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“General Principles” and “Planned Measures” Provisions in the International Law Commission Draft Articles on the Non-Navigational Uses of International Watercourses: A Mexican Point of View

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DRAFT

"GENERAL PRINCIPLES" AND "PLANNED MEASURES" PROVISIONS
IN THE INTERNATIONAL LAW COMMISSION DRAFT ARTICLES ON THE NON-
NAVIGATIONAL USES
OF
INTERNATIONAL WATERCOURSES
A Mexican Point of View

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THE FACT THAT THE INTERNATIONAL LAW COMMISSION, DURING ITS FORTY THIRD SESSION, REACHED THE POINT OF ADOPTING BY FIRST READING THE 32 DRAFT ARTICLES ON THE LAW OF NON-NAVIGATIONAL USES OF INTERNATIONAL WATERCOURSES, IS IN ITSELF A TRIBUTE TO THE PERSISTENCE AND EXCELLENCE OF SPECIAL RAPPORTEUR STEPHEN C. McCAFFREY, AS WELL AS TO RAPPORTEURS KEARNEY, SCHWEBEL AND EVENSEN WHO PRECEDED HIM IN SUCH TASK, ALL OF THEM HIGHLY DISTINGUISHED JURISTS.

WHEN TWENTY YEARS AGO THE INTERNATIONAL LAW COMMISSION INCLUDED IN ITS PROGRAM THE LAW OF THE NON-NAVIGATIONAL USES OF INTERNATIONAL WATERCOURSES, IT EMBARKED IN ONE OF ITS MOST FORMIDABLE UNdertakings, IF IT IS TAKEN INTO ACCOUNT THAT THIS WAS A FIELD WITH A VERY RICH STATE PRACTICE AROUND THE WORLD, BUT MOSTLY INFLUENCED BY LOCAL CONDITIONS AND PECULIARITIES. THUS, THE PROGRESSIVE DEVELOPEMNT AND CODIFICATION OF THIS BRANCH OF INTERNATIONAL LAW, REQUIRED A GREAT DEAL OF LEGAL SKILL AND IMAGINATION.

THROUGHOUT THE YEARS DURING WHICH THIS MATTER WAS WORKED ON AT THE INTERNATIONAL LAW COMMISSION AND, THUS, SUBSEQUENTLY DISCUSSED AT THE UNITED NATIONS GENERAL ASSEMBLY'S SIXTH COMMITTEE, THE MEXICAN DELEGATION DISPLAYED IN THE LATTER A CONSTANT AND MOST ACTIVE PARTICIPATION. MOREOVER, IT CAN EASILY BE SAID THAT NO OTHER INTERNATIONAL LEGAL MATTER PROMPTED A HIGHER MEXICAN PROFILE, NEITHER AMONG THOSE COMING AS PART OF THE ANNUAL REPORT OF THE ILC, NOR AMONG THOSE IN THE SIXTH COMMITTEE'S AGENDA.

THE REASON FOR THE ABOVE IS SIMPLE TO UNDERSTAND. MEXICO'S TERRITORY IS LARGELY DELIMITED BY SEVERAL INTERNATIONAL WATERCOURSES WITH ITS THREE CONTINENTAL NEIGHBOURS. THROUGHOUT ITS HISTORY, MEXICO PRACTICED MOSTLY GOOD NEIGHBOURLINESS WITH THEM BY CONCLUDING INTERNATIONAL LEGAL INSTRUMENTS, WHICH HAVE BECOME MODELS OF STATE PRACTICE FOR OTHER COUNTRIES IN THE REST OF THE WORLD, THUS DIRECTLY INFLUENCING THE PROGRESSIVE DEVELOPMENT OF INTERNATIONAL RIVER LAW.

CONSEQUENTLY, WHEN MEXICO HAS TAKEN THE FLOOR IN THE SIXTH COMMITTEE, TO ADDRESS THE WORK OF THE ILC ON THE LAW OF THE NON NAVIGATIONAL USES OF INTERNATIONAL WATERCOURSES, IT HAS INVARIABLY DONE SO FROM AND ON THE BASIS OF ITS RICH EXPERIENCE, ACCUMULATED FOR MORE THAN A CENTURY AND WHICH CONSTITUTES, DESPITE THE VARIOUS LASTING DISCREPANCIES WHICH FROM TIME TO TIME AROSE WITH ITS NEIGHBOURS, ONE OF THE HAPPIEST CHAPTERS OF ITS BILATERAL RELATIONS, AND ONLY THANKS TO THE FACT THAT ALL SUCH DIFFICULTIES HAVE BEEN IN THE END PEACEFULLY SOLVED, ON THE BASIS OF MUTUAL RESPECT AND ADHERANCE TO THE RULES OF INTERNATIONAL LAW.

