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INTRODUCTION AND OVERVIEW ON
THE INTERNATIONAL LAW COMMISSION'S DRAFT RULES ON
THE NON-NAVIGATIONAL USES OF INTERNATIONAL WATERCOURSES

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THE LAW OF INTERNATIONAL WATERCOURSES:
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Commission's Draft Rules on the Non-Navigational
Uses of International Watercourses

Second Nicholas R. Doman
Colloquium on International Law

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Background and Overview of the International
Law Commission's Study of the Non-Navigational
Uses of International Watercourses

Stephen C. McCaffrey

Introduction

1. Thank co-sponsors of the colloquium and in particular Dan Magraw for conceiving idea, for assembling a distinguished and highly qualified group of participants, and for so skillfully preparing the meeting.
2. Acknowledge great debt to the work of my predecessors in the field of the law of international watercourses, both individuals and organizations. But would like to single out two bodies of work that have been of particular benefit to me as the ILC's special rapporteur and that have had a profound influence on the shape of the Commission's draft articles that we are gathered here to consider.
 - The first is the excellent and thoroughly prepared body of work of the International Law Association's

Committee on International Water Resources Law and its predecessor, the Committee on the Uses of Waters of International Rivers. I refer here not only to the pathbreaking Helsinki Rules, adopted by the ILA in 1966, but also to the ten other drafts relating to international watercourses adopted by the ILA since that time.

- The second body of work I would like to single out because it was particularly helpful and influential, both in my work and in the Commission's deliberations, is the Third Report of one of my predecessors as the ILC's special rapporteur on the topic, then Professor, now Judge Stephen Schwebel. This is a monumental work that contains a wealth of material and a number of thoughtful and forwardlooking proposals. And it is a particular pleasure for me to single this work out this morning because an individual who contributed importantly to it is here among us, and he is Professor Robert Hayton. Bob Hayton not only provided much of the expertise that went into the preparation of Judge Schwebel's Third Report, but also gave unselfishly of his time and great knowledge in discussing with me drafts of my reports and proposals to the International Law Commission. Bob is a good friend, a valued colleague, and it is a pleasure for me

to have this opportunity to recognize him publicly in this way.

Now let me turn to the two areas I have been asked to address this morning: the background of the ILC's articles, and an overview of the draft. I will have to be very brief in order to stay within my allotted time, but I am reassured by the knowledge that many, if not most, of those here are familiar with the work of the Commission that we are examining here today.

I. Background

A. Origins:

- Work on the topic began in the Commission in 1974 after the UNGA had recommended in 1970 that the ILC take up the study of the law of the non-navigational uses of international watercourses.
- Work has been interrupted three times by changes in the special rapporteurship. The original rapporteur was Ambassador Richard Kearney of the United States, who was followed in 1977 by then Professor Stephen Schwebel. Then in 1982 Ambassador Jens Evensen succeeded Judge Schwebel and, after Evensen's election to the ICJ, I was appointed in 1985

to assume the special rapporteurship.¹

- Another factor which has delayed the ILC's work on this and other topics, and which should not be underestimated, is more subtle. It is that the membership of the ILC changes to some extent every 5 years. Terms are not staggered, so continuity is not ensured. For example, in the most recent election (in 1986), 14 new members were elected out of a total of 34 members of the Commission, which amounts to more than a 40% turnover. This phenomenon means that a special rapporteur is, so to speak, playing to a different audience during each of the ILC's terms of office: some members know very little about the subject when they join the Comm'n, while other new members bring with them views that are at variance with those of the member they have, in effect, replaced. This factor operates not only to delay work on a given topic, but also to reduce the likelihood that a draft, work on which spans more than one term of office (as almost all do), will remain internally harmonious over time.

B. Adoption of First Articles on the Topic

- This occurred not in 1987, but in 1980, a year in which

¹ For the history of the Commission's work on the topic to 1985, see [1985] Y.B. Int'l L. Comm'n, vol. 2, part 2, pp. 68-70.

the ILC adopted the first **six** draft articles on the watercourses topic.

- Those articles were entitled as follows:

Art. 1, Scope of the present articles;

Art. 2, System States;

Art. 3, System agreements;

Art. 4, Parties to the negotiation and conclusion
of system agreements

Art. 5, Use of waters which constitute a shared
natural resource

Art. X, Relationship between the present articles
and other treaties in force

- It will be noted that four of these six articles have counterparts in the draft as adopted on first reading. The two that do not are article 5 on shared natural resources and article "X" on the relationship between the articles and other treaties in force. Article 5² was controversial because of

² Art. 5 provided as follows:

1. To the extent that the use of waters of an international watercourse system in the territory of one system State affects the use of waters of that system in the territory of another system State, the waters are, for the purposes of the present articles, a shared natural resource.

