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### The International Law Commission's Draft Articles on the Law of International Watercourses: Principles and Planned Measures

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THE INTERNATIONAL LAW COMMISSION'S DRAFT ARTICLES ON  
THE LAW OF INTERNATIONAL WATERCOURSES:  
PRINCIPLES AND PLANNED MEASURES

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

Second Nicholas R. Doman  
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THE INTERNATIONAL LAW COMMISSION'S DRAFT ARTICLES  
ON THE LAW OF INTERNATIONAL WATERCOURSES:  
PRINCIPLES AND PLANNED MEASURES

by

Charles .B. Bourne\*

International law governing the utilization of transfrontier waters has been evolving slowly, for the most part since about 1950, and the process is incomplete; there is still uncertainty about its basic elements. The International Law Commission (ILC) has now made a notable contribution to that evolution by its adoption on first reading of a set of Draft Articles on The Law of the Non-Navigational Uses of International Watercourses, a topic that has been on its agenda since 1971 (1). It has transmitted these articles through the Secretary-General of the United Nations to governments with the request for their comments and observations to be submitted by January 1, 1993 (2). The responses of governments will give some measure of the extent to which the provisions of the Draft Articles will be accepted by states as law.

In its work the ILC has recognized that the characteristics of a watercourse are often unique and that the rational use of its waters may require different solutions from those required elsewhere. It has therefore designed the Draft Articles as a framework agreement whose rules can be set aside by the agreement of the watercourse states concerned (3). This flexibility, however, calls into question whether there is any firm body of customary international law on water resources. Are international watercourse states free to do as they please with the waters in their territories? Or are there some rules of customary law that they cannot put aside? To what extent do the Draft Articles embody rules of customary international law? These questions should be borne in mind.

Only Part II of the Draft Articles, entitled General Principles, and Part III, entitled Planned Measures, will be considered here. Part II will be dealt with first, for its provisions prescribe the procedural rules that states must follow in approaching the utilization of the waters of an international watercourse, and, if proper procedural steps are followed, questions of legal entitlement, liability for harm, compensation, and so forth will arise later, if at all.

#### Procedural rules

The procedural rules proposed by the ILC are found in Draft Articles 11 to 19. They begin by stating the obligation of watercourse states to "exchange information

and consult each other on the possible effects of planned measures on the condition" of the watercourse (Article 11). They then set forth in some detail the steps that a watercourse state must take before it implements or permits the implementation of measures that may have "an appreciable adverse effect" on other watercourse states. In particular, it must give timely notice thereof which "should be accompanied by available technical data and information" (Article 12); it must allow the notified state six months to study the matter (Article 13) and during that period it must provide any requested additional information that is "available and necessary for an accurate evaluation" of the planned measures and not implement them (Article 14); and it must enter into consultations and negotiations with the notified state if, within the six month period referred to in Article 13, that state objects to the measures on the ground that its rights under Articles 5 (equitable utilization) or 7 (appreciable harm) will be affected (Articles 15 and 17).

The obligation to enter into consultations and negotiations will also arise if a watercourse state has serious reason to believe that measures planned by another watercourse state, of which it has not been notified by that state, may have an appreciable adverse effect upon it and requests that state to comply with the provisions of the Draft Articles concerning notice, the exchange of data, and consultation and negotiation (Article 18).

There are three exceptions to the above rules. Under Article 19, a watercourse state may immediately proceed to implement measures that are "of the utmost urgency in order to protect public health, public safety or other equally important interests." In this case, however, it must transmit to the other watercourse states a formal declaration of the urgency of the measures together with relevant data and information; thereafter the normal requirements for consultation and negotiation apply.

The second exception is similar to the first but wider in scope; it is found in Article 25 dealing with an emergency, which is defined as "a situation that causes, or poses an imminent threat of causing, serious harm to ... other states and that results from natural causes ... or from human conduct ...." The article provides that "a watercourse state shall, without delay and by the most expeditious means available, notify other potentially affected states and competent international organizations of any emergency originating within its territory" and shall, in cooperation with them, "immediately take all practicable measures ... to prevent, mitigate and eliminate harmful effects of the emergency." A notable feature of this article is that the obligations it imposes extends not only to other watercourse states but also to other states; it thus departs from the purpose of the Framework Agreement to enunciate rules governing the relations of watercourse states.



The third exception from the procedural rules governing planned measures is provided for in Article 31. Under it a watercourse state is excused from providing data or information that is vital to its national defence or security. In this case, as in the case of the exceptions mentioned above, the normal substantive rules about equitable utilization and prohibition of harm will, of course, apply to any measures that may be implemented.

A notified state is required to communicate its finding about the planned measures in accordance with Article 15, that is, within the six month period allowed for study and with the required "documented explanation setting forth the reasons for the finding." If it fails to do so, the notifying state may then proceed to implement its measures in accordance with the notification and any other data and information provided to the notified state, but it will do so "subject to its obligations under articles 5 and 7" (Article 16). According to this provision, therefore, the failure of a notified state to object to or otherwise respond to the notice of the planned measures within the prescribed time has no prejudicial effect on that state's rights; in particular, its silence cannot be treated as its consent to the measures. The ILC, in its commentary on Article 16, expresses the view that the silence of the notified state has some effect; it precludes that state "from claiming the benefits of the protective regime contained in Part III," that is, the benefits of the

procedural rules relating to planned measures (4 ). This self-imposed loss of procedural safeguards, however, can hardly be regarded as a significant sanction; the reality is that the notified state's substantive rights are not affected in any way.

This position is not satisfactory. By not providing for a substantive sanction for a failure to respond to a notice of planned measures, the Draft Articles do not give any incentive to a notified state to engage in the process that offers the best chance of equitable and reasonable solutions to the complex problems inherent in the utilization of international water resources. Furthermore, it would seem unfair to the state that has given due notice of its planned measures. In the first place, if objection to its planned measures is not made within the prescribed time, it is deprived of the opportunity to meet objections to its plans, by clarifying or modifying them so that they do not infringe the legal rights of other watercourse states. And second, as Article 16 expressly provides, in proceeding with the implementation, it remains subject to its obligations under the substantive law of Articles 5 and 7. In other words, it must either delay implementation of its planned measures, or proceed to implement them, thus running the risk of incurring uncertain legal liability if harm results. It might justly ask why it should not be a good defence to a subsequent claim by the unresponsive

notified state that its silence amounted to tacit consent to the implementation of the measures in question (5).

It is true that the Draft Articles do not impose any special sanction on a watercourse state for failing to comply with the provisions respecting notice, the giving of data and other information, and consultation and negotiation. At one stage, Professor S. McCaffrey, the fourth Special Rapporteur on the topic, proposed to the ILC the following draft article : "If a State fails to provide notification ..., it shall incur liability for any harm caused to other States by the new use, whether or not such harm is in violation of article [9] (emphasis added). He said that he had included it on the assumption that article [9], now article 7 in the Draft Articles, which prohibits causing appreciable harm to other watercourse states, would be reformulated to take into account the distinction between factual "harm" and legal "injury" as he had recommended in his Second Report (6). This assumption proved false and the proposed article was dropped; it became redundant once a watercourse state was made liable for any appreciable harm, not merely legal injury (7).