THE POSITION TAKEN BY MEXICO THROUGH THOSE INTERVENTIONS HAS BEEN, MOST OF THE TIMES, AS WILL BE AMPLY SHOWN HERE, QUITE CRITICAL OF THE DRAFT ARTICLES.

IN THEIR FUNDAMENTALLY NEGATIVE CONTENTS, HOWEVER, THOSE INTERVENTIONS HAVE SOUGHT TO POSITIVELY CONTRIBUTE NOT ONLY TO THE QUALITY OF THE OUTCOME, IN THE SENSE THAT IT SHOULD GENUINELY AND FAITHFULLY REFLECT THE PRACTICE OF STATES, BUT ALSO TO ITS VIABILITY, SO THAT, UNLIKE MOST SIMILAR MULTILATERAL CONVENTIONS OF THIS NATURE, WHENEVER A FINAL DRAFT IS SUBMITTED TO THE INTERNATIONAL COMMUNITY OF STATES, THEY CAN EFFECTIVELY NEGOTIATE IT, ADOPT IT AND, ABOVE ALL, PUT IT AS SOON AS POSSIBLE INTO FORCE AND WITH THE WIDEST POSSIBLE PARTICIPATION.

NEEDLESS TO SAY, MEXICO HAS AIMED ALSO AT ENSURING THAT IT WILL EVENTUALLY BE IN A POSITION TO JOIN THAT FINAL PROCESS, POSITIVELY CONTRIBUTE TO IT INSTEAD OF OPPOSING IT, AND JOIN IT BY BECOMING A PARTY TO AN EVENTUAL CONVENTION.

UNFORTUNATELY, HOWEVER, MEXICO HAS SO FAR FELT, NO WITHOUT SOME DEGREE OF FRUSTRATION, THAT ITS MANY CONTRIBUTIONS TO THE TREATMENT OF THE SUBSEQUENT DRAFT ARTICLES IN THE SIXTH COMMITTEE, HAVE NOT HAD THE DESIRED INFLUENCE, NOR RECEIVED THE EXPECTED RESPONSE, AND SO IT HAS REITERATED THROUGHOUT ITS INTERVENTIONS.

ALLOW ME AT THIS POINT A RATHER PERSONAL NOTE. I HAVE VENTURED TO RELATE IN SOME DETAIL ALL OF THE ABOVE, WHICH CONCERNS ONLY ONE COUNTRY, INDEPENDENTLY OF HOW MANY OTHERS FEEL SIMILARLY, JUST BECAUSE THE CORE OF MEXICO'S ANXIETIES AND INSTISFACTIONS WITH THE DRAFT ARTICLES LIES MOSTLY, ALBEIT NOT EXCLUSIVELY, AROUND PARTS II AND III OF THE DRAFT, THAT IS, PRECISELY THE SET OF ARTICLES THAT I WAS SELECTED TO ANALYZE IN THIS EVENT, NAMELY, ARTICLES 5 TO 19.

I IGNORE IF SUCH SELECTION WAS MADE CONSCIOUSLY, ON THE AWARENESS THAT MEXICO HAS REPEATEDLY EXPRESSED DIFICULTY WITH JUST THOSE PROVISIONS, AND ON THE FACT THAT THROUGHOUT THE PAST EIGHT YEARS I MYSELF WAS THE REPRESENTATIVE OF MY COUNTRY TO THE SIXTH COMMITTEE WHO PRONOUNCED THE SAID INTERVENTIONS.

WHATEVER THE CASE MAY BE, I SHALL NOW PROCEED, WHILE ANALYZING DRAFT ARTICLES 5 TO 19, TO DESCRIBE THE POSITION SO FAR TAKEN BY MEXICO, AND WITH WHICH I OBVIOUSLY AGREE. I WILL ALSO ANALYZE THE DRAFT IN ITS LATEST VERSION, AS RECENTLY APPROVED BY FIRST READING AT THE ILC, AND WHICH MAY OR MAY NOT COINCIDE WITH THE POSITION THAT MEXICO IS LIKELY TO EXPRESS THIS YEAR AT THE SIXTH COMMITTEE THROUGH ITS NEW REPRESENTATIVE THERE, DEPENDING ON WHETHER THAT POSITION IS CONSISTENT WITH PAST PRONOUNCEMENTS.