2. Waters of an international watercourse system which constitute a shared natural resource shall be used by a system State in accordance with the present articles.

uncertainty as to its portent; most members did not believe that it added anything of substance to the draft. Article X was considered unnecessary since the normal rules concerning successive treaties regarding the same subject matter³ would apply to the draft articles.

- The six articles adopted in 1980 had a rather short life. They were, in essence, withdrawn by the new special rapporteur, Jens Evensen, who presented a complete draft convention in his first report in 1983. Evensen modified this draft in some respects in his second and final report, but then left the Commission on his election to the ICJ, before the Commission had adopted any articles of his draft.

C. The Adoption of the First Articles of the Present Draft

- The first articles of the present draft were adopted in 1987. These were articles 2-7 and included the first substantive articles on watercourses that had been adopted by the Commission: article 6 (as it was originally numbered) on equitable utilization, and article 7, enumerating factors relevant to equitable utilization. From the adoption of those

³ See article 30 of the Vienna Convention on the Law of Treaties, Vienna, 23 May 1969, 1155 U.N.T.S. p. 331.

first six articles in 1987, it took the Commission only five years to complete work on the entire draft. I say "only" five years because this is something of a record as far as ILC drafts are concerned. But it would be misleading to suggest that it only took the Commission five years, from beginning to end, to complete work on the watercourses draft because ILC was hardly writing on a blank slate in 1987. Unless the groundwork had been laid by well over a decade of previous work, completion of the draft would doubtless have taken at least several additional years.

- I turn now to a very brief overview of the draft's provisions.

II. Overview

A. Introduction

- The Commission's draft consists of 32 articles which are divided into 6 parts, or chapters. Two fundamental questions concerning the draft articles persisted until the very end of the Commission's work on the provisionally adopted text. They concerned, respectively, the physical scope of the draft articles, and the utility of a set of general principles concerning the non-navigational uses of international watercourses.

- The question of the physical scope of applicability of the draft articles (which is another way of referring to the question of how to define the term "international watercourse") proved very controversial and was deferred to the very end.⁴ Only at the 1991 session did the ILC face this issue; it ultimately decided that the rules of the draft articles should apply to the entire "system" of surface and underground waters constituting by virtue of their physical relationship a unitary whole, and flowing into a common terminus. This decision is reflected in article 2 on use of terms.
- The second question has to do with whether it is possible to draft a single set of articles whose provisions will be appropriate for all of the many different international watercourses in the world, particularly in view of the widely differing circumstances of the states making use of them. This problem was addressed early in the Commission's work on the topic, and in 1980 the ILC, in adopting the first set of articles, decided to employ what has become known in the field of international environmental law as a "framework agreement" approach. This approach was carried over into the present set

⁴ There was general agreement in the Commission as early as 1976 that the scope of the term "international watercourses" did not have to be determined at the outset of the work on the topic. [1976] Y.B. Int'l L. Comm'n, vol. 2, part 2, p. 162, para. 164 (197_).

of draft articles in the form of article 3 on watercourse agreements. Thus the draft articles set forth general principles and rules which states can apply and adjust through specific watercourse agreements to suit the conditions of individual watercourses and the needs of the states concerned.

B. Survey of the Draft's Provisions

As already mentioned, the Commission's draft consists of six parts, or chapters. **Part I**, entitled "Introduction," contains provisions on the scope of the draft (article 1), use of certain terms that are employed throughout the draft articles (article 2), and application of the general provisions of the draft to particular international watercourses through specific watercourse agreements (articles 3 and 4).

Part II sets forth certain "general principles," many of which find specific application in later provisions of the draft. These general principles are really five in number: equitable and reasonable utilization and participation (articles 5 and 6); the obligation not to cause appreciable harm to other watercourse states (article 7); the general obligation to cooperate with other watercourse states with regard to shared international water resources (article 8); the obligation to exchange data and information on a regular basis (article 9); and the principle that

no use of an international watercourse enjoys inherent priority over other uses (article 10).

Part III, entitled "Planned Measures," lays down obligations of prior notification and consultation with regard to contemplated new uses, or alterations of existing uses, of an international watercourse. This part, which contains nine articles, constitutes perhaps the most detailed treatment of any subject dealt with in the draft, detail that is due largely to the controversial nature of the obligations involved.

