

CHAPTER 1

Regulation of the Uses of International Watercourses

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INTRODUCTION

The development, apportionment and use of water resources has blossomed into a major economic and social—and even political—issue. The controversies between Israelis and Palestinians, and those between Turkey, Syria and Iraq, illustrate this point, as do the judgment of the International Court of Justice (ICJ) in the Gabcikovo-Nagymaros case and the recent adoption, by the UN General Assembly, of a convention on the non-navigational uses of international watercourses (IWC).

This chapter will focus on the genesis of this new multilateral instrument and highlight some of the problems relating to it. Before dealing with these issues, it will be necessary, however, to remember that transboundary waters may serve more than one function.

First, IWC may be used to draw international boundaries. While it is true that such waters form a natural unit and, ideally, should be treated as such, it is equally true that they provide a natural means for separating human communities and their territories.

Second, those IWC which are navigable can be used as international highways. As such, they may be of great economic significance for the riparian and possibly other countries. They will be especially important for those riparians who have no access to the sea. It is useful, therefore, to highlight the rules of navigation on IWC.

Third, and as pointed out, such waterways may serve non-navigational uses, such as fishing, irrigation and the production of hydro-electric energy.

The fact that most IWC can accommodate several uses—a similar situation may occur in marine space—raises two questions. The first is that of the priority of utilizations: is there any activity—for instance navigation, if the waterway is

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navigable—which should enjoy inherent priority over other uses, such as the production of electricity? The second related question is whether certain users should have priority over others. Can it be said, for instance, that Egypt, whose prosperity depended on the Nile from time immemorial, enjoys vested rights over the bulk of the Nile's waters because historically it was the first user and because of its economic dependence on these waters?

Another problem which increasingly besets the use of IWC—especially their multiple utilization—is the strain put on the environment of such waterways and their ecosystems. If an upper riparian uses a waterway for purposes of irrigation, for example, its flow will be reduced and irregular, and the water restituted to the watercourse after irrigation may be of increased salinity, thereby injuring the lower riparian or riparians.

Before dealing with the main topic of this presentation—the non-navigational uses of IWC—it will be useful briefly to look at two other possible functions: their use as international boundaries, and navigational activities.

INTERNATIONAL WATERCOURSES AS BOUNDARIES

As pointed out, surface waters—rivers and lakes—may serve to separate human communities and their territories. This can be achieved: (1) by following a shore of an IWC; (2) by cutting across its waters; and (3) by using the waterway as a reference for drawing a land boundary.

Historically, the oldest category is formed by shore boundaries separating two adjacent, i.e., opposing or contiguous States, which can take two forms. Either each State fixes its own boundary on its own shore, in which case the watercourse itself forms either a “no man's land” or a condominium of the States concerned; or those States agree to place the international boundary on the shore of one or the other riparian, thus attributing the entirety of the waters to one State. The first solution is no longer used in State practice, while the second, which is obviously detrimental to the State on whose shore the boundary runs, may still be found in some treaties. This is the case, e.g., for the French-Swiss boundary in the Jura region, located on the Swiss side of the Doubs river, or for part of Lake Malawi, where the border between Malawi and Tanzania runs along the Tanzanian shore.

The second type of situation is that of upper and lower riparians sharing a waterway traversing—instead of separating—their territories. In this case, one speaks of a successive watercourse. Here the boundary will usually consist of a straight line connecting the terminal points of the relevant land boundaries.

The third possibility to be examined is that of ordinary land boundaries drawn by reference to a waterway. An old agreement between France and Great Britain relating to their respective possessions on the West coast of Africa, for instance,

prescribes that the boundary shall run parallel to the river Gambia at a distance of 10 kilometers.

Clearly the most important issue is the drawing of water boundaries between contiguous riparian States. Unless these States decide to establish an arbitrary borderline, for example, by using selected points of reference or coordinates, two basic methods can be used:

- The thalweg (a German word meaning the path running at the bottom of a valley.) State practice shows that this concept has been given three meanings: (i) the succession of deepest points in the river bed; (ii) the main channel used by navigators when traveling downstream; and (iii) the median line of that main channel.
- The median line, that is, a line every point of which is equidistant from the nearest point on each shore, or a simplified median line formed by connecting equidistant points in the watercourse by straight lines.