There is, then, a lack of balance in the treatment of the notifying state and the notified state for failure to comply with the required procedures; for, while the former remains legally bound by all provisions of the Draft Articles, the latter may ignore the procedural rules with impunity. In the circumstances, when a notified state does

not respond to the notice in due time, it should thereafter be estopped from raising claims under Article 5 (equitable utilization) or Article 7 (appreciable harm) as a result of the implementation of the measures in question.

The time at which a watercourse state is obliged to give notice of its planned measures and to comply with the other procedural rules, has been in the past a matter of differing opinions (8). Should the obligation arise only when the implementation of a measure may have a serious adverse effect on another watercourse state? Or a significant or appreciable adverse effect? Or merely some effect? Or even if it is thought that the implementation will have no effect? The problem is that only the state planning a measure knows precisely what it has in mind and is in the best position to judge its effect on the other states; but its opinion in the matter will be subjective, as it will be based on its view of the facts, which may be incomplete. With the best of intentions, it may find it difficult and at times impossible to determine on its own what the effect of the measure will be.

In these circumstances, it is tempting to argue for the adoption of the widest rule for bringing the procedural rules into play, so that judgments about the effects of implementing the planned measures will be based on facts as seen from the viewpoint of all concerned parties. This idealistic view, however, has had little support, for it would involve the costs and delays in giving notice and

exchanging data, although it is clear that the proposed measure will have no effect whatever on other states. On the other hand, the adoption of a "serious effect" rule for the initiation of the procedures has had diminishing support; it is seen as narrowing too strictly the opportunity of watercourse states to assess and raise timely objections to proposed measures.

The desirable rule, therefore, should fall between the two extremes of notice of all planned measures and notice only of measures that may have serious effects. The position taken by the ILC in Draft Article 12 is that notice of planned measures must be given only when their implementation may have an "appreciable adverse effect" upon other watercourse states. In its commentary on this article, it points out that "The threshold established by this standard is intended to be lower than that of 'appreciable harm' under article [7]. Thus, an 'appreciable adverse effect' may not rise to the level of 'appreciable harm' within the meaning of article [7]. 'Appreciable harm' is not an appropriate standard for the setting in motion of the procedures ..." (9). This solution is commendable. It is important that the process for reconciling the conflicting interests of watercourse states should begin early in the planning of utilizations of the waters of an international watercourse.

The meaning of the words "appreciable adverse effect upon other watercourse states" in Article 12 is not

altogether certain. They clearly encompass effects upon the existing state of affairs, but what about effects on the possible future developments in the other states? The implementation of a measure now may, on becoming an existing use, preclude a future utilization of the waters by others. Article 17, paragraph 2, expressly provides that, in the consultations and negotiations subsequent to the giving of notice, "each state must in good faith pay reasonable regard to the rights and legitimate interests of the other state." Is the possibility of the future use of the waters in its territory not a "legitimate interest" of the state which must be taken into account in the application of Article 12? The answer to this question is almost certainly no. The future uses, at least those that are not being planned, are speculative and cannot be assessed with any precision. It is not practical or reasonable to complicate and perhaps delay the implementation of present plans on the ground that something may be done at some unspecified future time.

This is not to say that the Draft Articles do not pose serious difficulties for watercourse states whose future interests are not taken into account before present measures are implemented. As shall be seen below, the ILC has made the prohibition of "appreciable harm" the primary rule in the law of international watercourses. Consequently, in the absence of agreement between the watercourse states concerned, a utilization undertaken now will thereafter be immune from appreciable harm by the subsequent utilizations

of other states. The law is slanted in favour of the earlier developer. The only possible solace for the state concerned about its right to a reasonable and equitable share of the beneficial use of the waters of an international watercourse in the future is found in Article 9, one of the general principles, which requires watercourse states to exchange on a regular basis data and information about the condition of the watercourse, and in Article 11 which requires the states to exchange information and consult each other on the possible effects of planned measures on the condition of the watercourse. With a constant flow of information, a state may have some chance of protecting not only its present but also its future interests (10).

Subject to the above comments, Part III of the Draft Articles set forth an admirable set out procedures to be followed by watercourse states. For the most part, the basic requirements of the exchange of information, notice, consultation, and negotiation now form part of customary international law (11). In fleshing out these basic rules, such as providing for a six month time limit, the ILC has engaged in beneficial progressive development of the law. What it has done, however, is not in any sense radical; the new provisions are merely extensions of the basic rules to make them effective and can be seen as implicit in them. Insofar as these provisions constitute new law, they should

have little difficulty in gaining ready acceptance by the international community.

### Substantive rules

Notions about the legal rights and obligations of watercourse states undoubtedly influence the attitudes of these states in their dealings with each other concerning the utilization of a watercourse and thus play an important part in their decisions about it. In advancing their own interests, they may invoke international law. It will, of course, be a nationalistic version of that law, ranging from the territorial sovereignty theory of the Harmon doctrine kind to the theory that the consent of a watercourse state is needed for any utilization of waters that might adversely affect it. Instances of resort to theories at extreme ends of the legal spectrum abound; the arguments of India and Pakistan in their dispute over the Indus river during the 1950's are a notable example (12). In the end, however, states almost always settle their international watercourse disputes by agreement, their legal claims and arguments having been mainly bargaining ploys.

The task of the ILC has been to discern the principles of international law that have emerged from the welter of legal claims and counter-claims made by states about their utilizations of international watercourses, to codify these principles, and to contribute to their progressive development. The result of its labours, under the tutelage of four Special Rapporteurs during the past twenty years, is



now presented in the Draft Articles, Part II of which, composed of Articles 5 to 10, sets forth the general principles of law on the subject.

Articles 8, 9, and 10 are not controversial and call for little comment. The first imposes a general obligation on watercourse states to co-operate "in order to attain optimal utilization and adequate protection of an international watercourse." Article 9 is procedural, providing for the exchange "on a regular basis ... [of] reasonably available data and information on the condition of the watercourse"; it thus complements the procedural provisions in the subsequent articles discussed above, but the obligation under it is a continuing one, not tied to the implementation of planned measures. Article 10, on the other hand, is substantive; it provides that, "in the absence of agreement or custom to the contrary, no use of an international watercourse enjoys inherent priority over other uses." This principle is generally accepted. For example, Article 6 of the Helsinki Rules expresses the principle in similar words.

Articles 5, 6, and 7 purport to express the fundamental principles of international law that define the rights and duties of watercourse states, while the Draft Articles considered above are merely adjuncts to them, providing guidelines for states so that they may act in conformity with their obligations under these principles. The

evolution of Articles 5 and 7 in the proceedings of the ILC merits particular attention.

