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Sergei V. Vinogradov

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**OBSERVATIONS ON
THE INTERNATIONAL LAW COMMISSION'S DRAFT RULES ON
THE NON-NAVIGATIONAL USES OF INTERNATIONAL WATERCOURSES
"MANAGEMENT AND DOMESTIC REMEDIES"**

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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
Colloquium on International Law**

**University of Colorado
School of Law
Boulder, Colorado**

October 18, 1991

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O B S E R V A T I O N S O N
THE INTERNATIONAL LAW COMMISSION'S DRAFT RULES ON THE
NON-NAVIGATIONAL USES OF INTERNATIONAL WATERCOURSES

"MANAGEMENT AND DOMESTIC REMEDIES"

By Sergei V. Vinogradov*

I. INTRODUCTION

The final part of the draft rules adopted by the International Law Commission, Part VI, which is under consideration here, is entitled "Miscellaneous Provisions". That speaks for itself. It comprises a set of articles some of which were elaborated and adopted only recently while others were transferred from different parts of the draft. The lack of a generalizing idea devoids this part of inner logic and structural integrity typical for the other parts of the text. This remark, however, does not mean that these provisions are unimportant and do not deserve attention and close examination.

In general terms, provisions of Part VI can be divided into three categories, concerning respectively: management of international watercourses (arts. 26-28), exchange of data and information (arts. 30 and 31) and domestic remedies (art. 32). It is along this line that the further examination of the draft rules will proceed.

II. MANAGEMENT OF INTERNATIONAL WATERCOURSES.

Among three articles which form this category, the

most important is Article 26 entitled "Management". It reads:

1. "Watercourse States shall, at the request of any of them, enter into consultations concerning the management of an international watercourse, which may include the establishment of a joint management mechanism.

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2. For the purposes of this article, "management" refers, in particular, to:

(a) planning the sustainable development of an international watercourse and providing for the implementation of any plans adopted; and

(b) otherwise promoting rational and optimal utilization, protection and control of the watercourse". 1)

Since the International Law Commission has acknowledged in general the essentially "shared" character of international watercourses and subsequently the interdependence of the community of States sharing them, the introduction of this provision in the draft rules seems to be fully justified. Although very general in its scope and content, especially if compared with an article proposed by the Special Rapporteur Professor Stephen McCaffrey in his sixth report, 2) this provision reflects the generally recognized need for integrated management of an international watercourse for the benefit of all riparian States. It is obvious that any attempt at codification and progressive development in any particular sphere of international law has to be based on certain

fundamental concepts. The essential underlying concepts in this case include a general obligation of States to co-operate (set forth in article 8 of the draft) and an objective of optimal and rational utilization of water resources of international watercourses (reflected in article 5).

From a conceptual point of view the adoption of this provision reflects a visible shift from the doctrine of non-harmful use of the State's territory (or limited territorial sovereignty) to the concept of the community of watercourse States. This concept was applied by the Permanent Court of International Justice in its well-known River Oder decision, which spoke in terms of "a community of interest of riparian States". 3) It was endorsed subsequently in a number of international agreement, resolutions and recommendations, as well as in legal doctrine. 4)

This concept may well be regarded as derived from the principle of co-operation, which forms the foundation of integrated basin management. There is no need to dwell upon the necessity and the role of the integrated approach to the development of international watercourses. A great deal has been written in this respect. 5) Suffice it to say that mutual co-operation of watercourse States has in many cases led to a more efficient use of water resource shared by them than otherwise would be possible. An integrated approach, which can be regarded as a logical result of the recognition of the growing economic as well as ecological interdependencies across national boundaries will improve "the consideration by watercourse States of modalities of management that are

appropriate to the individual States and watercourses in question". 6) From the legal point of view the utilization of the integrated management approach may help to mitigate or reconcile the somewhat inherent contradiction between two fundamentals of the law of international watercourses: the principle of equitable utilization and the rule of "no appreciable harm". 7)

After having been introduced by the Special Rapporteur in his sixth report, article 26 has undergone drastic changes. The Commission's Drafting Committee managed to dispose of practically all controversial provisions and wording of the proposed article, while leaving intact its main idea: the need for co-operation of riparian States in managing their shared water resources. As was already mentioned, the article appears to be extremely general, thus corresponding to the "residual" nature of the draft rules.

Paragraph 1 provides nothing more than a not very stringent obligation of States "to enter into consultations concerning the management of an international watercourse" at the request of any of them. This request is not conditioned, however, by any objective element, which in the view of some members of the Commission was not entirely satisfactory. On the other hand, introduction of any such conditions could make appropriate provision even less obligatory if not illusory.

The watercourse States are not obliged to "manage" the particular watercourse or to establish a joint management mechanism. It is quite obvious. In fact, it is rather difficult to develop a sufficiently convincing argument that

there are any obligations of this sort in general international law. Although nothing precludes the Commission from defining and particularizing general principles, including the duty to co-operate, still such obligations could be regarded at present only in terms of *lex ferenda*, that goes beyond the scope of the Commission's mandate.

The text of paragraph 1 is flexible enough to be acceptable to States with different and even divergent positions with respect to consultations and their possible legal consequences. The objective of the Special Rapporteur Professor McCaffrey had been to formulate this paragraph in such a way as "to strike a fair balance between a simple recommendation to enter into consultations and an obligation to enter into "negotiations" as had been recommended by the second Special Rapporteur in his third report". 8) It can go without explanation that the obligation to enter into consultations is not entirely the same as a duty to negotiate, since consultations do not necessarily lead to negotiations.

The obligation to enter into consultations also does not presuppose the obligation to achieve some particular result. The outcome of the consultations may be different and is left by the article in the hands of the States concerned. One of the possible consequences of such consultations may be the establishment of a joint management mechanism. The choice of the term "mechanism" instead of a "joint organization for the management", is quite understandable. The article must focus not on the creation of a joint organization but rather on joint management which could take different forms. Their range

is wide enough: from ad hoc or regular meetings of the representatives of the watercourse States to joint projects and programs, bilateral arrangements and, where deemed necessary and appropriate, the establishment of permanent institutional machinery.