Each method has its strong and its weak points. In its modern and most usual form, the median line of the main downstream channel of navigation, the thalweg, presents the advantages of relatively easy identification and of offering both riparians access to the navigable areas of the waterway. Its drawback is that the dividing line may run close to the shore of one riparian State and, thereby, disadvantage the other.

Curiously, the median line's main shortcoming is the uncertainty regarding the points, on each shore, from which that line is to be constructed: from the high- or the low - water mark or something in between? From the main shores of the waterway or, if islands are present, taking into account the shores of insular formations? Another drawback of the median-line solution is that if the watercourse is navigable, and if the entire thalweg is located on one side of the median-line boundary, the riparian State on the other side will have no access to the navigable areas (unless, of course, such access is explicitly granted by treaty.) The main advantage of that solution is the fact that it seems to effect an equitable apportionment of the waters and of their non-navigational uses, although even this is not always true, depending on the configuration of the bed of the watercourse.

A question that may be asked is how one is to fix the boundary in the absence of agreement between the riparian States concerned. This is, by and large, an academic issue. Boundaries in waterways are almost invariably drawn by treaty, so that the real problem will be one of interpreting the provisions of the treaty. The density of treaty rules in this field has, in fact, inhibited the growth of customary rules. It has nonetheless been contended that there is at least one such rule, according to which the boundary in navigable rivers is formed by the thalweg, whereas the boundary in non-navigable waterways runs along the median line.

However, the existence of such a rule cannot be proved. One is, therefore, left with the conclusion that watercourses, as is the case of land territory in general, should be divided up by treaty; that in the absence of treaty provisions, there is no ready-made customary rule; and that the only element to turn to, in the absence of a treaty title, would be the effective exercise of sovereignty by one or the other riparian over the contested waters. The problem with the last element is that effective domination over precise surfaces of water will, owing to the nature of these surfaces, be difficult to localize. This leads to the overall conclusion that it is essential, for the riparians of contiguous waterways, to establish their aquatic boundary by treaty.

This is all the more true because complications may arise on account of the presence or disappearance of islands, changes in the configuration of the watercourse, the amalgamation of separate islands, or the fact that works have been constructed in, under or above the waterway.

The boundary treaties concluded by riparian States will also determine, in many cases, the regime of navigation and the allocation of non-navigational uses.

NAVIGATION

Introduction

One often overlooks the fact that navigation is, after all, an economic activity. Contrary to currently prevailing views, this activity is, in many cases, just as important as non-navigational uses such as fishing, irrigation and the production of energy. Accordingly, navigation on IWC may also be of interest to international financing agencies such as the World Bank. Of special interest are situations where navigation competes with non-navigational activities and where a modus vivendi must be sought between different uses and/or users.

The movement of goods, passengers and vessels on waterways was considered of vital importance throughout the 19th Century and part of the 20th Century, not only for trading purposes, but also from a strategic viewpoint. Witness the colonial penetration of the African continent, via the Congo river system, which had been made possible thanks to the freedom of navigation established in 1885 by the Congress of Berlin.

The General Regime of Navigation

The issue of free navigation first rose to prominence in Europe after the French Revolution and the Napoleonic Wars. The Final Act of the Vienna Congress of 9 June 1815, which ended those wars, contained a set of provisions opening the international rivers of the Contracting Parties to the commercial navigation of ships carrying their flag. The legal basis of the freedom of navigation for the flags of riparian States may

be found in the idea that the watercourses concerned are of common interest to those States and, hence, give rise to common legal rights.

Freedom of navigation was initially confined to riparian flags. In the second half of the 19th Century, however, it was gradually extended to the trading vessels of both riparians and non-riparians. It equally spread to Africa and Asia, but not to the Americas. The peak of this trend toward liberalization was reached with the Peace Treaty of Versailles, of 28 June 1919, and the Barcelona Statute on the Regime of Navigable Waterways of International Concern, of 20 April 1921. Both instruments opened the navigable rivers of Europe to all nations and only reserved local trade (cabotage) to the national flag.

Why has this trend toward ever-increasing liberalization, even though it may result in competition and in the presence of foreign vessels on national territory prevailed?

An essential factor was undoubtedly Europe's economic awakening during the 19th Century and the practice of unbridled economic *laissez-faire*. The trend was also motivated by policies of colonial expansion and, after the Great War, by the desire to control defeated Germany from the inside; one way of doing so was by ship. Finally there was the wish to secure the survival of a new State in Central Europe—Poland—by granting it access to the sea.

