provisions of subparagraphs (a) and (b).

60. Mr. HARRIS (United States of America) said that article 7 was a crucial article that needed to be read in conjunction with articles 5 and 6. It must be remembered that most international watercourses were already being used to almost their full potential, and any activity at all could cause harm to either upstream or downstream States. The problems of managing watercourses where there were competing uses could only be solved by establishing principles to determine what constituted equitable and reasonable utilization and to protect the watercourses from pollution and other threats. In that respect, the obligations laid out in Part IV constituted an important supplement to article 7.

61. He believed that the use of the word "significant", rather than "appreciable", was a helpful change, as "appreciable" could also be interpreted as meaning de minimis harm as well as significant harm. Furthermore, the opposite of significant harm - insignificant harm - was surely not a type of harm to be covered in the convention.

62. The introduction of the term "due diligence" had only made explicit what had always been implicit in the approach taken by the International Law Commission in the area under discussion. To delete it at the present stage could lead to misinterpretation in the future, when it might be assumed that the deletion was of some particular significance. The commentary showed how useful the term was, since it offered a standard that could be applied with greater severity to some activities than to others. For instance, in the case of extremely hazardous activities, it approached strict liability. If the term was deleted, the question would remain as to what standards of conduct the parties were obliged to follow, and that ambiguity might lead some countries to refrain from becoming parties to the convention.

63. Lastly, paragraph 2 should be retained because it created a process for the peaceful resolution of problems arising from competing uses.

64. Mr. ANDERSEN (Norway) said that for the moment, at least, his delegation supported the proposal to delete the word "significant", as it did appear to permit some level of harm. It was unclear whether the term "due diligence" implied a duty to take preventive action or a standard for liability. In any event, he did not believe it was necessary to include it in article 7, paragraph 2, as that paragraph simply provided for a process of consultation. However, it was necessary to introduce the principle of sustainable development

in either article 5 or article 6, as its inclusion would facilitate the interpretation of harm in article 7 significantly.

65. Mr. LOIBL (Austria) said that the no-harm rule was important in the relationship between articles 5 and 7, as it introduced a threshold for the effects one country's actions invariably had on other countries. Whether it applied to significant harm or simply harm was of secondary importance. He was in favour of retaining due diligence as a standard, as it was an obligation of conduct and not of result, as was done in the case of various international and national laws dealing with emission standards.

66. Mr. AL-HAYEN (Kuwait) said he opposed the deletion of article 7, but supported the proposal to delete the word "significant", which he found too vague and open to various interpretations.

67. Mr. de SILVA (Sri Lanka) said that he supported the provisions of article 7 in so far as they concerned the process of consultation. He felt that it would be presumptuous of him, coming as he did from a small island State, to comment on the questions of significant harm or due diligence. He considered that the rights and obligations relating to international watercourses should be considered as separate and distinct from other instances of transboundary harm, such as extremely hazardous activities, and that the Working Group should not conclude that due diligence was applicable in all situations of transboundary harm. However, as the discussion had led into those areas, he wished to point out that due diligence had not always been found to be an adequate standard in such cases.

68. Mr. THAHIM (Pakistan) said that the word "significant" should be deleted, as it was difficult to define and would only create controversy. Harm was harm, and any harm was to be avoided.

69. Mr. VILLENEUVE (Netherlands) said that it was difficult to strike a balance between articles 5 and 7. In an ideal world, of course, any harm at all was bad. He did not agree that due diligence was a question of liability, but saw it rather as intended to prevent situations from reaching the stage where the question of liability arose. Perhaps the preventive aspects of the article could be reinforced, but, on the whole, its current wording offered the best balance.

The meeting rose at 1 p.m.