Although the notion of "management" is the very essence of article 26 there is no concise definition of this term as might be expected. Instead of this, paragraph 2 of the article points out in general terms "the most common features of a program of management of an international watercourse". 9) They include, inter alia, planning the development of a watercourse so that it may be sustained for the benefit of watercourse States and their population and implementation of such plans jointly or individually.

One can ask: why did not the Commission try to produce a comprehensive definition of the term "management" as was requested by some of its members and governments' representatives in the Sixth Committee? Was it a result of its inability to do so, or just an unwillingness to be involved in time-consuming and unproductive deliberations?

This approach of definition by reference, however controversial it is, can be justified in view of the difficulties connected with defining the term "management", which is widely used in different meanings in literature and legal instruments in relation to the exploitation and development of natural resources. For example, several provisions of the 1982 United Nations Law of the Sea Convention contain the notion of management with regard to

living marine resources although without any attempt to clarify its exact content. 10)

Professor Guillermo Cano, for example, defines natural resources management, as "the action of man aiming at their utilization or at his protection against their harmful effects, including all successive steps from the exploration and inventory thereof to their ultimate re-use or restoration after use". 11) In his view natural resources management is a process which must cover all steps and activities required for policy implementation, including: inventory, exploration and monitoring of existing resources; evaluation (economic appraisal of natural resources); policy-making; planning (for implementation of a prior policy decision); legal regulation and control; development (the executive or operational stage); recovery and restoration. 12) It is evident that according to this approach, "management" is regarded mainly as an administrative process, a view which is shared by other authorities in this field. 13)

On the other hand, water management is deemed also in more technical context, as a discipline which deals with problems of occurrence, acquisition and use of water resources. 14) The components of water management embrace: development of water resources (including, in particular, the construction of storage reservoirs, drilling of test holes for accessible groundwater, etc.); supplying the population, industry and agriculture; use of water power; navigability of streams (including construction of shipping canals); regard for the quality of water; flood protection; construction of

municipal sewers; care of recreation areas; etc. The complex of water management includes also maintenance and operation of structures and installations, planning, data collection and related activities. All these elements form a complex whole which must be kept in dynamic balance. 15) Thus, this approach sees legal-institutional and administrative components as important but not the only aspects of water management, which of course do not exhaust its content.

In his sixth report Professor S. McCaffrey proposed an article with a more or less complete list of functions which, in his view, were covered by the term "management". Derived from various international arrangements concerning the establishment of international watercourse organizations and commissions, they in practice could be regarded as powers and functions entrusted to such joint institutions rather than as the principal elements of "management" in the exact meaning of this term.

Moreover, the Special Rapporteur has proposed also to include in this article (as paragraph 3) a list of additional functions which go beyond management, per se, such as: fact-finding, submission of recommendations and reports, and even serving as a forum for consultations, negotiations and other procedures for peaceful settlement of watercourse States' controversies.

In the course of extensive discussions in the Commission and in the Sixth Committee it was, however, found more appropriate to change the chapeau of the article as well as to dispose of this list and to replace it with more general

provisions set forth in subparagraphs (a) and (b). Together, as the Commission's commentary puts it, "they would include such functions as: planning of sustainable, multi-purpose integrated development of international watercourses; facilitation of regular communication and exchange of data or information between watercourse States; and monitoring of international watercourses on a continuous basis." 16) This enumeration, of course, is not exhaustive. Moreover, the wording of the sub-paragraph (b) ("... otherwise promoting rational and optimal utilization, protection and control of the watercourse") permits the inclusion of practically all possible components of water management, no matter what interpretation of this term is applied.

On the other hand, the Professor McCaffrey's work in outlining the main functions that may be entrusted to joint institutions, was not at all futile. It should simply be left to the parties to any future watercourse agreement to define those functions, from his list, which should obtain in the agreement between them.

Regulation of international watercourses, or "river training" as it was called earlier, is generally considered as one of the most important aspects of water management. Judge Schwebel made the following observation concerning the role of regulation: "Regulation, not itself a use of the waters, seeks to tame the watercourses rampages, seasonal or otherwise; to store waters for later use, such as irrigation; to maintain the flow necessary for "firm" hydro-power generation; to provide scouring and minimum flows for dilution of pollutants;

to sustain navigation, timber floating and fisheries; and to protect hydraulic works and other facilities and structures such as docks and bridges". 17) Thus, regulation is a necessary and sometimes indispensable prerequisite and component of effective management of international watercourses.

Control of the flow of an international watercourse by means of regulation permits riparian States to use it in most advantageous way, satisfying their needs and purposes. It allows them not only to extract maximum benefit but also to eliminate or mitigate hazards connected with utilization of their shared water resources. On the other hand, regulation undertaken within the boundaries of one riparian State irrespective of its extraterritorial effects and possible consequences for the others can result in serious controversies and conflicts between watercourse States. As Professor McCaffrey quite correctly points out, "the fact that river regulation is at once necessary for optimum utilization and potentially harmful makes cooperation between watercourse States essential." 18)

It is on this premise that the former Special Rapporteur S.Schwebel raised this issue as a special subtopic in his third report, and proposed an article concerning regulation for inclusion in the draft rules. 19) A few years later professor McCaffrey as his successor also addressed this question following in his deliberations the same lines that were set forth by Judge Schwebel. 20)

Regulation of international watercourses is dealt with in

article 27 of the ILC's draft rules which reads:

"1. Watercourse States shall cooperate where appropriate to respond to needs or opportunities for regulation of the flow of the waters of an international watercourse.

2. Unless they have otherwise agreed, watercourse States shall participate on an equitable basis in the construction and maintenance or defrayal of the costs of such regulation works as they may have agreed to undertake.

3. For the purposes of this article, "regulation" means the use of hydraulic works or any other continuing measure to alter, vary or otherwise control the flow of the waters of an international watercourse".

The thrust of this article is quite clear. Closely related to the provisions of article 26 on management it specifies further the general obligation of cooperation provided for in article 8. In fact, articles 26 and 27 relate to the same subject, i.e. the joint utilization of an international watercourse by riparian States. In this connection it may appear rather unreasonable to treat management and regulation separately. But, on the other hand, in view of the significance commonly attached to regulation by watercourse States there are no serious arguments against dealing with this issue in a special article.