Authoritarian regimes often are a threat to economic liberalism. This is why the general freedom of transit on the international waterways of Europe began to decline with the advent of fascism in Germany and elsewhere in Europe. The decline continued as the world moved into the Cold War. In 1948, the Belgrade Convention practically limited free trade on the Danube to the flags of the Eastern European riparian States. Later on, the riparians of the Rhine retorted by introducing a similar restriction. In many areas of the Third World, the freedom of navigation for all flags resulting from the treaties concluded by the colonial powers was replaced, upon decolonization, by agreements or legislation limiting that freedom to the vessels of the riparian States. This also seems to be the position under contemporary international law. Accordingly, a rule of customary law may be seen to exist which grants freedom of navigation on international rivers—but not lakes—to private vessels flying the flag of a riparian State. This is borne out by Article XIII of the 1966 Helsinki Rules, a codification effected by the International Law Association (ILA). The ILA is a private scholarly body which, however, enjoys a high reputation in this particular field. According to Article XIV of the Helsinki Rules, the freedom of navigation extends to traffic for commercial or other purposes, but not to public vessels (Article XIX) or local trade (Article XVI). It also covers lakes and, in that particular respect, seems to go beyond the existing customary law.

In the Americas, the situation is completely different. The American States have, from the outset, been reluctant to open their waterways even to other riparians

and have developed what one may call the regional custom of the “concesión especial.” Each riparian State is entitled, on the part of watercourse located on its territory, to prohibit foreign navigation of any kind. Vessels sailing under a foreign flag, including that of a co-riparian, may circulate on that part of the watercourse only if they have been given special permission to do so by international agreement or national legislation. Thus the general rule of freedom of navigation for the flags of riparian States does not apply to the American continent where, obviously, IWC are not considered as forming a commonality of the riparians.

NON-NAVIGATIONAL USES

Introduction

The Draft Articles on the Non-Navigational Uses of International Watercourses prepared by the International Law Commission of the United Nations (ILC) have a long history. This history may be traced back to the early sixties, when another respected scholarly body, the Institute of International Law, adopted a resolution on the non-navigational uses of international waterways. This text stressed the idea that the uses and resources of such waterways are to be shared among the riparian States in accordance with equitable principles.

The first modern text dealing with an issue which, hitherto, had attracted minimal attention, was followed, in 1966, by the ILC's Helsinki Rules, which have been mentioned already in connection with navigation. Drafted by some of the then leading lights in the field, the 1966 Rules form, in fact, a comprehensive code of the law of IWC, excluding only the issues of boundaries and of groundwaters. The Helsinki Rules were completed, later on, by various additional texts dealing in particular with environmental problems and with the status of groundwaters. Despite the provisions on navigation it contains, the Helsinki text's main interest lies in its rules on the non-navigational uses of international drainage basins. Article IV sets out the rule of equitable and reasonable apportionment, and Article V enumerates some of the geographical, hydrological, climatic, historical, social, economic and technical elements to be considered when effecting that apportionment. These two basic rules are completed by articles providing that there is no category of uses enjoying any inherent preference over another (Article VI), that no State may reserve future uses for itself (Article VII), and that existing activities may be deemed equitable and reasonable, unless the riparian State challenging them establishes their inequitableness (Article VIII).

The Helsinki Rules make no mention of a principle which would enjoin riparians from causing harm to their co-riparians. But Article V, which enumerates the elements determining the equitable and reasonable share mentions, among them, “the degree to which the needs of a basin State may be satisfied, without causing substantial injury to a co-basin State.” In other words, the harm a given use may inflict on a watercourse State is an element, but not the decisive element, for measuring equitable

and reasonable utilization. This is so because otherwise, in the case of a fully-exploited watercourse, any new activity would be prohibited since it would, necessarily, harm present uses and users.