Part IV concerns the "protection and preservation" of international watercourses, including their ecosystems, against pollution and alien species. It also deals with what Bob Hayton has referred to as the "maritime interface," requiring watercourse states to protect and preserve the marine environment, including estuaries, from harm transmitted through international watercourses.

Part V is a rather curious amalgam of two articles, one on a whole range of problems that are referred to as "harmful conditions" and the other on "emergency situations." The article on harmful conditions, article 24, is a radically abridged version of a provision originally proposed on the subject. It deals with both natural conditions, such as ice jams, and human conduct, such as deforestation, that may result in harm in other watercourse states. The second article in Part V deals with an entirely different kind of problem, namely, emergency situations such as

those caused by a chemical spill or a flood.

Finally, **Part VI** gathers together a number of important but unrelated articles under the rather innocuous title, "Miscellaneous Provisions." The reader should not be fooled by this rubric, which suggests that the chapter contains provisions on such subjects as signature, ratification and entry into force. The Commission's practice is not to include such provisions in its drafts, however. The expression "miscellaneous provisions" has in fact been employed in a number of other ILC drafts and conventions based on Commission work as a title of chapters containing important, though unrelated, substantive provisions. Part VI contains articles on joint management (article 26), regulation of the flow of water (article 27), protection and safe operation of dams and other installations and works (article 28), international watercourses and installations in time of armed conflict (article 29), indirect procedures (article 30), data and information vital to national defense or security (article 31), and non-discrimination with regard to access to judicial or administrative procedures (article 32).

I should briefly note that two additional parts that had been proposed were not included in the draft articles. One of these chapters was entitled "Implementation," and contained a set of articles on the following subjects: private remedies, provision of information to the public, jurisdictional immunity, a conference of

the parties, and amendment of the draft articles. The other part was entitled "Fact-Finding and Settlement of Disputes. It contained an article on fact-finding, as a means of implementation of the provisions of the draft and of dispute avoidance, and four articles on the settlement of disputes (viz., obligation to settle disputes by peaceful means; consultations and negotiations; conciliation; and arbitration). All that remains of them at this stage of the Comm'n's work is art. 32, "Non-discrimination," which is a combination of parts of two different articles of the proposed chapter on Implementation.

Conclusion

Many observers, both within and outside governments, will undoubtedly speculate as to whether and to what extent the Commission's draft articles are intended to represent a codification of rules of general international law concerning the non-navigational uses of international watercourses. The answer to this question, both for this draft and for virtually all others on which the Commission has worked since its establishment, is clear: although its Statute contemplates a neat distinction between projects involving codification, and those entailing progressive development of international law, the Commission in practice has never found it possible to characterize a given draft as being one of codification or one of progressive development. Some members of

the Commission even resisted statements in draft commentaries that suggested that a particular article reflected existing law. The result is that, with very few exceptions, neither the commentaries nor the articles themselves contain indications as to whether the provisions of the draft represent proposals for new law or codifications of existing norms.

Determining the "pedigree" of a given article is made even more difficult because of the tendency of the Commission in recent years to insist on relatively brief commentaries. This unfortunate development is due in part to the Commission's procedure for adopting commentaries, according to which they often come before members only during the last week of a session, in the context of the approval of the Commission's report to the General Assembly. Members thus have very little time to consider commentaries, and understandably wish them to emphasize explanation of the articles and devote less attention to reviewing supporting authorities.

Finally, I would like to suggest a few issues that I believe are particularly deserving of attention at this meeting or elsewhere. I hasten to add that this list is not exhaustive, but contains several issues whose importance seems to me to be especially large.

1. Equitable utilization vs. "no harm:" which prevails in the event that they conflict?
2. Standard of responsibility for breach of the draft

articles -- e.g., article 7, which prohibits causing harm to other watercourse states.

3. Viability of the "framework agreement" approach in the field of international watercourses.

4. Whether the "system" concept, as presently formulated in article 2, is the most sound way of defining the physical scope of applicability of the draft articles (e.g.: Should unrelated/confined groundwater have been included? Should the "common terminus" requirement be retained, and if so, should cases in which basins are connected by means of canals or otherwise somehow be taken into account?)

- Should emphasize that this is only a "first draft," and that the ILC will have an opportunity to revisit these articles in light of the comments of governments and, it is hoped, the views of experts and interested observers. That's why this meeting and, it is hoped, others like it are so important.

- Once again, would like to thank the sponsors and organizers of this meeting, and especially Dan Magraw, for putting together what promises to be a most interesting and useful program.
