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An Assessment of the Work of the International Law Commission**

ABSTRACT

The United Nations International Law Commission recently completed work on its draft on international watercourses. The draft is significant not only because it was produced by the U.N. body responsible for the codification and progressive development of international law, but also because it will be the basis of efforts to prepare a convention on the subject in the fall of 1996. Being only a framework agreement, the draft leaves a number of issues undressed. But it does help clarify the law and thus should promote and strengthen cooperation by states in their use of shared water resources.

INTRODUCTION

After twenty years of work, the International Law Commission of the United Nations (ILC or Commission) at its 1994 session adopted in final form a complete set of thirty-three draft articles on the Law of the Non-Navigational Uses of International Watercourses.¹ The Commission also adopted at that session a companion resolution on transboundary confined groundwater.² The Commission recommended to the United Nations General Assembly that a convention be prepared on the basis of the draft articles, and the General Assembly has accepted this recommendation.³ The effort to draft a convention will begin in the fall of 1996. It is uncertain whether that effort will be successful and, if it is, whether the ultimate product will resemble the ILC's draft. If a

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1. Special Rapporteur for the work of the International Law Commission on the Law of the Non-Navigational Uses of International Watercourses, 1985-1991. *Report of the International Law Commission on the Work of its Forty-Sixth Session*, U.N. GAOR, 49th Sess., Supp. No. 10, at 197, U.N. Doc. A/49/10 (1994) [hereinafter 1994 ILC Report].

2. *Id.* at 326.

3. Draft Articles on the Law of Non-Navigational Uses of International Watercourses, G.A. Res. 49/52, U.N. Doc. A/RES/49/52 (1994) (adopted by a vote of 143 for, 0 against, with 8 abstentions).

convention is adopted, its prospects for success are unclear. Nevertheless, the Commission's draft deserves the attention of states and others interested in the law governing shared water resources. The ILC is the United Nations body entrusted by the General Assembly with the progressive development of international law and its codification.⁴

As an expert group, the Commission is entitled to, and has usually been accorded, a presumption of being more impartial than the political bodies of the United Nations. On the other hand, the ILC's membership represents "the main forms of civilization and . . . the principal legal systems of the world."⁵ Perhaps for these reasons, among others, states cite Commission drafts in support of their positions even when those drafts have not been finally adopted by the ILC⁶ and those wishing to refer to the *travaux préparatoires* of conventions based on ILC work must look to the Commission's commentaries on the corresponding article of its draft. After briefly reviewing the history of the Commission's work on the subject, this article comments upon selected aspects of the ILC's draft articles on international watercourses.

I. HISTORICAL OVERVIEW OF THE COMMISSION'S WORK

In 1970, the General Assembly recommended that the Commission "take up the study of the law of the non-navigational uses of international watercourses with a view to its progressive development and codification."⁷ In 1974, a subcommittee established by the Commission submitted a report⁸ proposing that the views of governments be sought on a number of issues⁹ including the following: the scope of the proposed study; the uses of water to be considered and whether the problem of pollution should be given priority; the need to deal with flood control and erosion problems; and the interrelationship between navigational uses and other uses. A questionnaire accordingly was circulated to United Nations member states.¹⁰ Also in 1974, the

4. Statute of the International Law Commission, art. 1(1), U.N. Doc. A/CN.4 rev. 2, 1 (1982).

5. *Id.* art. 8, at 2.

6. This is true, for example, of Part One of the ILC's draft articles on state responsibility.

7. Progressive Development and Codification of the Rules of International Law Relating to International Watercourses, G.A. Res. 2669, U.N. GAOR, 25th Sess., Supp. No. 8, at 127, U.N. Doc. A/8028 (1970).

8. [1974] 2 Y.B. Int'l L. Comm'n 301.

9. The solicitation of the views of governments is customary for new items on the agenda of the Commission.

10. The questionnaire and a discussion of other questions on which the views of states were sought are contained in the Commission's 1974 report, *supra* note 8, at 303-04.

Commission appointed Ambassador Richard D. Kearney of the United States¹¹ as the first of a succession of five special rapporteurs for its work on international watercourses.