Despite their soundness, the Helsinki Rules as such had no official standing. In addition, the world's water resources, especially those of developing countries, began to be in increasingly short supply. This is why the General Assembly of the United Nations decided, in 1970, to request the ILC to prepare a set of draft articles to govern the non-navigational uses of IWC. Thirteen Reports and five Special Rapporteurs later, in 1991, the Commission forwarded a first draft of 32 articles to the Assembly for discussion by its Sixth (legal) Committee and for comments by interested governments. Thereupon the ILC slightly amended its first draft, mainly regarding the relation between equitable utilization and the no-harm rule included in the draft, and the peaceful settlement of disputes. The amended text went back to the Sixth Committee which, as the reaction of States to this new version seemed quite favorable, decided to forego a diplomatic conference and to have the text finalized, in the form of a multilateral treaty of codification and of progressive development of international law, by a plenary ad hoc working group of the whole.

The Working Group first met from 7 to 25 October 1996 in New York and fought bitterly over the ILC draft, especially its provisions on: (1) the effect of the new Convention on existing watercourse agreements; (2) the possibility for watercourse States to conclude, in the future, agreements that would deviate from the new Convention; (3) the possibility for such States to participate in agreements concluded by other States of the same watercourse; (4) the relation between the principle of equitable and reasonable utilization and the rule that no harm may be caused by one watercourse State to another; and (5) the peaceful settlement of watercourse disputes.

As a result of these controversies, the Working Group nearly collapsed but was given another chance to come to terms by meeting between 24 March and 4 April 1997. Some kind of agreement was finally reached even over the most intractable issue—the relation between the principle of equitable and reasonable utilization and the no-harm rule. That agreement was not unanimous, however, so that some provisions and the Convention as a whole had to be put to a vote. Finally, on 21 May 1997, the Convention was approved by the General Assembly and opened for signature. The remainder of this chapter will be devoted to the first four contested issues.

The Convention in its Relation to Existing Watercourse Agreements

The fate of existing IWC agreements—of which there are a great number, especially in Europe and in North America—was one of the major questions to be settled by the Working Group. The issue had not been covered at all by the Draft Articles, presumably because the ILC had assumed as a matter of course that existing agreements would survive without change unless the Parties were to decide to abrogate or amend them in the light of the new Convention.

According to some participants (notably Portugal and Ethiopia), at least some provisions of the new Convention should be regarded, not only as codification of existing customary rules, but as rules of jus cogens, i.e., imperative law. Under Article 64 of the 1969 Vienna Convention on the Law of Treaties, this would have meant the lapse of all existing watercourse agreements contradicting such rules. At the opposite side of the spectrum, some other countries, such as Egypt, France and Switzerland—held that existing watercourse agreements should in no way be affected by the new instrument.

One will note with interest that both sides included upper as well as lower riparians. This goes to show that the issue was not conditioned by geographical considerations but, rather by the question of who was well served by the existing agreements.

Eventually, a deal was struck between these opposing views. Article 3 (1) of the new Convention provides that:

[n]othing in the present Convention shall affect the rights or obligations of a watercourse State arising from agreements in force for it on the date on which it became a party to the present Convention.

This meant that the States wishing to maintain existing watercourse agreements carried the day. As a concession to those who wanted to do away with them, Article 3 (2) adds, however, that:

[n]otwithstanding the provisions of paragraph 1, Parties to [existing] agreements ... may, where necessary, consider harmonizing such agreements with the basic principles of the present Convention.

Contrary to appearances, this “concession” is virtually without substance. The language used in Article 3 (2) clearly shows that there will be no “harmonization,” i.e., amendment of existing agreements without the consent of all States Parties to them, in conformity with the basic rules of the Law of Treaties. In addition, the “basic principles” with which such agreements may be harmonized are defined nowhere. Accordingly, it is up to the States concerned to do so, and this can only be accomplished by agreement. In short, Article 3 (2) does not go beyond stating the obvious, namely, that existing agreements may be amended with the consent of all the States Parties to them.

Article 3 was one of the provisions which had to be put to a vote within the Working Group. It was adopted by 36 votes to 3 (Egypt, France, Turkey), which was a modest score, considering that there were 21 abstentions. One may wonder, however, why Egypt and France, strong advocates of the survival of existing watercourse agreements, voted against a text which ensured just that. Perhaps they thought that

Article 3 failed to do so with sufficient clarity and vigor; or perhaps they were preoccupied by another aspect of Article 3, which will be considered next.