THE GENERAL PRINCIPLES WHICH APPEAR IN PART II ARE VIEWED BY MEXICO AS THE HEART OF THE DRAFT AND, BECAUSE OF THE WAY THEY ARE NOW FORMULATED, THEY ARE ALSO THE SOURCE OF ITS GREATEST CONCERN. IN NUMEROUS INSTANCES, MEXICO HAS BEEN WARNING AT THE SIXTH COMMITTEE ON THE INCREASING EMPOVERISHMENT OF THIS CATALOG OF PRINCIPLES, WHICH BECAME EVIDENT AS THE VARIOUS GENERATIONS OF DRAFT ARTICLES ON THE MATTER WERE BEING PREPARED.

MEXICO HAS POINTED OUT THAT THE INITIAL LISTS OF PRINCIPLES, INCLUDED IN THE REPORTS OF THE PREVIOUS RAPORTEURS, WERE RICHER AND, THEREFORE, CONTAINED A MUCH WIDER CONTRIBUTION TO THE PROGRESSIVE DEVELOPMENT AND TO THE CODIFICATION OF THE INTERNATIONAL LAW ON THE MATTER, AS THEY MORE EXHAUSTIVELY REFLECTED THE PRACTICE OF STATES.

WITH THE APPROVED DRAFT ARTICLES 5 TO 10, WE WOULD BE LEFT WITH THE GENERAL PRINCIPLES AT THEIR MINIMUM EXPRESSION AND, CONSEQUENTLY, WITH THE EXPRESS EXCLUSION OF OTHERS WHICH ARE EQUALLY VALUABLE AND APPLICABLE. THIS IS IN SHARP CONTRAST WITH WHAT IS GOING ON IN THE REAL WORLD. AT A TIME WHEN, UNDER THE INSPIRATION OF THE PREPARATORY WORK FOR THE HOLDING OF THE EARTH SUMMIT IN 1992, SEVERAL SERIOUS EXERCISES ARE UNDER WAY TO IDENTIFY AND STRENGTHEN THE GENERAL PRINCIPLES OF INTERNATIONAL ENVIRONMENTAL AND NATURAL RESOURCES LAW, ESPECIALLY FOR THE EARTH CHARTER, OUR DRAFT ARTICLES REMAIN OBLIVIOUS TO THOSE EXERCISES, AS IF THE NON-NAVIGATIONAL USES OF INTERNATIONAL WATERCOURSES WERE SUCH A SPECIAL CASE, THAT MOST OF THOSE GENERAL PRINCIPLES ARE TO BE REGARDED AS INAPPLICABLE TO THEM.

IS THERE NO ROOM IN OUR DRAFT ARTICLES, FOR INSTANCE, AT LEAST IN THE FIELD OF POTENTIAL GLOBAL WARMING IMPACTS ON LOCAL TRANSBOUNDARY WATER RESOURCES, FOR THE "PRECAUTIONARY PRINCIPLE"? WOULD IT NOT BE WORTHWHILE TO TAKE ANOTHER LOOK AT OTHER SERIOUS RECENT CATALOGUES OF APPLICABLE GENERAL PRINCIPLES, SUCH AS THOSE INCORPORATED IN THE 1986 LEGAL PRINCIPLES FOR ENVIRONMENTAL PROTECTION AND SUSTAINABLE DEVELOPMENT, OF THE EXPERTS GROUP ON ENVIRONMENTAL LAW OF THE WORLD COMMISSION ON ENVIRONMENT AND DEVELOPMENT?, OR IN THE UNCED PREPARATORY COMMITTEE CHAIRMAN'S CONSOLIDATED DRAFT ON PRINCIPLES ON GENERAL RIGHTS AND OBLIGATIONS (A/CONF.151/WG.III/L.8)?, OR IN THE 1991 DRAFT IUCN COVENANT ON ENVIRONMENTAL CONSERVATION AND SUSTAINABLE USE OF NATURAL RESOURCES?, OR IN THE 1991 HAGUE RECOMMENDATIONS ON INTERNATIONAL ENVIRONMENTAL LAW?, OR IN THE 1991 ASPEN REPORT ON INTERNATIONAL ENVIRONMENT AND DEVELOPMENT POLICY?. CAN NOTHING BE LEARNED AND TAKEN ADVANTAGE OF IN OUR DRAFT ARTICLES, FROM SUCH IMPORTANT EXPERIENCES?