The content and the wording of article 27 is an outcome of extensive analysis of appropriate international State practice undertaken by Judge Schwebel and Professor McCaffrey. A number of international arrangements concerning regulation of international watercourses is impressive. 21) But of

particular importance in this respect are nine articles on the Regulation of the Flow of Water of International Watercourses adopted by the International Law Association at its fifty-ninth Conference, in 1980, 22) which may be considered as a restatement of the international law in effect. As such, ILA articles contain certain general provisions some of which were reflected in article 27. The discussion of this topic in the Sixth Committee has revealed once more to what extent the positions of States with respect to legal norms in general and to regulation provision in particular were conditioned by their geographic positions. Thus, on the one hand, attention was drawn to the negative impact that regulation of a watercourse could have on the territory of States situated downstream. It was argued, that in many cases the construction of regulation works upstream has been a source of conflict between States. Consequently, a proposed article would have to reconcile the traditional concept of the use of international watercourses, based on the assumption that the principle of State Sovereignty should prevail, with the current evolution in the rights and obligations of States in exercising their territorial competence. 23)

On the other hand, a view was expressed that the draft had to protect not only the interests of downstream States by attributing liability solely to upstream States, but also had to take into account the water and energy requirements of watercourse States as a whole. 24)

Article 27 appears to be acceptable to both sides. It is based on the assumption that the best means to regulate

watercourses is through co-operation of riparian States while not imposing any far-reaching obligations upon them. According to this, as the ILC's commentary puts it, the article sets forth the basic obligation in respect of regulation (paragraph 1), the duty of equitable participation as it applies to regulation (paragraph 2), and a definition of the term "regulation" (paragraph 3).

Whereas provisions contained in the first and the third paragraphs do not pose any particular difficulties with respect to their interpretation and application, it is not the same with paragraph 2.

Thus, paragraph 1 obliges States to cooperate, where appropriate, in response to those needs and opportunities for regulation that really exist. This provision, if we compare it with an article proposed by Professor McCaffrey, which envisaged cooperation only "in identifying needs and opportunities," significantly changes the scope of States' obligation with regard to regulation. But, at the same time, the obligation itself is formulated in more mandatory terms than in the proposed article.

Paragraph 3, which defines the term "regulation" was inspired by and is analogous to definitions elaborated by the ILA in its draft rules and proposed by Judge Schwebel in his third report. It was added at the request of some members of the Commission and seems quite clear and unambiguous.

The same cannot be said about the second paragraph, which is a residual rule and represents a specific application of the general obligation of equitable participation contained in

article 5. According to the Commission's commentary, "it does not require watercourse States to "participate", in any way, in regulation works from which they derive no benefit. It would simply mean that when one watercourse State agrees with another to undertake regulation works, and receives benefits therefrom, the former would be obliged, in the absence of agreement to the contrary, to contribute to the construction and maintenance of the works in proportion to the benefits it received therefrom" 25) (emphasis added).

Certain questions arise in connection with paragraph 2 and the Commission's commentary. First of all, there is no doubt that according to general international law nobody can oblige States to participate in regulation works from which they derive no benefit. A less obvious situation, which the Commission failed to address in its commentary, can occur in the case of a watercourse State deriving definite and sometimes significant advantages from regulation undertaken by another riparian State. While discussing an article proposed by Professor McCaffrey some members of the Commission expressed the view that its wording could be construed to mean that, even in the absence of an agreement, watercourse States would be expected to pay towards a project simply because they happened to derive benefits from it. Although the Commission left the wording of paragraph 2 almost unchanged and thus did not remove completely the premises for such conclusions, it is evident that neither the Special Rapporteur nor the ILC envisaged such an interpretation of this provision. In such a case as well, the State which receives benefits is not under

obligation to share the costs of regulation works that have been undertaken by another riparian State.

If after a riparian State has been informed of another State's plans concerning regulation and agrees to them, perhaps even acknowledging them as beneficial to itself, does this oblige them to participate in cost-bearing? The answer must be in the negative inasmuch as consent or absence of opposition to proposed measures does not constitute an agreement to undertake regulation works as it is provided for in paragraph 2.

Thus, the prior agreement seems to be *conditio sine qua non*, that is the indispensable condition in any case where regulation works undertaken by one riparian State may involve the question of payment on the part of another watercourse State. In this respect the very necessity of this paragraph was questioned by some commentators. In their view it was inconceivable that a watercourse agreement on regulation would neglect the provision for the sharing of the burdens. On this premise it was argued that the residual rule contained in this paragraph was superfluous.

This position is not devoid of logic. The Commission in its commentary stipulates that the provision of paragraph 2 is a specific application of the general obligation of equitable participation. Actually, this provision was derived from the ILA rules on regulation of international watercourses and in slightly modified form is analogous to article 4 of these rules. 26) The question arises however why Special Rapporteurs and the ILC have chosen this particular article and not some

other no less important provision of the ILA rules, which could also be regarded as such a special application of general obligations. For example, the obligation not to cause appreciable harm was developed in article 6, which obliges States not to undertake regulation that would cause other basin States substantial injury unless those States were assured of enjoyment of the beneficial uses to which they were entitled under the principle of equitable utilization.

In fact, no sufficiently convincing argument has been put forward in favour of this particular provision which was included in paragraph 2 of article 27. In view of the fact that there still exist some doubts with regard to the principle of equitable participation as a general rule of the law of international watercourses 27) this provision could be replaced by the more general obligation for the water course States to reach an agreement on the construction and maintenance of works relating to the watercourse.

Articles 28 and 29 of the draft, which deal with the protection and safety of hydraulic installations, fall completely within the context of management and regulation of international watercourses. 28) At a first glance they may appear too specific to be included in a text of such a general character. On the other hand, the Commission is free to formulate some more concrete obligations on issues of common interest and particular significance for watercourse States.