Future Agreements

What would be the impact of the new Convention on future watercourse agreements? Article 3 (3) of the Convention, which survived virtually unchanged from the ILC Draft (Article 3 (1)), provides that in the future, watercourse States “may enter” into new agreements “which apply and adjust the provisions of the present Convention to the characteristics and uses” of the watercourse concerned. While the verb “apply,” taken in isolation, would seem to mean that the content of future agreements has to be in line with the provisions of the Convention, the second verb, “adjust”, suggests that the States concerned may also depart from those provisions. That this is so is corroborated by the words “may enter”: Whoever may conclude an agreement which applies provisions of the Convention may also do the opposite, that is, enter into an agreement which departs from those provisions. This confirms an earlier conclusion, namely, that the provisions of the Convention are not jus cogens; nor are they multilateral treaty rules which may not be derogated from by agreements between some of the Parties to it. They are, at the most, guidelines for those who intend to negotiate new watercourse agreements. In other words, the conventional freedom of States is fully maintained. This is a reassuring result. But some States may have thought that the language of Article 3 (3) was not vigorous and straightforward enough.

Partial Watercourse Agreements

Future agreements relating to an entire watercourse should apply to all States concerned or, to be precise, every watercourse State should be entitled to participate in the negotiation of such an agreement and to become a Party to it. This rule, contained in Article 4 (1) of the ILC Draft, was not seriously challenged and is now embodied in Article (4) (1) of the Convention.

The real problem, however, was that of partial agreements, that is, agreements concluded inter se by some States of a watercourse and limited to their respective segments of the latter, but threatening adversely to affect other States of the same watercourse. Article 4 (2) of the ILC’s Draft allowed such States, first, to take part in consultations on and in the negotiation of the agreement and, second, to become Parties to it. The question arising in connection with this provision was whether third States of the same watercourse could and should be allowed to accede to agreements from which their original Parties had wished to exclude them. Some countries, including a number of upstream States, thought that they should not. According to one participant, the threat to the interests of other watercourse States inherent in such agreements should be dealt with, not by entitling those States to become Contracting Parties, but by considering this threat as a potentially unlawful activity by the original Parties to the agreement, possibly entailing their international responsibility towards the other

watercourse States. This construction would have avoided any interference with the freedom of States to contract.

In the end, however, the views of the ILC prevailed, but in an attenuated form. Under Article 4 (2) of the Convention, a third watercourse State must be satisfied with a right “to participate in consultations on such an agreement and, where appropriate, in the negotiation thereof in good faith with a view to becoming a Party thereto, to the extent that its use is thereby affected.” From the viewpoint of legal orthodoxy, this solution is questionable. It was found acceptable, however, because of the inclusion of the words “where appropriate,” which give considerable leverage to the original Parties to the agreement, and also because the participation of a third State in the agreement will be limited “to the extent that its use is thereby affected.”

The Principle of Equitable and Reasonable Use and the No-Harm Rule

As has been pointed out, the relationship between the principle of equitable and reasonable utilization and the no-harm rule was the essential problem to be solved. Though addressed by the ILC, this question ripened into a major issue during the second meeting of the Working Group. It will be convenient briefly to analyze each principle or rule separately before examining their relationship.

The No-Harm Rule

The no-harm rule probably originated from the consideration that, as in the case of neighboring owners of real property, neighboring States may not act as they please on their territories. They are not allowed to use or to tolerate the use of their territory for causing damage to their neighbors. This principle, which is linked to the concept of abuse of rights and which originated in the sphere of private law, appears to be a “general principle of law recognized by civilized nations” which, by now, has also entered the realm of customary international law.

The no-harm rule covers the whole range of neighborly relations, including issues pertaining to the protection of the environment. It is relevant, in particular, for two aspects of the law of international waterways; the allocation of the utilizations of such watercourses and the protection of their environment. Regarding the second aspect—environmental protection—the no-harm rule is and remains fully valid. Concerning the first aspect, however, that rule is of little use today. Most international waterways are at present fully exploited or even over-used. Accordingly, the issue is no longer one of not causing harm—in situations of full or over-use, every new or increased activity is harmful for existing utilizations—but one of apportioning resources among competing uses and users. This is why the negative no-harm rule had to be superseded by a positive rule which would make it possible to effect such an apportionment.

The Principle of Equitable and Reasonable Utilization

This principle, which today governs the attribution of shared water resources, has its roots in the judicial practices of federal States such as the United States, Germany and Switzerland, and more precisely, in the case-law relating to the allocation of water resources among the member units of those countries. The practice of the Supreme Court of the United States has been particularly important in this context.