In 1976, the Commission considered responses of twenty-one states to the questionnaire¹² as well as a report submitted by Ambassador Kearney.¹³ The ILC agreed that it was not necessary to decide at the outset upon the scope of the expression "international watercourse" and that attention should be devoted instead to beginning the formulation of general principles.¹⁴

In 1977, the Commission appointed Professor (now Judge) Stephen M. Schwebel of the United States to succeed Ambassador Kearney, who had not stood for re-election to the Commission.¹⁵ This and the succeeding three changes in the special rapporteurship¹⁶ were unavoidable but undoubtedly delayed the completion of the draft. The Schwebel rapporteurship resulted in the adoption in 1980 of the first articles on watercourses¹⁷ and in a comprehensive Third Report which strongly influenced the shape of the Commission's subsequent work on watercourses.¹⁸

11. *Id.* at 301.

12. [1976] 2 Y.B. Int'l L. Comm'n 147. The Commission later received replies from eleven additional states. See [1978] 2 Y.B. Int'l L. Comm'n 253; [1979] 2 Y.B. Int'l L. Comm'n 178; [1980] 2 Y.B. Int'l L. Comm'n 253; [1982] 2 Y.B. Int'l L. Comm'n 192.

13. [1976] 2 Y.B. Int'l L. Comm'n 184.

14. [1976] 2 Y.B. Int'l L. Comm'n 162, para. 164. This question was not in fact to be addressed until 1991, the year in which the draft was completed on first reading. It is resolved in Article 2 of the draft articles, entitled "Use of Terms." 1994 ILC Report, *supra* note 1, at 199.

15. [1977] 2 Y.B. Int'l L. Comm'n 124.

16. In 1982 Ambassador Jens Evensen of Norway succeeded Judge Schwebel who had resigned from the Commission upon his election to the International Court of Justice. [1982] 2 Y.B. Int'l L. Comm'n 121. The author was appointed special rapporteur in 1985 following Evensen's own election to the Court. [1985] 2 Y.B. Int'l L. Comm'n 70. Professor Robert Rosenstock of the United States was appointed special rapporteur in 1992, the author not having stood for re-election to the Commission. *Report of the International Law Commission on the Work of its Forty-Fourth Session* 130, U.N. GAOR, 47th Sess., Supp. No. 10, U.N. Doc. A/47/10 (1992).

17. The articles, adopted in 1980, were entitled: Article 1, Scope of the present articles; Article 2, System States; Article 3, System agreements; Article 4, Parties to the negotiation and conclusion of system agreements; Article 5, Use of waters which constitute a shared natural resource; and Article X, Relationship between the present articles and other treaties in force. [1980] 2 Y.B. Int'l L. Comm'n 110-36. Four of these six articles have counterparts in the present draft. The two that do not are Article 5 and Article X. Article 5 later proved controversial. Some members feared it would have unforeseen legal effects, while others believed that it did not add anything of substance to the draft. Article X was ultimately considered unnecessary since the principle it set forth would be covered by the normal rules concerning successive treaties on the same subject matter.

18. The report was not submitted until after Judge Schwebel's departure for the Court.

The six articles adopted in 1980 were, in effect, withdrawn by Schwebel's successor, now Judge Jens Evensen, when Evensen presented a complete draft convention in his first report in 1983.¹⁹ This draft, which appears to have been inspired in large measure by the proposals made in Judge Schwebel's Third Report,²⁰ was revised by Judge Evensen the following year.²¹ Unfortunately, before the Commission had an opportunity to take action on his draft convention, Evensen left the Commission upon his election to the International Court of Justice. The author was appointed to succeed him in 1985.

When it resumed work on international watercourses in the mid-1980s, ten years after it had initially taken up the topic, the Commission technically began with a clean slate. On the other hand, by then it had a decade of experience with the subject. This background served the Commission well: from the adoption in 1987 of the first articles²² of what ultimately became the present draft, it took only five years to complete the provisional adoption of a full set of draft articles²³—a period which, in terms of ILC work, is a mere twinkling of an eye. The Commission's working method is that it initially adopts a complete set of draft articles on "first reading." This draft is then sent to governments for their comments and is given a "second" and final reading by the ILC in light of governments' observations. This dialogue between the Commission and member states of the United Nations informs the Commission of the views of at least those states who are interested in the subject matter.²⁴ The consideration of government views, in conjunction with the thorough research into state practice upon

Stephen Schwebel, *Third Report on the Law of the Non-Navigational Uses of International Watercourses*, [1982] 2 Y.B. Int'l L. Comm'n 65. In the report, Judge Schwebel acknowledges his debt to Professor Robert Hayton who had provided assistance in its preparation. The proposals in this report appear themselves to have been influenced to some extent by the Helsinki Rules on the Uses of the Waters of International Rivers adopted by the International Law Association in 1966. *Report of the Fifty-Second Conference Held at Helsinki, 1966*, at 484, International Law Association (1966) [hereinafter *Helsinki Rules*].