The initial attempt in the ILC to formulate the basic principles of international water law was made in 1981 by the Second Special Rapporteur, Mr. Stephen M. Schwebel; in his Third Report, he presented an exhaustive study of the subject and proposed a number of articles for the consideration. Two of them were fundamental. In his draft article 6, he accepted the principle of equitable utilization, stating the essence of that principle thus: "Without its consent, a State may not be denied its equitable participation in the utilization of the waters of an international watercourse system of which it is a system State" (13). And he made it clear in unequivocal language in draft article 8, entitled "responsibility for appreciable harm," that equitable utilization is the primary principle of international water law. Paragraph 1 of that article is as follows: "The right of a system State to use the water resources of an international watercourse system is limited by the duty not to cause appreciable harm to the interests of another system State, except as may be allowable under a determination for equitable participation for the international watercourse system involved" (14). For Judge Schwebel (a member of the International Court of Justice since 1981), then, the principle of "no appreciable harm" must on occasion yield to that of equitable utilization. In substance, appreciable harm is not the decisive factor in

determining the legality of a utilization of the waters of an international watercourse, though it is a very important, and undoubtedly often will be the overriding, factor in that determination.

Mr. Jens Evensen (now also a judge of the International Court of Justice) succeeded Judge Schwebel as Special Rapporteur in 1982. In his First Report to the ILC in 1983, he produced a draft convention of 39 articles. Like Judge Schwebel, he strongly endorsed the principle of equitable utilization, saying:

"This basic principle as laid down in the proposed [Schwebel] article 6 is a codification of prevailing principles of international law following from customary international law as evidenced by comprehensive State practice, general principles of law ... and also following from the very nature of things.... The task of the International Law Commission in drafting these articles must first and foremost be to draft principles, some of them of an obligatory nature, by codifying already established international law principles; others as legal ideas of a more progressive nature as guidelines.... In the respectful opinion of the Special Rapporteur, the provisions laid down in article 7 [on equitable utilization] belong to the first category of principles" (15).

Judge Evensen expressed the principle in article 6 of his revised draft articles of 1984 in the following terms:

"1. A watercourse State is, within its territory, entitled to a reasonable and equitable share of the uses of the waters of an international watercourse.

"2. To the extent that the use of the waters of an international watercourse within the territory of one watercourse State affects the use of the waters of the watercourse in the territory of another watercourse State, the watercourse States concerned shall share in the use of the waters ... in a reasonable and equitable manner in accordance with the articles of the present Convention..."

(16).

Turning to the no appreciable harm rule, Judge Evensen radically changed the manner in which Judge Schwebel had dealt with it; he omitted the exception clause. His new article 9, as revised in 1984, read as follows: "A watercourse State shall refrain from and prevent (within its jurisdiction) uses or activities with regard to an international watercourse that may cause appreciable harm to the rights or interests of other watercourse States, unless otherwise provided for in a watercourse agreement or other arrangement" (17). In short, notwithstanding his endorsement of equitable utilization, Judge Jensen made "no appreciable harm" the dominant rule, one not to yield to considerations of equity and reasonableness in the sharing of the uses of the waters.

A major change of this importance needs to be justified, but this is lacking in Judge Evensen's First

Report. In his commentary on article 9, he made no reference to the Schwebel formulation of the article and disposed of the issue in two short paragraphs (18). He began with this categorical statement: "The principle laid down in article 9 is a basic rule of international law pertaining to international watercourse systems. Thus it is a codification of an established principle of international law." He then quoted the first paragraph of Article 10 of the Helsinki Rules dealing with pollution; he seemed to find some comfort in this article even though it begins with these words: "Consistent with the principle of equitable utilization of the waters of an international drainage basin, a State (a) must prevent ... water pollution ...which would cause substantial injury" (emphasis added, the substance of this clause being identical with that used by Judge Schwebel to qualify the no appreciable harm provision in his draft article 8). Judge Evensen followed this with the observation that the issue had been dealt with in a number of bilateral and multilateral agreements, and then quoted Principle 21 of the Stockholm Declaration of 1972. He concluded with a short statement on the choice of the words "appreciable harm," agreeing with Judge Schwebel on this point. These few remarks cannot be regarded as an adequate or convincing justification for subordinating the equitable utilization rule to that of no appreciable harm. In his Second Report, Judge Evensen did not add to them; he

merely remarked that the comments on the article in his First Report were generally applicable.

When Professor Stephen C. McCaffrey succeeded Judge Evensen as Special Rapporteur on the topic in 1985, therefore, he inherited two sets of draft articles that reflected a fundamental difference of opinion on the substance of the basic principle of international water resources law. Ultimately, after considerable wrestling with the problem, the ILC accepted the view of Judge Evensen and it is incorporated in the Draft Articles now under consideration.

In these articles, equitable utilization is dealt with in Draft Article 5, which provides as follows:

"1. Watercourse States shall in their respective territories utilize an international watercourse in an equitable and reasonable manner. In particular, an international watercourse shall be used and developed by watercourse States with a view to attaining optimal utilization thereof and benefits therefrom consistent with adequate protection of the watercourse.

2. Watercourse States shall participate in the use, development and protection of an international watercourse in an equitable and reasonable manner. Such participation includes both the right to utilize the watercourse and the duty to cooperate in the protection and development thereof, as provided in the present articles."

The no appreciable harm rule is set forth in Draft Article 7 which simply states that "Watercourse States shall utilize an international watercourse in such a way as not to cause appreciable harm to other watercourse States."

Unlike Judge Evensen, Professor McCaffrey discussed carefully in his reports to the ILC and at its sessions the relationship between the equitable utilization and no appreciable harm principles. The views he expressed there and the justification advanced by the ILC for the adoption of Draft Articles 5 and 7 must be examined closely in order to understand the intended meaning of the language of these articles and their effect, and to judge the extent to which they are, or should be, part of international law.

At the outset Professor McCaffrey supported the position taken by Judge Schwebel on the relationship of the two principles. For example, in the discussion of Judge Evensen's draft articles at the 1984 session of the ILC, he is reported to have said:

"Draft article 9, which prohibited activities that might 'cause appreciable harm,' should be reconsidered. It would be more appropriate to proscribe 'exceeding a State's equitable share' or 'depriving another State of its equitable share' of the benefits of the waters of an international watercourse. Another solution ... would be to revert to the formula ... proposed by the previous Special Rapporteur [Schwebel] in this third report.... It was implicit in the concept of an equitable allocation of

benefits that probably neither party would get all it wanted.... The 'no harm' rule seemed in effect to create a prior appropriation system that could result in a far from equitable division of benefits.... In any event, a rule to the effect that a State could not exceed its equitable share, or deprive another State of its equitable share, would present far fewer difficulties than the rule that a State must not cause appreciable harm...." (19).