Contrary to the no-harm rule, the principle of equitable and reasonable utilization is specifically intended for, and limited to, activities on international watercourses other than navigation. Its emergence was prompted by the limitations of the no-harm rule: The latter did not allow for the settlement of controversies over allocation issues on fully-used or over-used international watercourses, or would have done so in an equitable way, that is, by giving complete priority to existing activities and by prohibiting the development of new or the extension of existing uses. Moreover, since the main users of international watercourses have usually been lower riparians, such a solution, if it were retained, would heavily advantage those countries and heavily disadvantage the upstream States. The situation on the lower Nile perfectly illustrates the situation. The no-harm rule, if it were the only one to apply, would fully protect the status quo, i.e., the existing rights of the lower riparians—Egypt and, to a lesser degree, the Sudan—and deny the upper riparians—first and foremost Ethiopia—any possibility of developing or expanding activities. In other words, the economic and social growth of any newcomer, in particular upstream countries, would be stunted.

The Relationship between the Principle of Equitable and Reasonable Utilization and the No-Harm Rule

When this question first arose, in the context of the 1966 Helsinki Rules, the ILC considered that the principle of equitable and reasonable utilization should be the guiding rule. Accordingly, the no-harm rule was one among a series of elements to be considered for determining whether a given use was “equitable and reasonable.”

Turning now to the work of the ILC, Mr. Stephen M. Schwebel, Special Rapporteur, had proposed an Article 8, paragraph 2, subordinating the no-harm rule to the principle of equitable and reasonable utilization reflected in Articles 6 and 7 of the Draft. The no-harm rule was to come into play only if a planned new or expanded use was likely to go beyond what was equitable and reasonable. The harm caused by such utilization was, moreover, included among the elements to ascertain the equitableness of that use.

The next two Special Rapporteurs, Mr. Jens Evensen and Mr. Stephen C. McCaffrey, reversed the priority. The no-harm rule was not only fully detached from the principle of equitable and reasonable utilization, but was now being characterized by some as forming “the fundamental rule” of the Draft. In addition, “harm” was

removed from the list of factors serving for the determination of what was equitable and reasonable.

This reversal was criticized by some States. Therefore, the last Special Rapporteur, Mr. Robert Rosenstock, attempted to reconcile the opposing views by proposing a new Article 7. Under paragraph 1 of this new Article, watercourse States were to incur international responsibility and liability for transgressions of the no-harm rule if they failed to exercise due diligence, i.e., to act pursuant to the habitual standard of care in matters of international responsibility. Paragraph 2 of Article 7 addressed the consequences of significant harm caused despite the exercise of due diligence, that is, in the absence of responsibility, by providing, for the State whose activity had resulted in the harm, an obligation of consultation on the equitableness and reasonableness of the harmful activity.

This new version of Article 7 was abundantly criticized. A first objection highlighted its lack of clarity. A second criticism was that responsibility and liability under the no-harm rule were maintained except, that where they were not attributable to a lack of due diligence, their consequences were reduced to a duty to consult over the equitableness of the harmful use and measures of abatement or indemnization. It is true that in one of its commentaries on the new Article 7, the ILC asserted that “in general, the principle of equitable and reasonable utilization remains the decisive criterion for balancing the interests in presence,” thus suggesting the primacy of that principle over the no-harm rule, but this suggestion was now being partly neutralized by the words “in general.” Indeed, the inclusion of these words would have meant that in some situations the principle in question was not the decisive criterion; if this was so, what were those situations? In addition, the text failed to make it clear that there would be no responsibility or liability if a new or expanded activity, though harmful, was within the right to equitable and reasonable utilization of the State proposing to exercise it.

The downstream countries as well as many “intermediary” States supported the ILC’s new version of Article 7, while the upstream countries opposed it. Among the suggestions made by the upper riparians, a package deal put forward by Switzerland may be briefly mentioned. That package consisted of three elements: (i) deletion of Article 7; (ii) inclusion, in the list of elements for the determination of equitable and reasonable utilization (Article 6), of a specific reference to the harm likely to result from a planned use; and (iii) inclusion in the Draft Articles of a provision to the effect that uses causing significant harm to the environment can in no circumstances be considered “reasonable.” This proposal had the merit of drawing a clear distinction between the matters to which the “no-harm” rule can no longer apply—the allocation of uses and resources—and situations where the usefulness of the rule remains unchallenged, namely, those relating to the protection of the environment.

