Convention on the Law of the Non-Navigational Uses of International Watercourses

Keywords: International Law Commission; international watercourses; United Nations General Assembly.

1. INTRODUCTION

On 11 April 1997, the text of the Convention on the Law of the Non-Navigational Uses of International Watercourses was presented by the Working Group of the Whole (WG) of the United Nations General Assembly Sixth Committee to the United Nations General Assembly (UNGA).[1] This Convention is based on the 1994 Draft Articles on the same topic prepared by the International Law Commission (ILC).[2] These Draft Articles were approved on second reading by the ILC during its 46th session in 1994 and subsequently submitted to the 49th session of the UNGA in 1994 for consideration by states.[3] By its Resolution 49/52, the UNGA invited states to present written submissions to comment on the Draft Articles and at the same time it proposed that a working group on the whole of the UNGA Sixth Committee be established to convene during the 51st session of UNGA (September-December 1996) to elaborate the text for a convention. During its first session, the WG did not manage to accomplish this task.[4] The final text submitted to the UNGA on 11 April 1997 was the result of the second session of the WG which had deliberated during the period from 24 March to 4 April 1997.[5]

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1. Convention on the Law of the Non-Navigational Uses of International Watercourses, 36 ILM 713 720 (1997).
2. *See* Report of the International Law Commission on the Work of its Forty-Sixth Session, UN Doc. A/49/10 (1994).
3. *See* Official Records of the General Assembly, Forty-Ninth Session, Supplement No. 10, UN Doc. A/49/10 (1994).
4. *See* resolutions adopted on the reports of the UNGA Sixth Committee, UN Doc. A/RES/49/52 (1996); for a comment on the text of the Convention which resulted after the first session of the WG, *see* T. Nussbaum, *Report of the Working Group to Elaborate a Convention on International Watercourses*, 6 Review of European Community & International Environmental Law 47-54 (1996); and A. Tanzi, *Codifying the Minimum Standards of the Law of International Watercourses: Remarks on Part One and a Half*, 21(2) Natural Resources Forum 109-117 (1997).
5. *See* Report of the Sixth Committee Convening as the Working Group of the Whole, Fifty-

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This note is a sequel to the present author's note published in this Journal which commented on the above-mentioned ILC's Draft Articles of 1994.[6] The note at hand and the previous one constitute one whole and should be read together. For that reason, the references to the ILC's Draft Articles will be made only in conjunction with the relevant articles of the Convention in order to emphasize the changes made in those Draft Articles. Thus the ILC's Draft Articles will only be invoked in connection with the relevant provisions of the Convention.

The final text of the Convention is the result of a compromise achieved between conflicting interests of riparian and non-riparian states, upper riparian and down stream states, and states that are particularly environmentally-minded. The ILC's Draft Articles were not perfect. In particular, objections arose with respect to Draft Article 3 (Watercourse Agreements), Draft Article 5 (Equitable and Reasonable Utilization and Participation), Draft Article 6 (Factors Relevant to Equitable Utilization and Participation), and Draft Article 7 (Obligation Not to Cause Significant Harm). Serious doubts were voiced about the use of the due diligence standard in conjunction with the principle not to cause significant harm and the principle of equitable and reasonable utilization.

The new Convention includes some other changes of a minor nature that will be indicated in the present note.

2. ARTICLE 3 (WATERCOURSE AGREEMENTS)

The new, amended text of Article 3 has three new paragraphs:

> 1. In the absence of an agreement to the contrary, nothing in the present Convention shall affect the rights and 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;
> 2. Notwithstanding the provisions of paragraph 1, parties to agreements referred to in paragraph 1 may, when necessary, consider harmonising such agreements with the basic principles of the present Convention; [...]
> 6. Where some but not all watercourse States to a particular international watercourse are parties to an agreement, nothing in such agreement shall

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First Session, Agenda Item 144, UN Doc. A/51/869 (1997).

6. *See* M. Fitzmaurice, *The Law of Non-Navigational Uses of International Watercourses - The International Law Commission Completes Its Draft*, 8 LJIL 361-375 (1995).

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> affect the rights or obligations under the present Convention of watercourse States that are not parties to such agreement.

Paragraph 3 of Article 3 has been reformulated in the following manner:

> [w]atercourse States may enter into one or more agreements, hereinafter referred to as 'watercourse agreements', which apply and adjust the provisions of the present Convention to the characteristics and uses of a particular international watercourse or part thereof.

The problems with respect to Article 3 of the Convention originated generally in the lack of certainty and understanding by states as to the relationship between already existing bilateral and multilateral watercourse agreements and the new framework convention. The views of states in connection with this relationship may be divided into two groups: one group of states of the same region that are not parties to existing watercourse agreements and that opposed the insertion of the exclusion clause to Article 3(1); and a second group of states that is already bound by existing watercourse treaty obligations. The first group of states voiced their concern that the provisions of existing agreements might exclude or contravene principles of the framework Convention that would benefit them. In order to satisfy to some extent the wishes of these states, Article 3(2) envisages the possibility for states to harmonize such agreements with the provisions of the framework Convention. The second group felt threatened by the new Convention as constituting a potential danger to existing agreements.[7]

The Convention in Article 3(3) seems to provide for the possibility of adjusting the framework Convention by states entering into new watercourse agreements by taking into consideration characteristics of a particular watercourse. Furthermore, the Convention adheres to the principle *pacta tertii nec nosunt nec prosunt*. This is evidenced by Article 3(6) which expressly excludes the legal effect of the Convention in relation to third parties.