These views were not accepted by all members of the ILC. In fact, in the deliberations on the matter, opinions varied considerably, some agreeing with Professor McCaffrey and some with Judge Evensen (20).

In 1986 in his Second Report, Professor McCaffrey again confronted the conflict between the Evensen draft articles 6 and 9 dealing with the concepts of equitable utilization and no appreciable harm respectively. He was unable to reconcile them as they stood. He concluded, however, from a "survey of all the available evidence of the general practice of States, accepted as law" that "there is overwhelming support for the doctrine of equitable utilization as a general, guiding principle of law for the determination of the rights" of watercourse states (21), and he was therefore unwilling to change article 6.

As for article 9, in what seems to have been an attempt to meet the arguments of its proponents who held the view that the sic utere tuo ut alienum non laedas maxim was the fount of all international law, certainly of the law



governing the relations of watercourse states, Professor McCaffrey stated that "the bedrock upon which the doctrine of equitable utilization is founded is the fundamental principle represented by the maxim sic utere ...." At first glance this statement is startling, but it soon becomes apparent that his understanding of the maxim at that time was profoundly different from that of the supporters of article 9 as formulated by Judge Evensen. For him, the maxim prescribes not harm but injury to other states. As he said: "Crucial to an understanding of the latter statement, and indeed of the doctrine of equitable utilization in general, is an appreciation of the meaning of the term 'injury' in the context: the term is used in its legal, as opposed to its factual sense. Thus an allocation of the uses and benefits of the waters of an international watercourse between two or more States may entail a certain degree of harm - in the factual sense of unmet needs - to one, or usually both States, and still be 'equitable'.... Thus,... where there is a conflict among the water needs of the States making beneficial use of those waters, that conflict is to be resolved on the basis of equity, taking all relevant factors into account" (22).

With this in mind, Professor McCaffrey indicated how article 9 might be reworded to conform with the overriding principle of equitable utilization. It could be done in three ways, he said: first, by replacing the words "appreciable harm to the rights or interests of" with the

words "injury to"; second, by replacing the reference to causing appreciable harm by a reference to a state exceeding its equitable share or depriving another state of its equitable share; and third, by the addition of an exception clause similar to that proposed by Judge Schwebel, namely "except as may be allowable within the context of the first state's equitable utilization of that international watercourse." He preferred the third solution; he thought it would "best achieve the goals of a provision on this subject, viz. to set forth the 'no harm' rule while making it consistent with the principle of equitable utilization" (23). In other words, he then still firmly held Judge Schwebel's view of the law.

In 1987 he continued to maintain this position and in this he was not alone, for opinion on the matter in the ILC was divided (24). By then, however, the Evensen version of article 9 was in the hands of the Drafting Committee and the debate about the no harm rule shifted from articles 6 and 9 to other draft articles, in particular those on protection of the environment. It is not intended to discuss these articles here, but in Draft Article 21 the ILC has applied the Evensen no appreciable harm rule to pollution. It was inevitable that in the discussion leading to the adoption of this article there would be further consideration of the relationship of that rule to that of equitable utilization, and of its meaning and application. What was said then

applies directly to Draft Articles 5 and 7 and must be taken into account.

There was little sympathy in the ILC for arguments in favour of a role for the principle of equitable utilization in dealing with pollution; the notion that pollution damage in one state should be balanced against the beneficial uses of another state was quickly rejected. The prevailing view was that any pollution, widely defined, that causes or may cause appreciable harm to the waters of an international watercourse in the territory of another state, should be prohibited. Nevertheless, having determined to do so, the ILC again faced the dilemma of reconciling the no appreciable harm rule, now applied to the particular case of pollution, with the principle of equitable utilization adopted in earlier Draft Article 5 as a principle of general application. Having failed previously in its attempts to reconcile them in Draft Articles 5 and 7, would the ILC be more successful in doing so in the case of pollution?

Professor McCaffrey, who had defended the primacy of equitable utilization so stoutly in the discussion of the now numbered Draft Article 7, abandoned it when he came to pollution. In his Fourth Report in 1988, he proposed a draft article that in substance prohibited pollution that would cause appreciable harm to other watercourse states or to the ecology. There was no mention of any of the three qualifications to the wording of Draft Article 7 that in 1986 he had argued were necessary in order to reconcile the

conflict between the two rules. This is not to say that he thought that he was denying the primacy of equitable utilization. He, and ultimately the ILC, took the view that harm caused by pollution was different from other kinds of harm and, therefore, its different treatment was justified. He put it this way:

"[In the light of] the need to protect the environment in order to permit sustainable development and to preserve the earth for future generations,... water uses that cause appreciable pollution harm to other watercourse States and the environment could well be regarded as being per se inequitable and unreasonable.... In the view of the Special Rapporteur, the Commission should ... [adopt] a rule of 'no appreciable pollution harm' that is not qualified by the principle of equitable and reasonable utilization. This position is without prejudice to any decision the Commission may take with regard to whether there should be an equitable use exception to the general rule of 'no appreciable harm' contained in draft article 9 [now 7]" (25).

The apparent conflict between the two principles, then, is made to disappear by simply assuming that what runs foul of the Draft Article prohibiting pollution, automatically runs foul of Draft Article 5 which contains the requirement of equitable utilization. But to deem that every polluting use is ipso facto inequitable and unreasonable whether or not it is in fact so, would seem to reflect an extreme and

unwarranted concern for the environment and itself be unreasonable.

There was some unease about whether this equation of the appreciable harm rule with that of equitable utilization in the case of pollution would by itself carry conviction. An attempt was therefore made to give it more force, first by an appropriate definition of "appreciable." This equation could have been achieved by adopting a definition that would encompass only harm that threatens human health or safety or poses a grave or long-lasting threat to the environment; this harm clearly would be held to be inequitable and unreasonable and therefore not protected by the equitable utilization rule. Although in the end the ILC chose not define "appreciable harm" in the Draft Articles, its discussion of the meaning of these terms makes it clear that it did not approve of this narrow definition.

Judge Schwebel, who first proposed that appreciable harm be the criterion for determining unlawful use of the waters of an international watercourse, gave in his Third Report the sense in which he used the term "appreciable" (26). To him it meant "more in quantity than is denoted by 'perceptible,' [but] less in quantity than ... 'serious' or 'substantial'." He added that "the effect or harm must have at least an impact of some consequence ... in the affected system State, but not necessarily a momentous or grave effect," and he quoted with approval statements that "there

must be a real impairment of use," and that "de minimis effects" are excluded.

This Schwebel definition was adopted subsequently by the ILC (27). Professor McCaffrey summed up the position as follows: "... the expression is intended to embody a factual standard, compliance with which is capable of objective determination. Thus, ... 'appreciable harm' is harm that is significant - i.e., not trivial or inconsequential - but is less than 'substantial.' The term 'harm' is used in its factual sense. There must be an actual impairment of use, injury to health or property, or a detrimental effect on the ecology of the watercourse" (28). This definition, it should be emphasized, was accepted by the ILC as being applicable not only to the article on pollution but to all the Draft Articles (29).