19. [1983] 2 Y.B. Int'l L. Comm'n 155.

20. See Schwebel, *supra* note 18.

21. [1984] 2 Y.B. Int'l L. Comm'n 101.

22. The provisions adopted in 1987 were articles 2-7. They included the first substantive provisions on watercourses that had been adopted by the Commission: Article 6 (as it was originally numbered) on equitable utilization and participation, and Article 7 (enumerating factors relevant to equitable utilization). [1987] 2 Y.B. Int'l L. Comm'n 25-38.

23. The ILC at this time had seven substantive topics on its agenda, on all of which the General Assembly had requested that it make significant progress. Major projects of codification and progressive development, such as the watercourses draft, normally take the Commission ten years or more to complete.

24. Of the more than 180 member states of the United Nations, it is unusual if more than thirty submit comments on ILC drafts. However, comments are usually submitted by those governments most interested in the topic in question.

which the ILC's drafts are based, helps to ensure that the Commission's work products are not merely theoretical proposals but are rather firmly informed and well-grounded in practice.

The Commission adopted a full set of draft articles in 1991. That draft consisted of thirty-two articles.²⁵ After receiving the comments of governments on the draft,²⁶ the Commission gave the draft articles a second reading on the basis of these comments and proposals of the special rapporteur.²⁷ The ILC completed the second reading in two years, adopting a final set of thirty-three draft articles in 1994.

II. THE DRAFT AS ADOPTED ON SECOND READING

The draft articles as finally approved and sent to the General Assembly are similar in most respects to those adopted on first reading in 1991. Several important changes were made, however, and these, together with the resolution on confined groundwater, enhance the Commission's contribution to the law in this field.

The thirty-three articles of the final draft are organized in six parts, or chapters: Part I, Introduction (articles 1-4); Part II, General Principles (articles 5-10); Part III, Planned Measures (articles 11-19); Part IV, Protection, Preservation and Management (articles 20-26); Part V, Harmful Conditions and Emergency Situations (articles 27 and 28); and Part VI, Miscellaneous Provisions (articles 29-33). A thorough analysis, or even description, of the articles is well beyond the scope of this brief treatment. This section will attempt only a general overview of the draft, giving particular attention to changes made at the second reading stage.

25. See *Report of the International Law Commission on the Work of its Forty-Third Session*, U.N. GAOR, 46th Sess., Supp. No. 10, at 161, U.N. Doc. A/46/10 (1991); [1991] 2 Y.B. Int'l L. Comm'n 66 [hereinafter 1991 ILC Report]. The articles adopted, on first reading were reported upon in Current Developments notes in the American Journal of International Law on the Commission's 1987-1991 sessions. See, e.g., 81 AM. J. INT'L L. 668 (1987); 82 AM. J. INT'L L. 144 (1988); 83 AM. J. INT'L L. 153 (1989); 83 AM. J. INT'L L. 937 (1989); 84 AM. J. INT'L L. 930 (1990); 85 AM. J. INT'L L. 703 (1991). A symposium on the draft articles as adopted on first reading may be found in 3 COLO. J. INT'L ENVTL. L. & POL'Y 1 (1992).

26. See *The Law of the Non-Navigational Uses of International Watercourses, Comments and Observations Received from States*, U.N. Doc. A/CN.4/447 (1993). See also *id.*, at Add.1, Add.2, Add.3 (containing comments of 21 states). The Commission also had the benefit of the views of states on the draft expressed in the discussion of the ILC Report in the 6th Comm. in 1991.

27. These proposals were contained in Robert Rosenstock's two reports. See Robert Rosenstock, *First Report on the Law of the Non-Navigational Uses of International Watercourses*, U.N. Doc. A/CN.4/451 (1993) [hereinafter *Rosenstock, First Report*]; Robert Rosenstock, *Second Report on the Law of the Non-Navigational Uses of International Watercourses*, U.N. Doc. A/CN.4/462 (1994) [hereinafter *Rosenstock, Second Report*].