In sum, the final text of the Convention constitutes a compromise between the two groups of states. The main principle underlying the Convention is that it does not affect in any way already existing watercourse agreements or third parties. The compromise achieved on these contentious

7. *See* Nussbaum, *supra* note 4, at 48-49. As for the first group of states, Nussbaum notes the example of the upper riparian states of the Nile. This position appeared to originate from their concern over an existing agreement between Egypt and the Sudan that apportions almost all of the waters of the Nile to themselves.

issues is, in the view of the present author, unsatisfactory. Taking into consideration the number of already existing watercourse agreements, there is only a very remote possibility that the framework Convention will have much impact on the relationships between riparian states. The only effective way to secure the rights of all states of the region is to strive for comprehensive regional participation in an existing watercourse agreement.

3. ARTICLE 5 (EQUITABLE UTILIZATION); ARTICLE 7 (OBLIGATION NOT TO CAUSE SIGNIFICANT HARM)

The relationship between the principle of equitable utilization and the 'no-significant harm' rule coupled with the principle of due diligence has had a long and troubled history. An additional problem has been caused by the lack of clarity in relation to the legal nature of all three elements separately, which in all cases is not easy to grasp. The ILC struggled to link them in a coherent manner, but did not entirely succeed.[8] In particular, the question which element - equitable utilization or the 'no-significant harm' rule - has priority in the case of a conflict has remained the most vexing question. These two articles were heavily debated in the UNGA Sixth Committee. There were three distinct groups of views. Upper riparian states were in favour of the strengthening of the principle of equitable and reasonable utilization and the deletion altogether of Article 7. A second group, of varied riparian status, were content with and supported the ILC's Draft Articles. The downstream states, on the other hand, together with particularly environmentally-minded states, supported the strengthening of the 'no-significant harm' principle and the insertion of articles which would reflect developments in the field of environmental law. These states were in favour of inclusion of the principle of sustainable development and the precautionary principle. They succeeded, at least in part, since Article 5 in its final form reads as follows:

> [i]n particular, an international watercourse shall be used and developed by watercourse States with the view to attaining optimal and sustainable utilization thereof and benefits therefrom, taking into account the interests of the watercourse States concerned, consistent with adequate protection of the watercourse.

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8. *See* Fitzmaurice, *supra* note 6, at 368-369.

The 'no-significant harm' principle of Article 7 also generated many comments from states. These can be divided in three main groups. The first group consisting of upstream states felt that Article 7, despite modifications, created an unacceptable restriction on the principle of equitable and reasonable utilization, and supported the deletion of the Article, or, alternatively, the insertion of a safeguard clause, such as "without prejudice to the principle of equitable and reasonable utilization". The second group favoured the ILC Draft Articles as they stood. The third group criticized the ILC's Draft Articles as weakening the no-significant harm principle in general. This last group argued that the standard of due diligence is not strict enough and asked for its deletion.[9]

Article 7 of the Convention differs greatly from the one proposed in the ILC's Draft Articles. It reads:

> 1. Watercourse States shall, in utilising an international watercourse in their territories, take all appropriate measures to prevent the causing of significant harm to other watercourse States.
> 2. Where significant harm nevertheless is caused to another watercourse State, the States whose use causes such harm shall, in the absence of agreement to such use, take all appropriate measures, having due regard for the provisions of Articles 5 and 6, in consultations with the affected State, to eliminate or mitigate such harm and, where appropriate, to discuss the question of compensation.

The standard of due diligence has thus been abandoned. Instead, reference is made to the obligation to adopt "all appropriate measures". This standard is equally vague. Nonetheless it was used in the 1992 Convention on the Protection and Use of Transboundary Watercourses and Lakes, so that both Conventions now apply the same standard.[10]

The Commentary to the Convention contains an interpretation of the meaning of 'significant'. It is different from 'substantial'. As used in the Convention, significant adverse effect must be "capable of being established" by objective evidence and "not be trivial by nature".[11] It need not rise to the level of being substantial.