THE DRAFT KEEPS US RESTRICTED TO THE GENERAL PRINCIPLES OF "EQUITABLE AND REASONABLE UTILIZATION AND PARTICIPATION", THE "OBLIGATION NOT TO CAUSE 'APPRECIABLE' HARM", THE "'GENERAL' OBLIGATION TO COOPERATE", THE "'REGULAR' EXCHANGE OF DATA AND INFORMATION", AND THE SO-CALLED "RELATIONSHIP BETWEEN USES" OR, RATHER, THE ALLEGED PRINCIPLE OF "NON-PRIORITY OF ONE USE OVER OTHER USES".

AS CAN BE APPRECIATED, ALL OF THEM CARRY WITH THEMSELVES, FROM THEIR VERY ENUNCIATION, THE SEED OF THEIR OWN WEAKNESS. THE UTILIZATION MUST BE EQUITABLE BUT ONLY "REASONABLE", INSTEAD OF STRENGTHENING THAT PRINCIPLE BY ENSURING THAT IT SHALL NOT BE EXERCISED BEYOND THE "OPTIMUM" SUSTAINABLE LIMITS, AS ORIGINALLY CONCEIVED IN THE 1982 DRAFT. HARM MAY BE CAUSED AS LONG AS IT IS NOT SUPPOSEDLY "APPRECIABLE", LEAVING THE DETERMINATION OF SUCH CHARACTERISTIC TO THE SUBJECTIVE UNILATERAL QUALIFICATION OF THE STATE WHICH CAUSES IT. THE OBLIGATION TO COOPERATE REMAINS A "GENERAL" ONE, AS IT IS HARDLY SPECIFIED IN A MEANINGFUL WAY ELSEWHERE IN THE DRAFT, AT LEAST NOT AS IT USE TO BE IN PREVIOUS DRAFTS. THE EXCHANGE OF INFORMATION AND DATA IS NOT EVEN ENUNCIATED AS AN OBLIGATION, AND IT APPLIES ONLY ON A "REGULAR" AND SEVERELY RESTRICTED BASIS, RATHER THAN ON A "PERMANENT" AND EXHAUSTIVE BASIS. FINALLY, AND OPENLY CONTRADICTING THE "FACTORS RELEVANT TO EQUITABLE AND REASONABLE UTILIZATION" WHICH APPEAR IN DRAFT ARTICLE 6, THE INCOMPATIBLE AND THEREBY UNACCEPTABLE CONCEPT OF "NON-PRIORITY OF ONE USE OVER OTHER USES" IS INCORPORATED IN ARTICLE 10.

IT IS EVIDENT THAT IN THE ABOVE LIST OF 5 ALLEGED GENERAL PRINCIPLES, BARELY THREE OF THEM CAN BE AUTHENTICALLY REGARDED AS SUCH. THAT IS WHY MEXICO HAS ANNOUNCED THAT IT IS AWAITING FOR THE PROCEDURAL OPPORTUNITY TO PROPOSE THE REINSTALLATION AND INTRODUCTION OF THE GENERAL PRINCIPLES PERTAINING TO GOOD FAITH, GOOD NEIGHBOURLINESS, ABUSE OF RIGHTS, AND RESPONSIBILITY FOR DAMAGES, JUST AS IT WILL WORK SO THAT

AMONG THE FACTORS RELEVANT TO EQUITABLE AND REASONABLE UTILIZATION, WHICH APPEAR ALSO REDUCED TO THEIR MINIMUM EXPRESSION IN DRAFT ARTICLE 6, THOSE RELATING TO HISTORICAL UTILIZATION, INCLUDING CURRENT UTILIZATION, SPECIAL NEEDS AND STAGE OF ECONOMIC DEVELOPMENT, AND ABOVE ALL THE FACTOR PERTAINING TO THE POPULATION DEPENDENT ON THE WATERS OF THE WATERCOURSE IN EACH STATE, BE REINTRODUCED, AS THEY HAD PREVIOUSLY BEEN CONSIDERED OR INCORPORATED IN THE DRAFTS PREPARED IN PREVIOUS DRAFTS.