A. Scope

The Commission's draft is intended to serve as a framework instrument, setting forth principles and rules that have general applicability and that may be applied and adjusted in agreements between states sharing international watercourses. However, whether it was feasible to draft such an instrument posed the first of several fundamental problems for the work of the Commission on international watercourses. Throughout the Commission's work, doubts were raised concerning the feasibility of formulating a set of general principles that would apply to all international watercourses. Each watercourse is different, it was argued, and the needs of the states using them vary considerably as well. How could the same rules apply to a river in an arid climate such as the Jordan and one in a more humid region such as the Rhine?

There is undoubtedly some merit to these observations. The uniqueness of each watercourse and its surrounding circumstances means that any rules drafted to apply to all international watercourses would have to be formulated at a high level of generality. Would rules so general be of any practical value? One answer to this question is that governments evidently thought so; otherwise, the General Assembly would not have referred the topic to the Commission. This answer is not entirely satisfying, however. Implicit in the referral of a topic to the ILC is the assumption that if the Commission finds the topic to be unsuitable for progressive development and codification, it will so inform the General Assembly. A more satisfactory answer may be found in the arguments made by states in actual controversies: they tend to rely upon general principles rather than specific rules or standards. However, there has not always been agreement on what these general principles are. Herein lies the chief value of the Commission's work: the definition, by a respected body of experts in international law, of the general rules governing relations between states with regard to the non-navigational uses of international watercourses. In calling upon states to conclude specific agreements that apply and adjust the provisions of the draft articles,²⁸ the Commission recognizes the diversity of international

28. 1994 ILC Report, *supra* note 1, at 206 (art. 3, *Watercourse Agreements*). Paragraph 3 of that article *requires* states sharing an international watercourse to enter into consultations with a view to negotiating such an agreement if one of them considers it necessary. In the words of the Commission's commentary to that article, the "framework agreement" character of the draft "will provide for the States parties the general principles and rules governing the non-navigational uses of international watercourses, in the absence of specific agreement among the States concerned, and provide guidelines for the negotiation of future agreements." *Id.* at 207.

watercourses and the needs they serve.

B. The Definition of "International Watercourse"

A second problem that confronted the Commission was the definition of the expression "international watercourse." Controversy began to swirl around this question even before the General Assembly referred the topic to the ILC. The resolution making that referral originated in the Sixth, or Legal Committee of the General Assembly, which in 1970 had adopted a resolution requesting the Commission to "take up the study of the law of the non-navigational uses of international watercourses with a view to its progressive development and codification."²⁹ The original draft of the resolution had suggested as a model for ILC work the Helsinki Rules on the Uses of the Waters of International Rivers, adopted by the International Law Association (ILA) only four years earlier, in 1966.³⁰ The Helsinki Rules, which represent an important and influential attempt to codify general rules of international law concerning international watercourses, take a "drainage basin" approach to the subject. It is probable that chiefly for this reason the proposal to refer expressly to the Helsinki Rules proved quite controversial within the Sixth Committee.³¹ The proposal was eventually put to a vote and was defeated, forty-one votes to twenty-five, with thirty-two abstentions.

It is often assumed, and is indeed only logical, that downstream countries will generally support a drainage basin or similar approach, while upstream states will advocate a more narrow definition of the international watercourse concept. In the case of the United Nations work on the law of international watercourses, however, this hypothesis is difficult to prove on the basis of empirical evidence. Neither the positions taken by states in the Sixth Committee debate nor the responses of governments to the ILC questionnaire³² provide unequivocal support for such a hypothesis. It is true that such states as "Argentina, Finland, and the Netherlands ardently supported the basin framework, while Brazil, Austria, and Spain absolutely opposed it."³³ However, South Asia, as

29. G.A. Res. 2669, ¶ 1 (1970).

30. Helsinki Rules, *supra* note 18, at 484.

31. According to one study, "[t]he most important substantive reservation [to mentioning the Helsinki Rules] . . . was that [they] advocated a drainage basin framework." James Wescoat, *Beyond the River Basin: The Changing Geography of International Water Problems and International Watercourse Law*, 3 COLO. J. INT'L ENVTL. L. & POL'Y 301, 307 (1992).