The second way in which the no appreciable harm rule may be harmonized with the equitable utilization rule is by interpreting the former rule as imposing not a standard of strict liability but one of due diligence. And this was the interpretation adopted by Professor McCaffrey, although he admitted that the wording of the Draft Article in question might lead one to conclude that "a State in which pollution originated would be strictly liable for any appreciable harm caused by that pollution" (30). He went on to argue that, in order to apply the due diligence standard, one must look at the facts to determine whether the watercourse state alleged to have violated the no appreciable harm rule has in

fact failed to exercise due diligence. Fault thus becomes the decisive factor; and thus the dispositive question will be whether the alleged wrongdoer acted reasonably in the circumstances; and thus considerations of equity will be introduced. This reasoning led Professor McCaffrey to suggest that, at least in the case of pollution, there may be no need for a formal reconciliation of Draft Articles 5 and 7, since the outcome could be the same as if the no appreciable harm rule were made subject to that of equitable utilization (31).

Two comments may be made about these attempts to persuade one that there is really no conflict between Draft Articles 5 and 7. First, the process by which the patent conflict between them is explained away, is one of definition. One may ask, then, why were these definitions not included in the articles to remove any doubts their meaning? If it were the intention to make due diligence the standard for engaging liability, one would have thought it a simple matter to say so clearly. And second, the proposition that the application of the due diligence rule will in practice convert the no appreciable harm rule into an equitable utilization rule is highly dubious. One senses that Professor McCaffrey himself did not think it was valid in cases other than pollution, for he qualified his statement with the words "at least in relation to the pollution of international watercourses"; and even in the

case of pollution he spoke hesitantly, saying only that "the outcome could be the same," not would be the same.

### The legal basis of the general principles

To what extent are the general principles adopted by the ILC in Draft Article 5 and 7 supported by legal authority? In the case of equitable utilization, there is ample authority for the proposition that it is now a rule of customary international law. This was recognized by the Special Rapporteurs themselves. Judge Schwebel, after an extensive survey of the authorities and the practice of states, concluded that "virtually all the commentators writing in the field sustain the existence of equitable utilization as a rule of general international law where the system States have conflicting uses or plans for the further development of their shared water resources" and that the international community of states had accepted the rule (32). Judge Evensen too regarded its inclusion in his draft articles as being merely a codification of a well-established principle of customary international law (33); and so did Professor McCaffrey, who stated that there was "overwhelming support for the doctrine ... as a general, guiding principle of law for the determination of the rights" of watercourse states (34). Their position on this point is sound and there is no need to pursue it further.

The case of the no appreciable harm rule is quite different. The ILC has had difficulty with it from the outset. The source of the trouble was the belief on the



part of the Special Rapporteurs that the sic utere tuo maxim was a fundamental principle of international law that proscribes activities in one state that cause harm in another and that that principle applied to the relations of watercourse states.

Judge Schwebel espoused this view but at the same time he recognized that it had to be qualified to make it compatible with the principle of equitable utilization and with the practice of states. He did this, first, by introducing the word "appreciable" before "harm," and second, by adding to his draft article, which is the equivalent of Draft Article 7, the exception clause noted above, and by starting his article on pollution with the words "consistent with article [5] on 'equitable [utilization]'" Thus he gave primacy to equitable utilization in all cases of conflict between the two rules. His justification of these qualifications was that one had to be "careful to take into account the possibility of permissible harm even of an appreciable amount or quality provided it falls within the context of equitable" utilization (35). In effect, therefore, for Judge Schwebel the sic utere tuo maxim, which he had referred to as the basic rule under general international law, turned out not to be a basic rule at all; harm, whether appreciable or not, has only the status of an important fact in judging if a utilization is equitable and reasonable. In the last analysis, the test of legality is equity and reasonableness.

Special Rapporteurs Evensen and McCaffrey also held the sic utere tuo maxim to be a basic rule of general international law, but they treated it differently from Judge Schwebel. Invoking the maxim, Judge Evensen accepted the "appreciable" but no other qualification of the no appreciable harm rule, thus creating an irreconcilable conflict between it and equitable utilization. Professor McCaffrey, on the other hand, accepted both Schwebel qualifications of the rule as it appears in Draft Article 7 as one of the principles of general application, but, in the case of pollution, accepted only the "appreciable" qualification and rejected the one that would have made the rule subject to equitable utilization. As seen above, the ILC decided in favour of the Evensen position.

In arguments supporting the no appreciable harm rule, three cases are invariably given as authority for it, namely the Corfu Channel case, the Trail Smelter arbitration, and the Lake Lanoux arbitration. The judgment of the International Court of Justice in the Corfu Channel case, it is said, confirms that the maxim sic utere tuo is a basic principle of international law which prohibits a state from causing appreciable harm in the territory of another state. The relevant passage of the judgment that is cited is: "Such obligations are based ... on certain general and well-recognized principles, namely, elementary considerations of humanity, even more exacting in peace than in war, the principle of freedom of maritime communication, and every

State's obligation not to allow knowingly its territory to be used for acts contrary to the rights of other States" (36). This is a slender reed to lean on. In the first place, the facts bear no resemblance to those that arise in the execution of a state's right to utilize the waters of a watercourse in its territory; the case did not involve any transfrontier issues or harm, but the responsibility of Albania for damage suffered in its territorial seas by British warships and sailors when the ships struck mines in Corfu Channel. And second, the proposition stated by the Court is that a state must not allow acts contrary to the rights of other states. One assumes that the Court would have spoken of "harm" if that was its intent. To a lawyer, there is a profound difference between the violation of a right and the suffering of harm; being harmed is a fact and it may be a violation of a right, but it is not necessarily so.

Professor McCaffrey, of course, acknowledged the weakness of the Corfu Channel case as a precedent for the law governing international watercourses (37), and yet he seemed to find comfort in it. One is not persuaded, however, that it contributes anything but confusion to the task of defining the respective rights and duties of watercourse states. In truth, the resort to the sic utere tuo maxim as the source of a legal rule indicates that, lacking existing law, one is about to engage in some law-making or, to put it in modern dress, in the progressive

development of the law, the result of which may or may not be justifiable. The maxim undoubtedly expresses a sound social policy and moral rule that should underlie all law; generally speaking, people, either individually or collectively as a state, should avoid harming one another.

This is not to say, however, that the maxim should be held to embody a rule that prohibits harm, whether it be appreciable, significant, substantial, or otherwise. Does any but a primitive system of law have such a rule of general application? In systems of any sophistication, fault with few exceptions replaces strict liability; the reasonableness of conduct becomes the test for determining legal rights and duties. That is the test reflected in the doctrine of equitable utilization.