IN ALL ITS INTERVENTIONS ON THE MATTER IN THE SIXTH COMMITTEE, MEXICO HAS REITERATED ITS CONCERN FOR THE QUALIFICATION WITH WHICH IT IS INTENDED TO RESTRICT THE OBLIGATION NOT TO CAUSE HARM OR ADVERSE EFFECTS, WHICH REPEATEDLY APPEARS IN DRAFT ARTICLES 7, 12, 21, 22, 28 AND 32.

IT VIEWS AS INADMISSIBLE THAT THE DETERMINATION OF THE "APPRECIABILITY" OF THE HARM, OR OF THE ADVERSE EFFECTS, IS LEFT TO THE SUBJECTIVE UNILATERAL DISCRETION OF THE STATE WHICH CAUSES THEM, AND THAT ONLY WHEN THAT STATE DECIDES TO CLASSIFY THEM AS BEING WITHIN THAT CATEGORY, IS THE VICTIM WHICH SUFFERS THEM ALLOWED TO INVOKE ITS RIGHTS.

THE SUBMISSION OF THIS KEY PRINCIPLE TO SUCH RESTRICTIVE REQUIREMENT, EFFECTIVELY LEAVES THE VICTIM STATE IN A SITUATION OF DEFENSELESSNESS.

THE DRAFT ARTICLES CONTEMPLATE NEITHER THE CONSEQUENCES OF THE ACCUMULATION OF ALLEGEDLY "NON-APPRECIABLE" HARMS OR ADVERSE EFFECTS, NOR THE WAY THROUGH WHICH THE STATE WHICH SUFFERS THEM CAN PREVENT THEM, OR AT LEAST STOP THEIR REITERATION. THE ONLY INSTANCES IN WHICH THIS LEGAL SITUATION IS SOMEWHAT REVERTED, SEEMS TO BE IN DRAFT ARTICLES 4 AND 18, WHICH ALLOW A STATE TO CLAIM ITS RIGHT TO PARTICIPATE IN A WATERCOURSE AGREEMENT, OR TO PUT INTO MOTION THE WEAK NOTIFICATION OBLIGATIONS WHEN IT DEEMS THAT A PLANNED MEASURE BY ANOTHER STATE MAY OR WILL HAVE AN APPRECIABLE ADVERSE EFFECT UPON IT. THE SAME DRAFTING POLICY SHOULD HAVE THUS PREVAILED IN THE OTHER SIX ABOVE MENTIONED ARTICLES. IS THERE ANY REASON TO GIVE A MORE PRIVILEGED TREATMENT TO THE STATE OF ORIGIN?

IT HAS TO BE RECOGNIZED THAT THE CRITICISM DIRECTED HERE TO THE ILC AND TO ITS SPECIAL RAPPORTEUR, ON THE SUBJECT OF "APPRECIABILITY", CAN HARDLY BE SUPPORTED BY SHOWING EVIDENCE OF STATE PRACTICE TO THE CONTRARY. MOREOVER, IT IS IN FACT TRUE THAT THE TREND SEEMS TO BE MOVING, UNFORTUNATELY, IN THE OPPOSITE DIRECTION, THAT IS, THAT OF KEEPING THE THRESHOLD OF THE OBLIGATION NOT TO CAUSE HARM AS LAX AND HIGH AS POSSIBLE, SO THAT IT CAN BE CLAIMED ONLY WHEN THAT HARM REACHES A CERTAIN HIGH, ALBEIT SUBJECTIVE AND VAGUE LEVEL.

THAT IS WHY QUALIFYING REQUIREMENTS ARE BEING CONSTANTLY ADDED IN A VARIETY OF INTERNATIONAL INSTRUMENTS IN THE FIELD, PERHAPS THE MOST TYPICAL OF WHICH IS THAT THE HARM OR DAMAGES HAVE TO BE "SIGNIFICANT".

IN A HYPOTHETICAL OVERALL NATURAL ENVIRONMENT OR ECOSYSTEM THAT HAS BEEN KEPT MOSTLY PRESERVED, AND ITS ECOLOGICAL EQUILIBRIUM LARGELY INTACT OR BARELY DETERIORATED, ITS CAPACITY TO TOLERATE LOW-LEVEL HARM OR DAMAGE MAY PERHAPS THEORETICALLY JUSTIFY ALLOWING FOR A LAXER STANDARD OF OBLIGATION NOT TO CAUSE SUCH HARM OR DAMAGES.