An additional difficulty in the implementation of this Convention will

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9. *See* Nussbaum, *supra* note 4, at 49-50.
10. For the text of the Convention, *see* 31 ILM 1312 (1992); *see, e.g.*, Art. 2 which provides that "[t]he Parties shall take all appropriate measures to prevent, control, and reduce any transboundary impact".
11. Commentary on the 1997 UN Convention on the Law of the Non-Navigational Uses of International Watercourses, UN Doc. A/61/869, at 5 (1997); and *supra* note 1, at 719.

be caused by the fact that the standard of due diligence is nonetheless applicable in relation to protection and preservation of international watercourses (Articles 21-23).[12] States must thus follow two standards: one of 'all appropriate measures' and the other of 'due diligence' - which may prove to be quite difficult to achieve having regard to the unclear character of both. The adoption of 'all appropriate measures' by a state will have little effect on elimination of, and/or compensation for, harm. States that cause harm must nonetheless "eliminate or mitigate such harm, and, when appropriate, discuss the question of compensation" (Article 7(2)). The formulation of Article 7(2) seems to indicate that the 'no-significant harm' principle has priority over equitable utilization. It appears that the relationship between the principles of 'equitable utilization', 'no-significant harm' and 'all appropriate measures' as contained in the Convention is as troublesome and convoluted as the previous relationship elaborated in the ILC's Draft Articles.

4. ARTICLE 12 (PLANNED MEASURES)

Article 12 of the ILC's Draft Articles was amended in the spirit of stricter environmental protection. Notification concerning planned measures that may have significant adverse effect upon other watercourse states must be accompanied by information, including *the result of any environment impact assessment.*

5. ARTICLES 20-21 (PROTECTION, PRESERVATION, AND MANAGEMENT)

Article 20 of the ILC's Draft Articles has been changed in the Convention with a view to emphasizing the necessity for joint cooperation on international watercourses. This is indicated by the formulation "where *appropri-*

12. Art. 20 (Protection and Preservation of Ecosystems) states as follows: "[w]atercourse States shall, individually and, when appropriate, jointly, protect and preserve the ecosystems of international watercourses". Although not indicated in the text of the Convention, the Commentary, *supra* note 11, at 5, states that: "[a]s reflected in the commentary of the International Law Commission, these articles impose a due diligence standard on watercourse States".

ate jointly". The stress on joint cooperation resulted in the amendment of Article 21(3) which lists "mutually agreeable measures and methods to prevent, reduce and control pollution of an international watercourse".[13] Some states considered the listing of possible methods and measures as superfluous in a framework Convention and expressed doubts whether all states of a certain region would be capable of implementing them given the state of technology.[14]

6. ARTICLE 33 (SETTLEMENT OF DISPUTES)

The procedure of the settlement of disputes has undergone a curious transformation. The ILC's Draft Article 33 provided for a graduated mechanism of dispute resolution involving consultations and negotiations, followed by an obligatory fact-finding commission, or optional mediation or conciliation if agreed by both parties to the dispute. If parties would fail to settle the dispute by means of a fact-finding commission, then they could agree to submit the dispute to arbitration or judicial settlement.

Article 33 of the Convention abandons the gradual approach of recourse to peaceful means of settlement of disputes. In Article 33(2), all means are listed, including arbitration and judicial settlement. If parties to the dispute fail to achieve settlement by any of the means listed in paragraph 2 (including arbitration and judicial settlement), then the parties may unilaterally have recourse to an independent fact-finding commission, unless they agree otherwise (Article 33(3)). The meaning of the above provision is not very clear. Usually, due to its binding nature, judicial or arbitral procedure is the 'last resort' for the parties to a dispute.

Paragraph 6 describes the duties of the parties to the dispute in relation to the work of the commission and the tasks of the commission. Paragraph 10 provides for the possibility of compulsory jurisdiction before the International Court of Justice (ICJ) or arbitration by an arbitral tribunal in

13. Art. 21(3) reads: "[w]atercourse States shall, at the request of any of them, consult with a view to arriving at mutually agreeable measures and methods to prevent, reduce and control pollution of an international watercourse, such as: a. setting joint water quality objectives and criteria; b. establishing techniques and practices to address pollution from point and non-point sources; c. establishing the list of substances the introduction of which into the waters of an international watercourse is to be prohibited, limited, investigated or monitored".

14. *See* Nuesbaum, *supra* note 4, at 50.

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respect of any dispute. The optional procedure of such an arbitral tribunal has been annexed to the Convention. The adoption by both parties to the Convention of compulsory jurisdiction of the ICJ or of an arbitral tribunal cancels the obligation to have recourse to the fact-finding commission. The system of settlement of disputes adopted in this Convention is unusual and not altogether convincing. The ILC's Draft Article 33, although subject to some criticism, was more acceptable.[15]

7. Concluding Remarks

The Convention has introduced many far-reaching modifications into the ILC's Draft Articles. The inconsistencies that were noticeable in the Draft Articles were, unfortunately, not remedied. The unclear and problematic relationship between Articles 5 and 7 has remained unresolved. The introduction of the concept of 'all appropriate measures' has not clarified this inherent conflict.

Likewise, the relationship between this Convention and other bilateral and multilateral treaties is weak and unconvincing. The procedure for dispute resolution is too complicated and it is doubtful that states will follow it. In general, the framework Convention is disappointing and its usefulness is doubtful.

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15. *See* Fitzmaurice, *supra* note 6, at 373-374.

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