Although hydraulic works or installations are erected as a rule within the territory of one riparian State, under its jurisdiction and control, this does not mean that other

watercourse States might not be concerned with their safety and normal operation. It is clear in view of the fact that such installations are usually considered to contain "dangerous forces" which if released may inflict substantial damages to other riparian States and their population. Furthermore, as Judge Schwebel puts it in his third report, "system States have a legitimate interest in the safety and security of water-related installations, and not simply because of their potential for death and destruction. More and more projects are part of a regional or system-wide plan for development, control and environmental protection, with benefits and costs, direct and indirect, to each participating system State." 29)

This issue was addressed by all Special Rapporteurs, although their approaches to it were not the same. Traditionally the emphasis in States' practice and international legal doctrine was on the problem of security of hydraulic installations in time of armed conflict. It was reflected, in particular, in the third report of Judge Schwebel. 30) There are several provisions of general international law (for example, Protocols Additional to the Geneva Convention of 1949) which deal with the protection of objects indispensable to the survival of the civilian population, including water installations and irrigation works, in time of armed conflict.

On the other hand, other issues of concern, such as acts of sabotage by terrorists, as well as negligence or forces of nature, which may threaten to an equal extent the safety of water installations, have not been given much attention at the

international level. "Lacking generally is authoritative articulation of general principles of co-operation in the fields of public safety and security of water installations, as is expression of the extent of a system State's possible responsibility for failure to use its best efforts to keep this kind of harm from happening". 31)

Although this does not mean that States have never addressed this problem in their treaty practice, 32) the absence of any generally recognized obligations with respect to the safety of hydraulic installations in peacetime is apparent. The need to fill this gap in legal regulation may explain the shift towards this issue made by Judge Evensen and followed by professor McCaffrey.

Article 28, which has undergone considerable changes in the course of its discussion within the ILC, 33) is a step, however modest, in the right direction. It lays down two obligations of a substantive and procedural character, embodied accordingly in the first and the second paragraphs.

Paragraph 1 obliges watercourse States, within their respective territories, to employ their best efforts to maintain and protect installations, facilities and other works related to an international watercourse. This requirement stems from the well established notion of due diligence according to which States are under the obligation to take all necessary measures to ensure that activities within their jurisdiction do not cause appreciable harm to other States. In a given case, according to the commission's commentary, "watercourse States may fulfil this obligation by doing what

is within their individual capabilities" to maintain and protect water installations and works as well as by taking all reasonable precautions to protect such works from foreseeable kinds of damage due to forces of nature, such as floods, or to human acts, whether wilful or negligent". 34)

The second paragraph is procedural, providing for consultations of watercourse States with regard to the safe operation or maintenance of installations, facilities or other works as well as their protection from wilful or negligent acts or the forces of nature. The consultations are initiated by the request of watercourse State "which has serious reason to believe that it may suffer appreciable adverse effects" as a result of improper operation, maintenance or inadequate protection of the installations or other works.

Hence, this paragraph sets forth two objective standards which may serve as a safeguard against possible attempts on the part of one watercourse State to abuse its position by using the proposed consultations as an excuse to intervene in the activities within the jurisdiction of another watercourse State. Firstly, it is the requirement that the watercourse State must have a "serious reason to believe" that it may suffer adverse effects, i.e. that the danger has to be real, although not imminent. Secondly, the obligation to enter into consultations is triggered only when there is a threat of "appreciable adverse effects". But, according to the ILC's commentary, the threshold established by this standard is lower than that of "appreciable harm" 35) which makes it easier for a concerned watercourse State to initiate

consultations.

Thus, article 28 can be regarded as a successful attempt to strike a balance between obligation not to interfere in the internal affairs of States, based on the principle of State sovereignty, and the notion of community of interest of riparian States.

II. DOMESTIC REMEDIES.

The use of local courts and administrative bodies in resolving transboundary pollution problems is gradually becoming an important element of international legal regulation in the field of environmental protection and in gaining substantial support in the States' practice and legal doctrine.

This private-remedies system has certain advantages in comparison with inter-State solution of transboundary environmental problems. As Finnish representative in the Sixth Committee observed, "several reasons spoke for domestic procedures at private level: they were usually less costly; they involved individuals and companies actually engaged in the relevant activities; they provided a more effective incentive to comply with the rules; in certain cases they were faster than diplomatic channels; they led to legally binding and enforceable determinations of the relevant parties's obligations; and they encouraged regional cooperation in the management of the particular watercourse system." 36)

Hence, it is not surprising that this issue was addressed by Professor McCaffrey in his sixth report, although it has not been mentioned in the outline on the basis of which the Commission was working. In a view of the Special Rapporteur, there was certain merit in having actual and potential watercourse problems resolved, in so far as possible, through civil law procedure which usually brought relief to those suffering environmental harm more expeditiously than diplomatic procedures and could prevent problems from

escalating and becoming unnecessarily politicized. 37)

So, among the eight additional articles proposed by the Special Rapporteur in his sixth report, three (articles 2, 3 and 4) had direct relation to the question of private remedies. 38) The extensive discussions within the ILC and the reduction work undertaken by its Drafting Committee has resulted in 1991 in the adoption of article 32 ("Nondiscrimination"). In fact this article is composed of what was left from these three articles after their careful and somewhat critical discussion in the Commission.

Article 32 stipulates that watercourse states are under the obligation not to discriminate on the basis of nationality or residence in granting access to judicial and other procedures, in accordance with their legal systems, to any natural or juridical person who has suffered appreciable harm as a result of an activity related to an international watercourse or is exposed to a threat thereof.