Properly interpreted, therefore, the sic utere tuo maxim would be held to proscribe legal injury and not factual harm, and the word "right" in the quoted statement in the Corfu Channel case would be held to mean a legal right. One example indicating that this is the interpretation used by states, is found in the section of the American Law Institute's Restatement of the Foreign Relations Law of the United States dealing with "State Obligations with Respect to the Environment of Other States and the Common Environment"; under it "a state is obliged ... to ensure that activities within its jurisdiction or control ... are conducted so as not to cause significant injury to the environment of another State..." (38). As

seen above, the use of "injury" instead of "harm" was one of the changes to Draft Article 7 advocated by Professor McCaffrey.

Of the trilogy of cases mentioned above, the Trail Smelter arbitration is regarded as the classic case in the field of international environmental law and it is frequently cited in that connection. The case did not concern water resources but air pollution, damage having been caused in the United States by fumes from a smelter in Canada. This fact, however, is not seen as impairing its authority as a decisive precedent in watercourse problems, for the tribunal purported to find the appropriate law in the American cases on interstate waters, which, it said, was the same as international law. The essence of that law, as it saw it, is summed up in its much quoted statement that "under the principles of international law ..., no State has the right to use or permit the use of its territory in such a manner as to cause injury by fumes in or to the territory of another or the properties or persons therein, when the case is of serious consequence and the injury is established by clear and convincing evidence" (39).

On the face of it this seems to be a clear and concise statement of the law. But there are difficulties in treating it as a precedent for a "no harm" rule or for a rule of strict liability, or even as an accurate statement of international law. First, the law as expressed in the statement bears little resemblance to the principle of

equitable utilization developed and applied by the Supreme Court of the United States in interstate water disputes. Second, even if it is an accurate statement of the law, it prohibits only "injury," not harm, Third, it prohibits only injury "of serious consequence," not merely appreciable harm as the ILC's Draft Articles do. And fourth, in any event the statement is hardly more than obiter dicta, for Canada had agreed to pay for any damages caused in the United States, and by their compromis the two governments had asked the tribunal only to determine the amount of the compensation payable and to decide whether the smelter should be required to refrain from causing damage in the future and, if so, to what extent.

Considering these things, one cannot regard the Trail Smelter arbitration as authority for the "no appreciable harm" rule. Professor McCaffrey also had doubt about what the true intent of the award was, concluding merely that it "represents an apt illustration of a general observation of Professor Quentin-Baxter: 'It is ... a feature of the modern world - of which there is ample evidence in the jurisprudence of the Court - that the resolution of disputes between States may turn as much upon the adjustment of competing interests as upon the ascertainment and application of prohibitory rules'" (40). Perhaps it should be recalled here that Article IV of the compromis establishing the tribunal in the Trail Smelter case

expressed the desire of the parties "to reach a solution just to all the parties concerned" (41).

The third case usually relied on in argument to support the no appreciable harm rule is the Lake Lanoux arbitration (France v. Spain) decided in 1957 (42); of the three cases, it is the only one that deals with an international watercourse. When France proposed a diversion of some of the waters of Lake Lanoux to another drainage basin in its territory and then a return of at least an equal amount of water to the Lake Lanoux basin before its waters flowed into Spain, the Spanish government objected. It claimed that the project would infringe its rights under the Treaty of Bayonne of 1866 and the Additional Act of the same date and thus could not be undertaken without its consent. The award of the tribunal, therefore, is based on the application of these treaties.

Nevertheless, it throws light on some of the general principles of the law on international watercourses, particularly on the procedural rules. In this respect, the case strongly supports the planned measures section of the ILC's Draft Articles. As for general principles, its main contribution to them is to emphasize that a watercourse state does not have a veto over the projects of the other watercourse states; its consent is not required. Apart from that, as Professor Lammers has written, the tribunal's statements "did not go beyond noting the generally recognized necessity to take the interests of other riparian

States into consideration and to reconcile conflicting interests brought into play by the industrial use of international watercourses through mutual concessions" (43). In particular, again to use the words of Professor Lammers, "the Tribunal was able to avoid a finding regarding the validity under general international law of the principle that a riparian State may not use the waters of an international watercourse in such a manner that serious injury is caused to other riparian States" (44).

It is surprising, therefore, to find a passage in Professor McCaffrey Second Report stating that the tribunal in the Lake Lanoux case had held that, "although it had no application to the facts of the case, 'there is a rule prohibiting the upper riparian State from altering the waters of a river in circumstances calculated to do serious injury to the lower riparian State' " (45). The same statement is repeated in his Fourth and Fifth Reports (46). The inconsistency between this conclusion and that of Professor Lammers apparently arises from a minor but crucial inconsistency in the texts relied on.

The Special Rapporteur supported his view of the case with the following quotation purporting to come from the award: "[W]hile admittedly there is a rule prohibiting the upper riparian State from altering the waters of a river in circumstances calculated to do serious injury to the lower riparian State, such a principle has no application to the present case ..." (47). And this quotation is repeated in



exactly the same terms in the commentary to article 8 (now Draft Article 7) among the authorities cited in support of the "well-established no appreciable harm" rule (48). It is not, however, altogether accurate. When the quoted passage is examined in the report of the case in the Reports of International Arbitral Awards and in International Law Reports, it is found that in the former the opening words are "Thus, even if it is admitted ..." and in the latter "Thus, if it is admitted ..." (49). The statement of the tribunal, therefore, is conditional; it did not admit anything about a no harm rule. Incidentally, even if it had so admitted, the word used in the award is "injury," not "harm," and the word qualifying harm was "serious," not "appreciable," so to that extent the ILC paid no heed to the case that it thought was authoritative.

In short, these three cases, the pillars on which the ILC's "no appreciable harm" rule in Draft Article 7 rests, do not support it. The other authorities called in aid by the ILC are treaties, diplomatic exchanges, and the resolutions and declarations of various conferences and intergovernmental and international non-governmental organizations, and individual experts (50). It is questionable, however, whether all of these instruments really do reflect customary international law. Observe, for example, the practice of two states party to a treaty with an explicit provision prohibiting transfrontier harm. Article IV of the Boundary Waters Treaty of 1909 between

Canada and the United States (51) provides that "the waters herein defined as boundary waters and waters flowing across the boundary shall not be polluted on either side to the injury of health or property on the other." From the time of that treaty until today, however, the boundary waters in question, especially the Great Lakes, have been seriously polluted and they continue to be polluted contrary to Article IV.

This experience with Article IV suggests that an absolute "no harm" rule, or any such rule with a low threshold of entry, is not successful in reconciling the "conflicting interests brought into play by the industrial use of international watercourses" (52). In fact, in the case of the Great Lakes, Canada and the United States had to enter into a new treaty, the Great Lakes Water Quality Agreement of 1972 (revised in 1978) (53), in an attempt to halt and reverse the degradation of their waters. This treaty in effect modifies Article IV of the Boundary Waters Treaty by giving a narrower and more realistic definition of "pollution" as used in it.