32. For the questionnaire and government replies, see [1976] 2 Y.B. Int'l L. Comm'n 147, U.N. Doc. A/CN.4/SER.A/Add.1.

33. Wescoat, *supra* note 31, at 311.

well as North and Central America supported either the drainage basin approach or use of the Helsinki Rules as a model while both were rejected in much of Europe. It is possible, therefore, that at least some delegates' resistance to the Helsinki Rules and the drainage basin concept was due to factors other than their country's position relative to others on a watercourse.³⁴ On the other hand, it is also possible that, as in other contexts, governments did not express their true motivations for fear of being accused of special pleading.

Regardless of what motivated the positions of governments, the trend among learned societies certainly appears clearly to favor a broad definition of the waters subject to international legal regulation. Like the ILC in its Helsinki Rules, the Commission ultimately opted for an expansive definition of the subject matter. Article 2 defines "watercourse" broadly to mean "a system of surface waters and groundwaters constituting by virtue of their physical relationship a unitary whole and normally flowing into a common terminus."³⁵ An "international watercourse" is defined as "a watercourse, parts of which are situated in different states."³⁶ Thus the draft applies not only to the main stem of a river or stream forming or crossing an international boundary, but also to tributaries of such watercourses, boundary-straddling lakes, and groundwater that is connected with other parts of an international watercourse, whether or not the groundwater is intersected by a boundary. The ILC's articles would not, however, apply to aquifers intersected by a boundary but not connected to surface water. These aquifers are the subject of the resolution on "Confined Transboundary Groundwater" mentioned above. The resolution is discussed more fully later in this article. A final point concerning the definition of "international watercourse" is that, unlike some resolutions of learned societies,³⁷ intergovernmental declarations³⁸ and venerable treaties,³⁹

34. See *id.* at 307, summarizing reasons for representatives' positions on the Helsinki Rules in the Sixth Committee debate. For example, one reservation was that the "Helsinki Rules had been formulated by a professional organization that did not represent nation-states." *Id.* Another was that "privileging the Helsinki Rules might hamper the work of the ILC." *Id.*

35. 1994 ILC Report, *supra* note 1, at 199, art. 2(b).

36. *Id.* art. 2(a).

37. See, e.g., the resolution adopted by the Institute of International Law at its 1911 session in Madrid. 1911 ANNUAIRE DE L'INSTITUT DE DROIT INTERNATIONAL (Inst. Int'l L.) 885.

38. For an example, see the Declaration of Montevideo concerning the Industrial and Agricultural Use of International Rivers, approved by the Seventh Inter-American conference at its fifth plenary session in Montevideo on December 24th, 1933. [1974] 2 Y.B. Int'l L. Comm'n 212; 28 AM. J. INT'L L. Supp. 59-60 (1934).

39. See, e.g., the final act of the Congress of Vienna of June 9th, 1815. G. Martens, 2 NOUVEAU RECUEIL DES TRAITÉS 379 (1887).

of compensation."⁶⁹ By requiring consultations the article enhances the possibility that the concerned states will resolve the problem by agreement. If consultations do not resolve the problem the draft's new article on dispute resolution would apply.⁷⁰ In view of the importance of establishing the facts when a conflict between two states' uses arises, and because of the many factors that must be assessed in such cases, the requirement that the states concerned resort to third-party dispute settlement is a highly useful addition to the draft articles.

An additional element of precision added to the final draft appears in the commentary to Article 7. It addresses the question whether a state could attempt to explain away even serious harm on the ground that it was permissible as part of an overall equitable balance: "A use which causes significant harm to human health and safety is understood to be inherently inequitable and unreasonable."⁷¹ For other kinds of harm, the fact that the reasonableness of the use is merely a question for consultations suggests that a showing that the use is equitable would not relieve the state of its Article 7 obligation. Nevertheless, establishing that the use was equitable and reasonable might make it easier for the states concerned to reach an agreed resolution of the situation and, if this does not prove possible, should assist the state making the use in a subsequent dispute-resolution process.