According to the ILC's commentary, "the gravamen of this article is that where the watercourse States provides access to judicial or other procedures to their citizens or residents, they must provide access on an equal basis to non-citizens and non-residents." 39) The article is not confined exclusively to cases involving transboundary adverse effects, but covers as well situations such as that "of a foreign national who had suffered harm in the territory of the watercourse State in which the source of the harm was situated." 40)

The wording of the article, and in particular its phrase

"has suffered appreciable harm... or is exposed to a threat thereof", reveals another important aspects of this provision. As the commentary puts it, the article is applicable "both to cases involving actual harm and to those in which the harm is prospective in nature." 41) According, the commentary adds, "since cases of the latter kind can often be dealt with most effectively through administrative proceedings, the article, in referring to "judicial and other procedures", requires that access be afforded on a non-discriminatory basis both to courts and to any applicable administrative procedures." 42)

The rule, contained in article 32, and is known as a principle of equal access, and is not a new one in inter-State practice. It was included in some international agreements, for example, the 1974 Nordic Convention on the Protection of the Environment, 43) and a number of recommendations of international organizations. Of particular importance in this respect are the recommendations of the Organization of Economic Co-operation and Development (OECD), which laid down certain basic principles of private-remedies system, 44) including mentioned above. The analogous provision is enclosed in the UNEP Principles of conduct in the field of the conversation and harmonious utilization of shared natural resources (Principle 14) as well as in the legal principles of environmental protection and sustainable development drafted recently by the Experts Group on Environmental Law of the World Commission on Environment and Development (WCED) (Article 20) 46).

Some points are pertinent to the provision of article 32.

Firstly, there can be noticed certain discrepancy between the title of the article "Non-discrimination") and its subject and content. Traditionally the principle of non-discrimination has been understood mainly in terms of equal regard to actual as possible adverse effects in the country of origin of the pollution and in the countries exposed to it. 47) The comments accompanying article 13 ("Non-discrimination between domestic and transboundary environmental interferences")* proposed by the WCED's Experts Group explains that "according to this principle States are obliged vis-a-vis other States, when considering under their domestic policy or law the permissibility of environmental interferences or a significant risk thereof, to treat environmental interferences of which the detrimental effects are or may be mainly felt outside the area of their national jurisdiction in the same way as, or at least not less favourably than, those interference of which the detrimental effects would be felt entirely inside the area under their national jurisdiction." 48) The same conclusion can be drawn from the analysis of the relevant provisions of other legal instruments. Thus, as Robert Stein once observed, "the principle of nondiscrimination is an application of an adaptation of the "Golden Rule" Do not do unto others what you do not want to be done unto yourself." 49)

On the other hand, the principle of non-discrimination, at least as it is formulated in some legal documents, embraces, inter alia, a rule of equal right of access. For example, in accordance with the OECD's Recommendation C(74) 224 "countries should initially base their action on the

principle of non-discrimination," which, among other things, provides that "persons affected by transfrontier pollution should be granted no less favourable treatment than persons affected by a similar pollution in the country from which such transfrontier pollution originates." 50)

The same approach may be found in the Restatement (Third) of Foreign Relations Law of the United States 51) which speaks in terms of non-discrimination against foreign nationals.

And still, the principle of non-discrimination is considered mostly as a broad principle of inter-State relations, which may include but is not limited to the rule of equal access. Although this inconsistency of article 32 is not significant and has mainly technical meaning it can, nevertheless, lead to certain confusion and misunderstanding.

Secondly, the rule of equal access can pose serious problems for States as regards its practical implementation. As WCED's Experts Group on Environmental Law pointed out "while there are good reasons why in certain cases resort to domestic proceedings in the State of origin is to be preferred over the intergovernmental approach, such proceedings will not always be possible." 52)

One representative in the Sixth Committee while acknowledging that individuals who might potentially be affected would understandably wish to be involved in the preparation in other States of decisions designed to avoid hazards, stressed at the same time that a legal claim to be involved similar to that granted by the national law of other States to their own national organizations would place a great

strain on such procedures. 53)

Furthermore, the adoption of this rule may require significant changes in the legislation of various countries which is not always welcomed and is connected with many difficulties.

The States' practices vary significantly with regard to the rule of equal access. In some countries, such as France or the Netherlands, (potentially) affected foreign persons will have locus standi, or access to and treatment in administrative or judiciary proceedings. In the others, on the opposite, "the administrative authorities and/or courts take the view that the scope of the applicable administrative law is strictly territorial, so that foreign interests are not considered to be legally affected not protected by that law with the consequence that the foreign complainants are denied locus standi." 54)

At present only some States have accepted this rule either by introducing it into their national legislation or by becoming a party to the international agreement. Practise shows that this rule is appropriate mainly for a small group of integrated States and can be most effectively applied by the States with homogeneous or similar social, political and legal systems and traditions, as in the case with Scandinavian or OECD countries. Hence, as it was pointed out in the Sixth Committee, this provision was virgin territory for many States and the national legislation and different legal traditions of member States suggested that it might be possible to reach agreement only on the lowest common denominator, especially as

regards the status of private individuals. 55) The question which arises in this respect and needs to be examined thoroughly is whether the provision of article 32 corresponds to this requirement.

It is on this premise that the last and more general comment must be made. At present there is no universal legal instrument in effect that would establish the rule of equal access as a generally recognized principle, nor has it been accepted by majority of States in their national legislation. Rather, it was endorsed in a number of recommendations and other legal documents of "soft law" character. It does not mean, of course, that this non-obligatory norm may not ultimately acquire binding force through the process of customary law formation. But the lack of opinion juris as a necessary element for creating customary rules does not permit the unequivocal conclusion that the rule of equal access has emerged as a norm of general international law. Even the ardent protagonists of this rule acknowledge that "a right of the individual neighbour residing on the other side of the frontier to equal access to administrative and judicial procedure cannot be seen as part of international law in the field of the protection of the environment". 56)

Given these circumstances, it is rather questionable whether this rule will be acceptable to the States as a "residual" norm designed for general application.

III. EXCHANGE OF DATA AND INFORMATION

Two articles contained in Part VI fall into this category

- article 30 "Indirect procedures" and article 31 "Data and information vital to national defence and security". Both articles are complementary to the procedural provisions of the ILC's draft and deal with exceptional cases related to the exchange of data and information.

Article 30 focuses upon the situation where there are serious obstacles to direct contacts between watercourse States. In such a case, the States concerned are required to fulfil their obligations of cooperation, including exchange of data and information, notification, communications and negotiations, through any indirect procedures accepted by them.