#### Applying the "no appreciable harm" rule

The real contradiction that exists between Draft Articles 5 and 7, that is to say, between the principle of equitable utilization and the no appreciable harm rule may be illustrated by considering the Flathead River case. This river flows from south-eastern British Columbia into north-western Montana. When a company proposed to establish a

coal mine on Cabin Creek, a tributary of the Flathead River in British Columbia, there were objections to the project and the Canadian and United States governments referred the matter to the International Joint Commission (IJC) under Article IV of the Boundary Waters Treaty for study. In December 1988, the IJC submitted its report and recommendations to the governments (54).

Relying on the technical assessment of a Study Board established by it, the IJC recommended that the governments not approve the projected mine. While noting that the available data were incomplete, it felt confident in holding that the operation of the mine would violate the no injurious pollution rule of Article IV of the Boundary Waters Treaty, or at least that it carried the risk of that violation. In particular, the IJC concluded that damage would inevitably occur to the habitat, which would cause a significant loss of the fish population. And this loss, it said, "would be such as to cause a reduction in the quantity and quality of the sport fishing activity in the United States and create a negative impact on the associated economic infrastructure since the affected fish population migrate for much of their adult lives to United States waters" (55). The IJC, however, indicated that its conclusion was "not based on the dollar losses ..., although ... there will be demonstrable and sustained economic loss to a number of interests dependent on this fishery," but on the ground that "a reduction of the fish population ...

would undoubtedly be an injury of most serious consequence to the integrity of the fishery itself, and thus to that property interest in the public domain on the other side of the border" (56).

This conclusion was dictated by the strict no injury rule of Article IV. Would the same conclusion have been reached if the governing rule were that of equitable utilization? The IJC itself perhaps indicated otherwise, for its final recommendation to the governments was that they "consider, with the appropriate jurisdictions, opportunities for defining and implementing compatible, equitable and sustainable development activities and management strategies in the upper Flathead River basin" (57). The fact of the matter is that the IJC was precluded by the no injury rule of Article IV from itself attempting to reach an equitable and reasonable balancing of the conflicting interests of the parties. If it had been free to do so, it might well have found in favour of the project; for, while the evidence established that the fish population would be reduced, it did not show that the fishery would suffer any long-term or irreversible damage. Furthermore, while the negative impact of the project on sport fishing and on the associated economic infrastructure was remarked on, there was no mention of the impact of a rejection of the project on the economy of British Columbia and Canada. Even under the ILC's Draft Article 6, these are relevant factors that must be taken into account in determining the equitable

and reasonable manner of utilization of an international watercourse.

The Flathead River demonstrates the limits imposed by a no harm rule on those called upon to apply it in a watercourse case; in the last analysis, they cannot ensure that their decision or recommendation, as the case may be, is equitable and reasonable. This is so even if the rule is qualified by words such as "appreciable," unless one is prepared to give them such a meaning that the rule becomes equivalent to that of equitable utilization.

Although, as seen above, there was some suggestion in the proceedings of the ILC that the apparent conflict between the two rules in Draft Articles 5 and 7 was not real, in its commentary to Article 7 the ILC did acknowledge that in some instances the application of the no appreciable harm rule might not achieve an equitable and reasonable utilization; in that case, it wrote, the necessary accommodations would be arrived at through specific agreements. It added: "Thus, a watercourse State may not justify a use that causes appreciable harm to another watercourse State on the ground that the use is 'equitable', in the absence of agreement between the watercourse States concerned" (58). This is a frank admission of the existence of a real conflict between the two articles.

#### Conclusion

In its Draft Articles 11 to 19 on planned measures, the ILC has elaborated the customary international law

applicable to states in their utilization of the waters of an international watercourse. In doing so, it has developed this law progressively and the result should prove to be acceptable to states.

On the other hand, the ILC has not been so successful in defining the general principles of law applicable to international watercourses. Its formulation of the principles dealing with equitable utilization (Articles 5 and 6), the duty to cooperate (Article 8) and exchange data and information regularly (Article 9), and the relationship between uses (Article 10) reflect current law. The novelty comes in Article 7 which effectively makes no appreciable harm the primary rule of international water resources law, relegating the principle of equitable utilization to a subordinate role. This change in the law is profound. As seen above, it was done contrary to the recommendations of Special Rapporteurs Schwebel and McCaffrey, and with divided opinion in the ILC.

In defence of Article 7, it may be argued that in practice the conflict between it and that of equitable utilization is more apparent than real because watercourse states will settle their disputes by agreement anyway. This argument is hardly persuasive. First, it invites the response that, if the rule will have no effect in practice, it should not be included in the Draft Articles. Second, the notion that the rule will have no effect in practice is inaccurate. For example, if the parties to a watercourse

dispute fail to reach agreement and the issue is submitted to an adjudicative body, that body will be bound to apply the rule, as it would be the law; in these circumstances, the rule will be of the utmost significance.

Furthermore, the no appreciable harm rule will significantly influence the course of the consultations and negotiations required by the Draft Articles on planned measures, for the states involved, being aware of the rule, will fashion their policies and arguments in the light of it. Thus, while it is natural for a downstream state to argue that the implementation of a project in the upstream state will cause harm in its territory and, therefore, will be a violation of its rights, the existence of the rule in Draft Article 7 will tend to reenforce that state's subjective view of its rights and lead it to be stubborn in their defence in negotiations.

Apart from the effect of the rule just mentioned, the reality is that it does alter significantly the law concerning existing uses. Under current law, existing uses are only one of the factors, but of course an important factor, in determining whether or not a project is in conformity with the principle of equitable utilization, and they do not have any inherent preference or priority (59). A state, therefore, may have to tolerate some harm, certainly some appreciable harm and perhaps even serious harm, if it is necessary to achieve an equitable and reasonable result. Draft Article 7 changes that law; under

it, no appreciable harm could be inflicted on an existing use.

In short, Draft Article 7 resurrects the discredited doctrine of prior appropriation; it entrenches the rights of those who first utilize the waters of an international watercourse. While this doctrine is popular with downstream states, where first developments usually take place, it is politically and legally unacceptable to upstream states. In practice, it may be invoked in negotiations, but it is not accepted or applied as a principle of law in the settlement of watercourse disputes.

Draft Article 7, therefore, should be seen as an aberration. There is merit in retaining it, but only with the addition of the exception clause advocated by Judge Schwebel and Professor McCaffrey, that is to say, a clause that would make the no appreciable harm rule subordinate to the principle of equitable utilization. Otherwise, it should be deleted. It is retrogressive, not progressive development of the law of international watercourses. The international community should not accept a law whose application may in some instances result in decisions that will be inequitable and unreasonable. The proper touchstone for determining the legal validity of utilizations of the waters of international watercourses should be the reasonable use and management of these waters, judged in the light of all relevant factors.