Even if the "equity" of a state's otherwise harmful use could provide a defense to a claim by the harmed state under Paragraph 1, it would apparently not be a complete defense. The absence of a conjunction between the two subparagraphs of Paragraph 2 leaves some doubt as to whether the subjects on which the states are to consult are listed conjunctively or disjunctively. Both the lack of such words as "where appropriate" and the commentary to the article⁷² suggest that the subparagraphs are in the conjunctive rather than the disjunctive. This leads to the conclusion that even if it is established that the harming state's use is equitable and reasonable, consultations must continue over the possibility of ad hoc adjustments to the harming state's use and the question of compensation. This seems only appropriate, since the equity of a state's use should not necessarily absolve it from the responsibility to attempt to mitigate the harm and to provide compensation for any harm that is unavoidable. In addition, there appears to be no good reason why consultations should have to focus first on whether the use was

69. *Id.*

70. *Id.* at 244, art. 7 ¶ 21 of commentary.

71. *Id.* at 242.

72. See *id.* at 243 ¶ 18 of commentary (stating that the "consultations . . . would include, in addition to the factors relevant in subparagraph (a), such factors as the extent to which adjustments are economically viable") (emphasis added).

equitable and only then on adjustments and compensation. The subjects dealt with in the two subparagraphs could be discussed together, and probably often would be as a practical matter. Such a procedure makes sense since, unless there is third-party involvement, it could well be difficult for the states concerned to come to an agreement upon whether the use in question was, in fact, equitable and reasonable. If the harming state undertakes to make ad hoc adjustments and to compensate the affected state for significant harm, the latter may be more willing to accept the use in question. The "package" of the two sub-paragraphs may thus make it easier for the states to work out their differences than a pure equitable-utilization override.

In sum, the approach adopted by the Commission to the relationship between Articles 5 and 7, while not perfect, is preferable to the more wooden rule of the earlier draft for two reasons. First, it mitigates the absolute priority given the "no-harm" rule under the 1991 articles, a priority that does not accord with state practice and could well give rise to more problems than it would resolve. Second, the revised text is more likely to lead to a satisfactory resolution of any conflict in uses because of its requirement that the states concerned enter into consultations and ultimately have recourse to the draft's dispute-resolution procedures. Resolving disputes over non-navigational uses of international watercourses, especially where the watercourses are "successive" in character, is a highly complex affair which is unlikely to be accomplished satisfactorily by simply giving priority to the "no-harm" rule.

D. Procedural Rules

Part III of the draft addresses a subject that has been problematic in the practice of states—that of the obligations of a state planning a change in its use of an international watercourse. While initially somewhat controversial within the Commission itself, the question was resolved in 1988 in a detailed set of provisions regulating the rights and obligations of both the state contemplating the change and the state or states likely to be affected by it. This regime, which was not altered substantially at the second reading stage, essentially requires the state planning to undertake a change "which may have a significant adverse impact" upon other states to provide those states with a timely notification of its plans. If the notifying state has received no reply from the notified states⁷³ within six months of the notification, it may

73. A change was made at the second reading stage to encourage an early response by the notified state. See *id.* at 272 art. 16(2).

the ILC's draft makes no distinction between watercourses that are "contiguous" (those forming a boundary) and "successive" (those crossing one). While most international controversies over the use of fresh water have arisen with regard to successive watercourses, commentators are in general agreement that the same rules apply, or at least should apply, to both kinds of watercourses.⁴⁰ The author agrees that the same rules *should* apply to both forms of international watercourses, but believes that a close examination of state practice will reveal that, in fact, the practice of states is somewhat different with regard to each of the forms. This is no criticism of the ILC's approach, however, since the Commission engages not only in codification of international law, but also in its progressive development.

Reaction in the Sixth Committee to the Commission's approach appeared similar to, though somewhat more positive than, its response in the early 1970s to the use of the drainage basin concept. While some representatives, in commenting upon the above-quoted provisions, strongly supported the ILC's expansive definition, others continued to have reservations. The following summary of the debate in the Sixth Committee, which concerns the substantially identical provisions of the draft adopted on first reading, is representative of the latter position:

Some representatives . . . questioned whether the concept of an international watercourse system . . . should be used in the draft and cautioned against over-stretching the concept of an international watercourse. . . . The remark was also made that a broad concept, however justifiable from the scientific point of view, might not elicit the support of all watercourse States, especially upstream ones, and that while the argument developed in the [Commission's] commentary [to article 2] in favor of such a broad concept was persuasive from the philosophical, environmental and legal points of view, the issue raised serious political problems for many States.⁴¹

The latter comment, which may reflect the unspoken views of a significant (though probably not a large) number of states, seems almost

40. See, e.g., H. SMITH, *THE ECONOMIC USES OF INTERNATIONAL RIVERS* 155-56 (1931) ("If the principle be sound that every river system must be treated as a single physical unit, then it becomes immaterial to ask whether or not the bed of the river coincides, in whole or in part, with the political frontier."); Jerome Lipper, *Equitable Utilization*, in *THE LAW OF INTERNATIONAL DRAINAGE BASINS* 15, 16-17 (A. Garretson et al. eds., 1967) ("In summary, the distinction between contiguous and successive rivers . . . has no significance in international law.").