The idea of this provision is clear enough to require extensive deliberations. This article deals with the circumstances where there are no direct contacts between riparian countries, such as an absence of diplomatic relations or an armed conflict. There are such instances, as, for example, pollution incidents, floods, and other water related hazards, when even in the absence of sustained relations between watercourse States, some form of contacts is indispensable. According to the ILC's commentary, "there will often be channels which the States concerned utilize for the purpose of conveying communications to each other". 57) The range of such channels embraces good offices of third countries or international organizations, including joint water management institutions, armistice commissions, etc.

Article 31 is an exception to procedural rules governing the exchange of information between watercourse States. It

excuses a watercourse State providing data or information vital to its national defence or security. At the same time, that State is obliged to co-operate in good faith with the other watercourse States with a view to providing as much information as possible under the circumstances.

Originally this provision was submitted by Professor McCaffrey in his fourth report as a part of a more general article on "regular exchange of data and information." 58) Subsequently it appeared as a separate article and later on was transferred to Part VI.

The general thrust of this article is evident and fully justified. Following, in principle, the same pattern as was proposed by Judge Schwebel in his third report 59), the ILC addressed a very sensitive issue which has always been a matter of concern of sovereign States: confidentiality of "classified" information. The adoption of this article can be regarded as an attempt to strike a balance between the legitimate interests of all the States concerned. As Judge Schwebel puts it, "the very real needs in the information and data field when dealing with shared water resources must here be balanced against this undeniable interest of the system State to retain confidentiality in sensitive circumstances". 60)

Thus, in the view of the Commission, while States cannot realistically be expected to disclose information of particular importance for them, at the same time, other watercourse States should not be devoid of information concerning measures that may affect them. So, the bulk of

article 31 is directed towards promotion of co-operation between the watercourse States even in cases where there exist certain restrictions based on domestic legislation.

The commentary of the Commission explains that "the obligation to provide "as much information as possible" could be fulfilled in many cases by furnishing a general description of the manner in which the measures would alter the condition of the water of affect other States". It adds also that the "circumstances" referred to in the article "are those that led to the withholding of the data or information". 61)

The guiding principle of this article is good-faith cooperation. Although the notion of "good faith" lacks the necessary precision, the emphasis on this principle can be explained by the fact that the concept of a State secret was open to abuse. So, as it was pointed out by one of ILC's members, "the reference to "good faith" was thresfore meant to serve as a safeguard". 62) It is worth mentioning in this respect that the OECD's report on transfrontier pollution regards good faith as the key principle in the matter of information and consultation. "On this account it need not be stressed that a country would depart from this principle, one underlying all neighbourly relations, were it to fall back on a too extensive "State-secret" concept, thus making entirely void information and consultation of its substance". 63)

Hence, the inclusion of the "good faith" principle within the context of article 31, no matter how ambiguous this notion can be regarded, is fully justified and commendable.

Another aspect of article 31 which is less evident and

needs to be clarified concerns the nature of restricted information. Under this article the information which should not be divulged to other watercourse States is defined as "vital to the national defence and security", i.e. mainly strategic or military types of information. Due to this, other types of data and information which do not correspond to this qualification but, nevertheless, can be considered as "classified" are left beyond the scope of the exception provided for in article 31.

This approach differs considerably from that of Judge Schwebel who has acknowledged that "the matter of "trade secrets," national or corporate, has also come up in this context, as has a reluctance to divulge certain aspects of economic planning or local socio-economic conditions". 64) On this premise he proposed to divide the duty into two categories. "If the matter be vital from the standpoint of national defence, the system State is excused on the condition that it furnish as much of the requested information or data... as will be sufficient to appraise the other system State of the basic situation... If, on the other hand, the information or data be of a lesser, "restricted", character, whether economic, military or social, the duty to furnish is not excused where the other system State can show that it is prepared to protect the restricted status and its laws, regulations and practices give assurances that the information or data will in fact be so protected". 65)

This "double standard" approach, although rather complicated, was flexible enough in order to respond

adequately to various problems which may arise in connection with classified information.

This approach was not endorsed, however, either by the present Special Rapporteur, or by the Commission. In fact, Professor McCaffrey has acknowledged that "consideration should also be given to the related matter of information that does not, strictly speaking, relate to national security, but may be classified as a "trade secret" or relate to such possibly sensitive matters as economic planning or socio-economic conditions". 66) But this did not lead to any changes in the original draft proposed by Professor McCaffrey.

The Commission in its commentary did not provide any argument in favour of its preference. In this connection, it may be asked whether the adoption of this particular formulation mean that all other information, even classified under national laws, which is not qualified as "vital" is to be disclosed at the request of any other watercourse State. Would not it be more appropriate to elaborate less far-reaching provision 67) - leaving it to the States concerned to work out more stringent obligation?

These questions have to be considered carefully before this provision becomes ultimately an integral part of the future framework legal document.

1) Draft Report of the ILC on the work of its forty-third session, Chap. III, A/CN.4/L.463, July 1991, p.161.

2) See S. McCaffrey, Sixth Report on the Law of the Non-Navigational Uses of International Watercourses, U.N. Doc. A/CN. 4/427 (1990). Draft Article 26 "Joint institutional management" provided as follows:

1. Watercourse States shall enter into consultations, at the request of any of them, concerning the establishment of a joint organization for the management of an international watercourse (system).

2. For the purposes of the present draft article, the term "management" includes, but is not limited to, the following functions:

(a) Implementation of the obligations of the watercourse States under the present draft articles, in particular the obligations under parts II and III of the draft articles;

(b) Facilitation of regular communication, and exchange of data and information;

(c) Monitoring international watercourse(s) (systems) on a continuous basis;

(d) Planning of sustainable, multi-purpose and integrated development of international watercourse(s) (systems);

(e) Proposing and implementing decisions of the watercourse States concerning the utilization and protection of international watercourse(s) (systems); and

(f) Proposing and operating warning and control systems relating to pollution, other environmental effects of the utilization of international watercourse(s) (systems), emergency situations, or water-related hazards and dangers.

3. The functions of the joint organization referred to in paragraph 1 may, include, in addition to those mentioned in paragraph 2, inter alia:

(a) Fact-finding and submission of reports and recommendations in relation to questions referred to the organization by watercourse States; and

(b) Serving as a forum for consultations, negotiations and such other procedures for peaceful settlement as may be established by the watercourse States".