BUT WHERE IN THE WORLD ARE THOSE ECOSYSTEMS LEFT? DO WE NOT HAVE TO ADMIT THAT IN MUST INSTANCES HUMANS HAVE PUSHED THAT LEVEL OF TOLERANCE TO ITS VERY LIMITS IN MOST CORNERS OF THE HUMAN ENVIRONMENT ON EARTH? DO WE STILL HAVE TIME TO ALLOW FOR A WEAK AND TOLERANT LEGAL SYSTEM, WHICH HAS THE LOWEST POSSIBLE DENOMINATOR IN THE MANDATORY LEVEL OF ITS RULES?.

THAT IS PRECISELY THE POINT THAT MEXICO HAS BEEN TRYING TO MAKE IN THIS REGARD, BASED ON THE FUNDAMENTAL THESIS THAT THE MORE CLEARLY DEFINED AND THE MORE STRINGENT THOSE RULES ARE, THE LESSER THE POSSIBILITY OF CONFLICT BETWEEN STATES.

IT HAPPENS TO THINK, ON THE BASIS OF AT TIMES BITTER HISTORICAL EXPERIENCE, THAT THIS IS ESPECIALLY TRUE IN THE CASE OF WATER QUALITY STANDARDS IN INTERNATIONAL WATERCOURSES. THIS EXPLAINS WHY ITS DELEGATIONS TO THE VARIOUS FORA WHERE INTERNATIONAL LEGAL RULES ARE BEING DRAFTED ON ENVIRONMENTAL AND NATURAL RESOURCE ISSUES, INCLUDING NOW ITS DELEGATION TO THE PREPARATORY COMMITTEE FOR UNCED, THEIR INSTRUCTIONS HAVE BEEN TO STRUGGLE FOR WELL DEFINED, PRECISE, FULLY MANDATORY AND STRINGENT RULES.

AND A STRUGGLE INDEED IT IS, AS THE TYPICAL TREND IN SUCH EXERCISES HAS BEEN, AND IS NOW, ESPECIALLY IN THE MULTILATERAL ARENA, TO WATERDOWN THE CONTENTS AND THE LEVEL OF THE OBLIGATIONS TO BE ASSUMED, THROUGH EXAGGERATED SO-CALLED COMPROMISE FORMULAS, AND TO REACH CONSENSUS ON THEM ONLY BY KEEPING THE WORDING AS VAGUE AND AS UNCLEAR AS POSSIBLE, SO AS TO ALLOW FOR VARYING INTERPRETATIONS, EVEN IN ALL POSSIBLE OPPOSITE DIRECTIONS.

FOR MEXICO, THIS IS ONLY THE SEED OF POTENTIAL CONFLICT, AS THEN THE LAW DOES NOT FULFILL ITS FUNCTIONS BUT, INSTEAD, GENERATES THE INGREDIENTS OF THE VERY SITUATIONS WHICH IT IS SUPPOSED AND EXPECTED TO PREVENT. MEXICO HAS HOPED THAT THIS LAMENTABLE TREND CAN BE AVERTED IN AN AREA AS IMPORTANT AND SENSITIVE AS THE LAW OF TRANSBOUNDARY WATERS.

MORSOVER, IT FEELS THAT IF THE ILC HAS ALREADY GONE INTO SUCH HIGH LEVEL OF COMPROMISE DRAFTING TECHNIQUES, IN THE PREPARATION OF THE DRAFT ARTICLES, WHEN THEY FINALLY COME UP FOR NEGOTIATION BY THE GOVERNMENTS THEMSELVES, VERY LITTLE IN THE WAY OF SUBSTANTIVE OBLIGATION WILL BE LEFT IN THEM.

MEXICO REALIZES THAT IN DEFENDING SUCH CONCEPTS, IT IS GOING AGAINST THE TREND OF MOST EMERGING PRACTICE. THE SAME INSTRUMENTS THAT IT HAS INVOKED TO PROVE THAT THE APPLICABLE GENERAL PRINCIPLES ARE RICHER THAN THOSE INCORPORATED IN THESE DRAFT ARTICLES, SHOW THAT THE COMMON ACCEPTED THRESHOLD REGARDING HARM AND ADVERSE EFFECTS IS BEING KEPT HIGH. NONETHELESS, THE INSISTENCE ON ITS POSITIONS IN THIS REGARD MAY END UP PLAYING, AT LEAST, A HUMBLE MODERATING INFLUENCE IN THE FINAL PRODUCT OF THE INTERNATIONAL LEGISLATIVE WORK IN THE FIELD OF THE ENVIRONMENT AND OF NATURAL RESOURCES.