41. *Report of the International Law Commission*, U.N. GAOR 6th Comm., 46 Sess. at 16, U.N. Doc. A/CN.4/L.469 (1992) (topical summary of the discussion held in the Sixth Committee of the General Assembly during its forty-sixth session, prepared by the Secretariat).

tantamount to taking the position that while the Commission's approach is sound from all points of view, it is politically problematic because it will not allow states to do whatever they wish with regard to "their" international watercourses. In other words, the position seems functionally equivalent to the much-maligned Harmon Doctrine, which has long since been laid mercifully to rest by the country of its birth, if indeed it ever had any true vitality there or elsewhere.⁴²

Another aspect of the definition of "international watercourse" that proved controversial was the "common terminus" requirement.⁴³ The commentary to the articles adopted on first reading explained that the requirement "was included in order to introduce a certain limitation upon the geographic scope of the articles. Thus, for example, the fact that two different drainage basins were connected by a canal would not make them part of a single 'watercourse' for the purpose of the present articles."⁴⁴ To illustrate the point concretely, without the "common terminus" requirement the Rhine and Danube systems, connected by the Rhine-Main Canal, could conceivably be viewed, functionally, as a single international watercourse. The common-terminus requirement would presumably result in their being viewed as two independent watercourses, even though activities in one could be felt in the other (e.g., through transfer of pollution or biota).⁴⁵

42. The "Harmon Doctrine" was enunciated by Attorney General Judson Harmon, who cited as authority a decision of the U.S. Supreme Court in a case involving immunity of state vessels from suit. 21 Op. Att'y Gen. 281-82 (1898). The Doctrine suggests that a state has complete freedom of action with regard to the portion of an international watercourse (at least a successive one) within its territory, regardless of the consequences of its actions upon other states. This is not the only possible interpretation of Attorney General Harmon's opinion, however, since nothing in it denied that there was an obligation not to cause harm to other states. The United States and Mexico amicably resolved, by treaty, the dispute that gave rise to the Doctrine. Convention Providing for the Equitable Distribution of the Waters of the Rio Grande for Irrigation Purposes, May 21, 1906, 34 Stat. 2953, T.S. no. 455, 9 Bevans 924. The Doctrine has been repudiated by the United States, the country that originally articulated it. See, e.g., the statement of Frank Clayton, counsel for the United States section of the International Boundary Commission, U.S.-Mexico, before the U.S. Senate Committee on Foreign Relations in 1945: "Attorney-General Harmon's opinion has never been followed either by the United States or by any other country of which I am aware." *Hearings Before the Senate Committee on Foreign Relations on Treaty with Mexico Relating to the Utilization of the Waters of Certain Rivers*, 79th Cong., 1st Sess., part 5, 97 (1945). See generally Stephen McCaffrey, *Second Report on the Law of the Non-Navigational Uses of International Watercourses*, [1986] 2 Y.B. Int'l L. Comm'n 105-110, ¶¶ 79-91, U.N. Doc. A/CN.4/SER.A/1986/Add.1 (Part 1) (1988).

43. This requirement was also one of the elements of the definition of "international drainage basin." Helsinki Rules, *supra* note 18, art. 2.

44. 1991 ILC Report, *supra* note 25, at 175.