This provision, in its turn, parallels the articles on the same subtopic that were submitted by two former Special Rapporteurs: Mr. Schwebel (See S. Schwebel, Third Report on the Law of the Non-Navigational Uses of International Watercourses, Yearbook of the International Law Commission 1982, vol. II, (Part One), 65-192, U.N. Doc. A/CN.4/348) and Mr. Evensen (See J. Evensen, Second Report on the Law of the Non-Navigational Uses of International Watercourses, Yearbook... 1984, vol. II (Part One), U.N. Doc. A/CN.4/381).

3) Territorial Jurisdiction of the International Commission of the River Oder, (1929) P.C.I.J., ser.A, No.23.

4) See, e.g., J.Lipper, Equitable Utilization, in The Law of International Drainage Basins, A.H. Garretson, R.D. Hayton and C.J. Olmstead, eds. Dobbs Ferry, N.Y. (Oceana Publications, 1967); J.G. Lammers, Pollution of International Watercourses, The Hague, (Nijhoff, 1984).

5) For the most extensive analysis of the international practice and legal doctrine see S.Schwebel, Third Report..., pp.175-180; S.McCaffrey, Sixth Report..., pp. 3-33.

6) Supra, note 1, p. 161.

7) See, e.g., C.Bourne, Protecting the Environment: Fresh Water Resources, in From Coexistence to Cooperation: International Law and Organization in the Post-Cold War Era. E.McWhinney, D.Ross, G.Tunkin and V.Vereshchetin, eds. Dordrecht, Boston, London (Nijhoff, 1991), pp. 138-141. S.MacCaffrey, International Liability and International Watercourses: The Work of the International Law Commission Relating to International Pollution, in International Law and Pollution, D.Magraw, ed. Philadelphia, (Univ. of Pennsylvania Press, 1991), pp. 105-106.

8) Topical summary of the discussion held in the Sixth Committee of the General Assembly. Report of the ILC on the work of its forty-second session (1990). U.N.Doc. A/CN.4/L.456 (1991), p.87.

9) Supra, note 1, p. 162.

10) See The Law of the Sea. United Nations Convention on the Law of the Sea with Index and Final Act of the third United Nations Conference on the Law of the Sea - U.N., N.Y., 1983. Articles 56 (1) (a); 61 (2); 118; 120; 123 (a); 277 (a); 297 (3) (a).

11) G.J. Cano, A Legal and Institutional Framework for Natural Resources Management. FAO Legislative study No.9, Rome (1975), p.9.

12) Ibid., pp.9-17.

13) See, e.g., Yang Ch'eng Shih, American Water Resources Administration, N.Y. (1956), vol.1; G.White, Strategies of American Water Resources Management, Ann Arbor, Mich. Univ. Press (1969). See also United Nations, Management of International Water Resources: Institutional and Legal Aspects. Natural Resources/Water Series No.1. It is worth noting that article 15 on the management of international watercourses, introduced by the Special Rapporteur S.Schwebel in his third report, was entitled "Administrative management". S.Schwebel, Third report..., p. 181.

14) M.Holy, Water and the Environment, FAO Irrigation and Drainage Paper No.8, Rome (1971), p.20.

15) Ibid., p.21.

16) Supra, note 1, p. 162.

17) S.Schwebel, Third report..., p.162.

18) S.McCaffrey, Fifth Report on the Law of Non-Navigational Uses of International Watercourses, U.N.Doc.A/CN.4/421/ Add.2 (1989), p.9.

19) Article 12. Regulation of international watercourses. S.Schwebel, Third report., p.164.

20) Article 25 "Regulation of international watercourses" proposed in the fifth report of S.McCaffrey provides as follows:

"1. Watercourse States shall co-operate in identifying needs and opportunities for regulation of international watercourses.

2. In the absence of agreement to the contrary, watercourse States shall participate on an equitable basis in the construction and maintenance or, as the case may be, defrayal of costs of such regulation works as they may have agreed to undertake, individually or jointly."

21) See, e.g., S.Schwebel, Third report..., pp.162-164; S.McCaffrey, Fifth report..., pp.

22) ILA, Report of the Fifty-ninth Conference, Belgrade, 1980, (London, 1982), pp.362-369.

23) See U.N. General Assembly, Sixth Committee Forty-fifth Session, Official Records. U.N.Doc.A/C.6/45/SR.24, p.4.

24) Ibid., U.N.Doc.A/C.6/45/SR. 26, p.17.

25) Supra, note 1, p.167.

26) Article 4 of the ILA articles on the Regulation of the flow of Water of International Watercourses reads as follows: "Unless otherwise agreed, each basin State party to a regulation shall bear a share of its costs proportionate to the benefits it derives from the regulation."

27) See, e.g., the opinion of Mr. Puissechet, representative of France in the Sixth (Legal) Committee of the General Assembly. U.N.Doc.A/C.6/45/SR.25 (1990), p.11.

28) Article 29 is considered under the rubric "Protection and Preservation, Harmful Conditions and Emergency Situations, and Protection of Water Installations."

29) S.Schwebel, Third report..., p.164.

30) Ibid., pp. 164-165.

38) Article 2. Non-discrimination.

In considering the permissibility of proposed, planned or existing activities, the adverse effects that such activities entail or may entail in another State shall be equated with adverse effects in the watercourse State where the activities are or may be situated.

Article 3. Recourse under domestic law.

1. Watercourse States shall ensure that recourse is available in accordance with their legal systems for prompt and adequate compensation or other relief in respect of the appreciable harm caused or threatened in other States by activities carried on or planned by natural or juridical persons under their jurisdiction.

2. With the objective of assuring prompt and adequate compensation or other relief in respect of the appreciable harm referred to in paragraph 1, watercourse States shall co-operate in the implementation of existing international law and the further development of international law relating to responsibility and liability for the assessment of and compensation for damage and the settlement of related disputes, as well as, where appropriate, development of criteria and procedures for payment of adequate compensation, such as compulsory insurance or compensation funds.

Article 4. Equal right of access.