## Footnotes

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1. This was in response to the recommendation of the UN General Assembly in Resolution 2669 (XXV) of 8 December 1970.

2. Draft Report of the International Law Commission on the work of its forty-third session, A/CN.4/L.463, 4 July 1991, at 10.

3. Draft Article 3, *ibid.*, add.4, at 2.

4. [1988] Yearbook of the International Commission (hereafter Yearbook ...), Vol. II, pt. 2, at 51.

5. Mr. William Griffin has expressed the opinion that the notified state's "consent need not be expressly given; having been given an opportunity to object, its silence may be taken as consent": Legal Aspects of the Use of Systems of International Waters. Memorandum of the State Department, S. Doc. No.118, 85th Cong., 2nd Sess., 91 (1958).

6. [1987] Yearbook ..., Vol. II, pt. 1, at 39.

7. In the 1966 Helsinki Rules, Article XXIX, para. 4, the ILC recommended a sanction for failing to give notice of a utilization, namely that the utilization "shall not be given the weight normally accorded to temporal priority in use" in

determining what is a reasonable and equitable share of the beneficial uses of the waters of the basin: see the article and commentary thereon in Report of the Fifty-Second Conference of the International Law Association Held at Helsinki, August 14-20, 1966 (1967), at 486,488. The Helsinki Rules, of course, do not preclude all measures that cause appreciable harm but base liability on what is inequitable and unreasonable; under that system, some sanction of this sort seems justifiable. See also Bourne, Procedure in the Development of International Drainage Basins, 22 U. of T.L.J. 172, 190-91,206 (1972).

8. See Bourne, supra 173-76, 205.
9. Supra note 4, at 46.
10. For a discussion of the protection of future interests of a watercourse state, see Bourne, supra note 7, at 176-77, 187-90.
11. There is now considerable authority for this proposition. In the Helsinki Rules, the ILA treated these procedural rules only as recommendations: see Helsinki Rules, supra note 7, ibid.. And as recently as the Stockholm Conference on the Environment in 1972, there was no agreement that the rules were obligatory. But the Lake Lanoux arbitration had treated them as part of international law: 12 RIAA 281, (1957) 24 ILR 101; and since the decisions of the International Court of Justice in the North Sea Continental Shelf cases, [1969] ICJ Rep. 3, esp. paras. 85 and 87, and in the Fisheries Jurisdiction case, [1974]

ICJ Rep. 3, esp. para. 78, there can be little doubt about the matter. See also Bourne, supra note 7 for a general discussion of the issue.

12. See R. R. Baxter, The Indus Basin, in Garretson, Hayton and Olmstead (eds.), The Law of International Drainage Basins 443-85. See also Ralph W. Johnson, The Columbia Basin, ibid., 167-255.

13. Art. 6, para. 2, in [1982] Yearbook ..., Vol. II, pt. 1, at 85.

14. Ibid., 103.

15. [1983] Yearbook ..., Vol. II, pt. 1, at 170 and 171.

16. [1984] Yearbook ..., Vol. II, pt. 1, at 110.

17. Ibid., 112.

18. Supra note 15, at 172-73.

19. [1984] Yearbook ..., Vol. I, at 245-46.

20. See [1985] Yearbook ..., Vol. II, pt. 1, at 93 and 95 for Professor McCaffrey's recollection of this discussion.

21. [1986] Yearbook ..., Vol. II, pt. 1, at 130.

22. Ibid., 130-31.

23. Ibid., 133-34.

24. See, for example, [1987] Yearbook ..., Vol. II, pt. 2, at 20 and 23. It is noteworthy that opinion was also divided when the Sixth Committee of the UN General Assembly discussed the draft article subordinating equitable utilization to the no appreciable harm rule: see, for example, the statement of the United States representative, A/C.6/43/SR.30, 18 November 1988, at 13.

25. A/CN.4/412/Add.2, 9 May 1988, at 14.
26. Supra note 13, at 100.
27. See [1988] Yearbook ..., Vol II, pt. 2, at 35-36.
28. Supra note 25, at 6. See also the commentary to Art. 4, para. 2, supra note 24, at 27.
29. Stephen C. McCaffrey, The Fortieth Session of the International Commission, 83 Am. J. Int'l L. 164 (1989).
30. See supra note 25, at 2-10.
31. Ibid., 15.
32. Supra note 13, at 82. For his general discussion of equitable utilization, see ibid., 75-91.
33. See text above at supra note 15.
34. Supra note 21.
35. Supra note 13, at 103 (emphasis added) and 145. See also ibid., 94 and 99-100.
36. [1949] ICJ Rep. 22.
37. Supra note 21, at 115-16.
38. American Law Institute, Restatement (Third) of the Foreign Relations Law of the United States, Vol. 2, sec. 601. This section was quoted by Professor McCaffrey in his Fourth Report, supra note 25, at 21.
39. 3 RIAA 1905, 1965 (1949); 35 Am. J. Int'l L. 684, 716 (1941). For a full discussion of the case, see J. G. Lammers, Pollution of International Watercourses 517-25 (Nijhoff, 1984).
40. Supra note 21, at 121. The quotation from Professor Quentin-Baxter's statement is taken from his Second Report

on International Liability for Injurious Consequences Arising out of Acts not Prohibited by International Law, in [1981] Yearbook ..., Vol. II, pt., 1, at 115.

41. See John E. Read, The Trail Smelter Dispute, 1 Can. Yb. Int'l L 213, 225 (1963).

42. 12 RIAA 285; (1957) 24 ILR 101. For a succinct description of this case, see Lammers, op. cit. supra note 39, at 508-17.

43. Lammers, op. cit. supra note 39, at 517.

44. Ibid., 516.

45. Supra note 21, at 119.

46. A/CN.4/421/Add.1, 3 May 1988, at 52. And A/CN.4/421/Add.1, 4 May 1989, at 22.

47. Supra note 21, at 118. This statement was evidently copied from that quoted in [1974] Yearbook ..., Vol. II, pt. 2., at 197.

48. [1988] Yearbook ..., Vol. II, pt. 2, at 40.

49. Supra note 42, at 308 and 129 respectively.

50. See, for examples, the commentary to Draft Article 8 (now numbered 7): [1988] Yearbook ..., Vol. II, pt. 2, at 35-41.

51. 208 CTS 214; 36 Stat. 2448; TS no. 548; III Redmond 2607.

52. Supra note 43.

53. Can. TS 1972/12, revised Can. TS 1978/20.

54. International Joint Commission, Impacts of a Proposed Coal Mine in the Flathead River Basin, December 1988.

55. Ibid., 8.

56. Ibid., 9.

57. Ibid., 11. See also ibid., 9.

58. Supra note 48, at 36.

59. See Articles V, VI, and VIII of the Helsinki Rules, supra note 7, at 488-94; also ILC's Draft Articles 5, 6, and 10, supra note 3.