The Swiss “package” was, however, turned down by the majority of delegations, especially those of lower riparians and “intermediary” States, and another

solution had to be devised. Accordingly, a compromise proposal was presented, at the end of the Working Group's first session, by Austria, Canada, Portugal, Switzerland and Venezuela. In essence, the five States suggested that if significant harm was inflicted by one watercourse State on another or on other watercourse States, the State causing it shall, in the absence of agreement:

take all appropriate measures, in conformity with the provisions of Articles 5 and 6, [setting forth the equitable utilization rule], in consultation with the affected State, to eliminate or mitigate such harm and, where appropriate, to discuss the question of compensation.

The key elements of this proposal were the words "in conformity with the provisions of Articles 5 and 6," which were intended to make it clear that while the no-harm rule embodied in Article 7 now had a life of its own, it was to come into play only if the principle of equitable and reasonable utilization contained in Articles 5 and 6 was inapplicable. The subordination of the no-harm rule to the principle of equitable and reasonable utilization was not to be complete, however, since Article 6 listed as one of the factors to be taken into account for determining such utilization "[t]he effect of the uses of the watercourses in one watercourse State on other watercourse States" (Article 6 (1) (d)). That factor would assume particular relevance in situations where harm threatens the environment of a watercourse, especially since Article 6 also mentioned the conservation and protection of water resources among the elements to be considered when determining the equitableness and reasonableness of a planned activity (Article 6 (1) (f)).

The effort made by the five States to bridge the existing gap could not, unfortunately, be put to a test because the Chairman of the Working Group had decided to put forward a compromise proposal of his own. That proposal was identical with the text suggested by the five States, except on one point: The phrase "in conformity with the provisions of Articles 5 and 6" was replaced—no doubt to forestall hostile reactions by downstream States—by the words "taking into account the provisions of Articles 5 and 6." Predictably the upper riparian States objected to this proposal, because they saw it as significantly weakening the subordination of equitable utilization to the no-harm rule.

The negotiations within the Working Group would have collapsed had its Chairman not been persuaded, on the very last day, to make an ultimate attempt at reconciling the participants. This attempt resulted in the replacement of the words "taking into account" by the expression "having due regard for." This new formula was considered by a number of lower riparians to be sufficiently neutral not to suggest a subordination of the no-harm rule to the principle of equitable and reasonable utilization. A number of upper riparians thought just the contrary, namely, that that formula was strong enough to support the idea of such a subordination.

These appreciations were not shared by all member of the two camps, however, and as the point addressed here had turned out to be the crux of the entire negotiation, a vote was requested for the “package deal” represented by Articles 5 to 7. That “deal” was accepted by 38 votes to 4 (China, France, Tanzania, Turkey), with 22 abstentions—a rate of approval which raises doubts over the viability of the new Convention.

CONCLUSION

The description and analysis provided in this presentation show that the issues raised by IWC are tricky and that many of them remain unsettled. There are no general rules governing watercourse boundaries, and the States concerned are forced to establish them through negotiation. While it is reasonably clear that there is freedom of navigation on navigable international watercourses—except lakes—for private vessels flying the flag of a riparian State, this rule does not seem to extend to the American continent.

By contrast, there seems to be a set of general rules governing the non-navigational uses of international watercourses, the most important of which are the principle of equitable and reasonable utilization and the no-harm rule. However, the new Convention embodying these as well as other rules had to be adopted, after a particularly difficult and even shrill bargaining, by a voting process revealing many divisions and, therefore, faces an uncertain future. It is doubtful, at this point, whether the new Convention will ever become truly operational.

This situation cannot be attributed to ill-will on the part of States. The allocation of the world’s watercourses is escalating into a major problem, while the law of international waterways has always been (and remains) vague and uncertain. The international financing agencies would do well to acknowledge this state of affairs. To hold, simply, that development schemes do not deserve assistance because there is disagreement among the watercourse States or because they are likely to cause harm may not always be a wise course to follow, unless these findings are accompanied by an offer to assist the States concerned in the settlement of their differences. An outstanding example of such a two-track approach is the action taken by the World Bank, almost 40 years ago, to settle the Indus basin dispute between India and Pakistan and to provide the necessary financial aid to harness the resources of that basin.