1. A watercourse State of origin shall ensure that any person who has suffered appreciable harm or is exposed to significant risk thereof receives treatment that is at least as favourable as that afforded in the watercourse State of

31) Ibid., p.168.

32) See, e.g., S.McCaffrey, Sixth report, pp.36037,

33) Article (27) proposed by the Special Rapporteur S.McCaffrey in his Sixth report reads as follows:

"1. Watercourse States shall employ their best efforts to maintain and protect international watercourses and related installations, facilities and other works.

2. Watercourse States shall enter into consultations, with a view to concluding agreements or arrangements concerning:

(a) General conditions and specifications for the establishment, operation and maintenance of installations, facilities and other works;

(b) The establishment of adequate safety standards and security measures for the protection of international watercourses and related installations, facilities and other works from hazards and dangers due to the forces of nature, or to wilful or negligent acts.

3. Watercourse States shall exchange data and information concerning the protection of water resources and installations and, in particular, concerning the conditions, specifications, standards and measures mentioned in paragraph 2 of this draft article".

34) Supra, note 1, pp.170-171.

35) Supra, note 1, p.172.

36) Supra, note . A/C. 6/45/SR.24 (1990), p. 13.

37) See McCaffrey, Sixth report..., pp. 48-49.

The articles proposed by the Special Rapporteur provided as follows:

origin in cases of domestic appreciable harm, and in comparable circumstances, to persons of equivalent condition or status.

2. The treatment referred to in paragraph 1 of this draft article includes the right to take part in, or have resort to, all administrative and judicial procedures in the watercourse State of origin which may be utilized to prevent domestic harm or pollution, or to obtain compensation for any harm that has been suffered or rehabilitation of any environmental degradation.

39) Supra, note 1, p. 179.

40) Ibid., p. 180.

41) Ibid., p. 179.

42) Ibid.

43) See article 3 of the Convention on the Protection of the Environment between Denmark, Finland, Norway and Sweden of 19 February 1974. United Nations Treaty Series, vol. 1092, p. 279.

44) See OECD Recommendation on Principles concerning transfrontier pollution, C(74) 224 (1974). Title D -

"Principle of Equal Right of Hearing" - reads as follows:

"Countries should make every effort to introduce, where not already in existence, a system affording equal right of hearing, according to which:

(a) whenever a project, a new activity or a course of conduct may create a significant risk of transfrontier pollution and is investigated by public authorities, those who

may be affected by such pollution should have the same rights of standing in judicial or administrative proceedings in the country where it originates as those of that country;

(b) whenever transfrontier pollution gives rise to damage in a country, those who are affected by such pollution should have the same rights of standing in judicial or administrative proceedings in the country, and they should be extended procedural rights equivalent to the rights extended to those of that country." See also OECD Recommendations on: Equal right of access in relation to transfrontier pollution, C(76)55(Final); implementation of a regime of equal right of access and non-discrimination, C(77)28 (Final), para. 4 (a).

45) Principles of conduct in the field of the environment for the guidance of States in the conservation and harmonious utilization of natural resources shared by two or more States approved in decision 6/14 of the Governing Council of the United Nations Environment Programme (UNEP) of 19 May 1978.

46) See Environmental Protection and Sustainable Development - Legal Principles and Recommendations, London, Dordrecht, Boston (Graham & Trotman/Martinus Nijhoff) (1987).

47) Cf, for example, article 2 of the Annex proposed by Professor McCaffrey in his sixth report, supra, note 38.

48) Supra, note 46, p. 88.

49) R. Stein, "The OECD Guiding Principles on Transfrontier Pollution," 6 Ga. J. Int'l & Comp. L. 250 (1976).

50) Supra, note 44, Recommendation C(74) 224, Title C.

51) See A.L.I., 2 Restatement (Third) of Foreign Relations Law of the United States. Section 602 (2). Accompanying comment explains that subsection (2) applies the principle of non-discrimination against foreign nationals, which requires that "a State in which pollution originates avoid discrimination in the enforcement of applicable international rules and standards, as well as give to foreign victims the benefit of its own rules and standards...". Subsection (2) applies the principle also to remedies.

52) Supra, note 46, p. 121.

53) Supra, note 8, p. 94.

54) See supra, note 46, p. 122.

55) Supra, note , p. 94.

56) A. Rest, Responsibility and Liability for Transboundary Air Pollution, in Transboundary Air Pollution. International Legal Aspects of the Co-operation of States. G. Flinterman, B. Kwiatkowska, J. Lammers, eds. Dordrecht, Boston, Lancaster (1986), p. 322.

57) Supra, note 1, p. 177.

58) See, S. McCaffrey, Fourth report on the Law of the Non-navigational Uses of International Watercourses.

UN D.C. A/CN. 4/412 (1988).

59) See S. Schwebel, Third report..., pp. 119-120.

Article 9 proposed by Special Rapporteur S. Schwebel provides, inter alia:

"Information or data vital to a system State's national defence need not be provided to other system States, provided that the system State declining to provide such information or data co-operates in good faith with the other system State in

order to inform it as fully as practicable under the circumstances. Information and data determined in good faith by a system State to be of a restricted nature only shall be provided to other system States upon request, providing that the requesting system State demonstrates its willingness and ability to safeguard the information or data in a manner consistent with its restricted nature."

60) Ibid., p. 121.

61) Supra, note 1, p. 178.

62) Yearbook... 1988, vol. I., p. 53 (Mr. Beesley).

63) OECD, Transfrontier Pollution and the Role of States, Paris, (1981), p. 23.

64) S. Schwebel, Third report..., p. 121.

65) Ibid., p. 122.

66) Yearbook... 1987, Vol. II, Part One, p. 44.

67) Cf, for example, the analogous provision of Principle 6 (2) of the UNEP Principles of conduct in the field of the environment for the guidance of States in the conservation and harmonious utilization of natural resources shared by two or more States, which reads: "In cases where transmission of certain information is prevented by national legislation or international conventions, the State or States withholding such information shall nevertheless, on the basis, in particular of the principle of good faith and in the spirit of good neighbourliness, co-operate with the other interested State or States with the aim of finding a satisfactory solution." Supra, note 45.

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