AFTER ANALYZING ARTICLES 9 AND 11 THROUGH 19, IT IS EASY TO CONCLUDE THAT THE OBLIGATION OF PRIOR AND TIMELY NOTIFICATION IS NOWHERE TO BE FOUND IN THE DRAFT ARTICLES, WHICH USED TO BE THERE IN PREVIOUS DRAFTS, ONLY TO BE REPLACED BY A MERE SCHEME OF INFORMATION EXCHANGE WHICH OSCILLATES BETWEEN THE OPTIONAL AND THE MILDLY COMPULSORY, AND THROUGH WHICH THE STATE WHICH PLANS THE UNDERTAKING OF A MEASURE HAS ALL THE POSSIBLE DISCRETIONALITY IN ITS FAVOUR, WHILE ITS COUNTERPART IS LEFT AT THE MERCY OF THE CAPRICIOUS EXERCISE OF SUCH DISCRETIONALITY.

ALL OF THIS IS IN SHARP CONTRAST WITH AN INTERNATIONAL LAW WHICH DEVELOPS RAPIDLY, AT LEAST IN ITS BRANCHES PERTAINING TO THE ENVIRONMENT AND TO NATURAL RESOURCES, IN THE DIRECTION NOT ONLY THAT PRIOR AND TIMELY NOTIFICATION SHALL BE DEFINITELY COMPULSORY, BUT ALSO THAT IT SHOULD COME WITH AN ASSESMENT OF THE IMPACT WHICH CAN BE FORESEEN FROM THE MEASURE OR ACTIVITY WHICH IS WISHED TO HAVE CARRIED OUT, ESPECIALLY THE IMPACT ON THE VARIOUS COMPONENTS OF THE ENVIRONMENT, AN ASSESSMENT WHICH CAN BE EVEN CHALLENGED BY THE OTHER INTERESTED STATES. THE 1991 ESPOO CONVENTION ON ENVIRONMENTAL IMPACT ASSESSMENT IN A TRANSBOUNDARY CONTEXT, MAKES IT MANDATORY TO UNDERTAKE AND PROMPTLY NOTIFY TO OTHER INTERESTED STATES SUCH IMPACT ASSESSMENTS AT THE PROJECT LEVEL.

ACCORDING TO DRAFT ARTICLE 9, A STATE MAY UNILATERALLY DETERMINE THE "REGULARITY" IN THE PROVISION OF INFORMATION AND DATA, MAY ALSO FREELY SELECT THE INFORMATION AND DATA WHICH IT WISHES TO SHARE, AND EVEN CHARGE FOR IT WHATEVER IT ALONE DEEMS "REASONABLE". IT ALSO MAY, ON THE BASIS OF DRAFT ARTICLE 31, EXCLUDE THAT DATA AND INFORMATION WHICH IT REGARDS AS "VITAL" TO ITS DEFENSE OR SECURITY. IT MAY ALSO, AS IN DRAFT ARTICLE 12, FEEL ONLY COMPELLED TO NOTIFY OTHER STATES OF A PLANNED MEASURE, WHEN IT UNILATERALY CONSIDERS THAT SUCH MEASURE MAY "APPRECIABLY" HARM OTHER STATES IN THE WATERCOURSE. MEANWHILE, THE SORT OF MORATORIUM IN THE UNDERTAKING OF PLANNED MEASURES, ACCORDING TO DRAFT ARTICLE 17, IS LIMITED TO "A PERIOD NOT EXCEEDING SIX MONTHS", EVEN WHEN ALL CONSULTATIONS AND NEGOTIATIONS WITH OTHER STATES IN THE WATERCOURSE HAVE NOT YET BEEN EXHAUSTED.

OBVIOUSLY, IN THE FACE OF SUCH PROVISIONS IN THE ABOVE MENTIONED DRAFT ARTICLES, BEING A "LOWER-RIPARIAN" MEANS, BY ITSELF, THAT ALL THE DISADVANTAGES OF BEING TREATED AS A SECOND CLASS STATE HAVE TO BE ASSUMED, WHICH EVOKES THE TIMES OF THE SO-CALLED "HARMON DOCTRINE". SUCH IS NOT ONLY THE CLEAR IMPRESSION RESULTING FROM THE PROVISIONS INCORPORATED IN PART III OF THE DRAFT ARTICLES, BUT ALSO THE UNAVOIDABLE RESULT, WHICH IS EVEN MORE ALARMINGLY TRUE IN THE CASE OF DRAFT ARTICLES 17 TO 19.

FINALLY, IT SHOULD BE RECALLED THAT, DURING THE FORTY FIFTH SESSION OF THE GENERAL ASSEMBLY, THE MEXICAN DELEGATION IN THE SIXTH COMMITTEE ALERTED THE MEMBERSHIP ON THE URGENT NEED TO INJECT, IN THE DRAFT ARTICLES, APPROPRIATE PROVISIONS PERTINENT TO THE EFFECTS OF GLOBAL WARMING ON WATER RESOURCES, ESPECIALLY IN THE AREA OF PREPARATION FOR RESPONSE MECHANISMS TO LOCAL EFFECTS.

THE SPECIAL RAPPORTEUR SHOWS, THROUGH ITS SEVENTH REPORT, THAT HE IS FULLY AWARE AND VERY MUCH UP TO DATE ON THE THREAT FROM THIS PHENOMENON TO WATER RESOURCES, THROUGH THE DETAILED ANALYSIS ON THE "HYDROLOGICAL CYCLE" THAT HE INCORPORATES THERE .

IN SPITE OF THAT, NOTHING IS CONCRETELY CONTEMPLATED IN THAT RESPECT IN DRAFT ARTICLES 24 AND 25, WHICH MAKES THEM ANACHRONIC AND DEVOID OF REALITY, SINCE THEY IGNORE ONE OF THE GRAVEST POTENTIAL SITUATIONS WHICH ARE STATES IN INTERNATIONAL WATERCOURSES ARE LIKELY TO FACE IN MANY PARTS OF THE WORLD.

THE ESTIMATED EFFECTS FROM GLOBAL WARMING ON THE INTERNATIONAL WATERCOURSES TO WHICH MEXICO IS A PARTY ARE OF SUCH ALARMING DIMENSIONS, THAT WHENEVER THE DRAFT IS ELEVATED TO INTERGOVERNMENTAL NEGOTIATION IT INTENDS TO PURSUE THIS MATTER FORCEFULLY, TO ENSURE THAT THE PROBLEM IS DEALT WITH IN EXTENSO.

I AM AWARE THAT THIS PRESENTATION HAS BEEN RESTRICTED TO THOSE ASPECTS OF THE DRAFT TREATIES WHICH RAISE GRAVE CONCERNS TO A COUNTRY LIKE MEXICO, AND THAT THE MANY POSITIVE ASPECTS AND ELEMENTS THEY CONTAIN HAVE NOT EXPRESSED HERE THE RECOGNITION THEY SURELY DESERVE.

IT IS HOPED THAT THIS, HOWEVER, IS FOUND UNDERSTANDABLE, BECAUSE WHEN A DRAFT REACHES THE DEGREE OF PROGRESS THIS ONE HAS ATTAINED, AND IT REACHES THE LEVEL OF APPROVAL THAT IT HAS RECEIVED AT THE INTERNATIONAL LAW COMMISSION, THE MOMENT IS NEAR WHEN STATES WILL EMBARK IN THE FINAL NEGOTIATION OF ITS DEFINITIVE CONTENTS AND, THEN, IT IS BOTH NECESSARY AND CONVENIENT TO MAKE KNOWN, WITH ALL POSSIBLE ANTICIPATION, WHAT CAN BE EXPECTED FROM THE VARIOUS CONTRACTING PARTIES IN THOSE NEGOTIATIONS.

MEXICO WOULD NOT SURPRISE ANYONE WHENEVER THAT TIME COMES, AND IT IS PERHAPS MUCH MORE CONSTRUCTIVE TO CLEARLY AND OPENLY EXPRESS ITS CONCERNS AND POSITIONS AS FROM NOW, SINCE THEN IT WILL BE IN A POSITION TO POSITIVELY CONTRIBUTE TO A VIABLE AND REALISTIC NEGOTIATION.