45. The "common terminus" requirement would presumably be satisfied by a delta with multiple "mouths" since virtually all major rivers form deltas and would otherwise be

The qualification that the system of waters need only "normally" flow into a common terminus was introduced at the second reading stage as:

[A] compromise aimed not at enlarging the geographic scope of the draft articles but at bridging the gap between, on the one hand, those who urged simple deletion of the phrase "common terminus" on the grounds, *inter alia*, that it is hydrologically wrong and misleading and would exclude certain important waters and, on the other hand, those who urged retention of the notion of common terminus in order to suggest some limit to the geographic scope of the articles.⁴⁶

Apart from its compromise function, the word "normally" is also a convenient way of dealing with hydrological conditions that are well known but sometimes not present, and that would not strictly satisfy the "common terminus" requirement.⁴⁷

C. General Principles

The centerpiece of the draft is Part II, General Principles. Contained in this part are two articles that define the most fundamental rights and obligations of states sharing international watercourses. These two articles have been the focus of much debate:⁴⁸ Article 5 on equitable utilization of international watercourses and Article 7 on the obligation not to cause significant harm to other riparian states. Discussion focused not on whether these principles should have a place in the draft, but on which of them should prevail in the event they come into conflict. For example, if the "no-harm" rule of Article 7 prevailed, a later-developing

excluded. This construction would accord with the general rule of interpretation of treaties, according to which "the ordinary meaning [is] to be given to the terms of the treaty in their context and in light of its object and purpose." Vienna Convention on the Law of Treaties, U.N. Doc. A/CONF.39/27 289 (1969), reprinted in 8 ILM 679 (1969) (art. 31(1)). It is also confirmed in the Commission's commentary, which states that the word "normally" is intended to cover, *inter alia*, rivers that flow into the sea via multiple "distributaries which may be as much as 300 km removed from each other (deltas) . . ." 1994 ILC Report, *supra* note 1, at 202.

46. 1994 ILC Report, *supra* note 1, at 201.

47. In addition to the phenomenon of deltas discussed in the previous note, the Commission's commentary refers to situations in which surface waters "flow to the sea in whole or in part via groundwater . . . or empty at certain times of the year into lakes and at other times into the sea." *Id.*

48. See, e.g., the comments and observations of Switzerland on the draft articles as adopted on first reading. U.N. Doc. A/CN.4/447, at 44 (1993); Stephen McCaffrey, *The Law of International Watercourses: Some Recent Developments and Unanswered Questions*, 17 DEN. J. INT'L L. & POL'Y 505, 508-53 (1989).

upstream state would not be permitted to construct a dam that would cause significant harm to its downstream neighbor.⁴⁹ If the equitable utilization doctrine of Article 5 took precedence, harm to the downstream state would be one factor to be taken into account in determining whether the dam would be permissible.

Each principle has its adherents. Perhaps the best known and most influential instrument supporting the preeminence of equitable utilization is the Helsinki Rules,⁵⁰ which consider harm as only one factor to be taken into account in determining whether a particular utilization is equitable.⁵¹ On the other hand, some commentators maintain that priority of equitable utilization is not supported by actual treaty practice,⁵² is unsound on policy grounds⁵³ and is even inconsistent with contemporary international law.⁵⁴ However, critics of equitable utilization as the prevailing doctrine are concerned principally, and justifiably, with its use in the field of pollution (water quality), rather than that of allocation (water quantity).⁵⁵ It is indeed difficult, and perhaps impossible, to apply the same rule to all kinds of problems relating to the non-navigational uses of international watercourses. This is especially so when one considers that in the first instance it will be the individual state, and not a third party, that will have to judge the lawfulness of its use of an international watercourse.⁵⁶ The Commission may, in fact, have recognized this difficulty in modifying Article 7 at the second-reading stage to make the "no-harm" rule more flexible and process-oriented. This point will be revisited below.

The draft adopted on first reading in 1991 accorded primacy to the "no-harm" rule.⁵⁷ The new special rapporteur proposed reversing that regime. However, his proposed text would have raised, in effect, a

49. Since upper riparian states generally develop their water resources later than their downstream neighbors this would make such development by upstream states difficult, at best.

50. Helsinki Rules, *supra* note 18, art. IV.

51. *Id.*, art. V(2)(k).

52. ANDRÉ NOLLKAEMPER, THE LEGAL REGIME FOR TRANSBOUNDARY WATER POLLUTION: BETWEEN DISCRETION AND CONSTRAINT 68 (1993).

53. See *id.* at 69 (equitable use "provides little or no guidance to a state that unilaterally intends to assess the permissibility of pollution").

54. HARALD HOHMANN, PRAVENTIVE RECHTSPFLICHTEN UND PRINZIPIEN DES MODERNEN UMWELTVÖLKERRECHTS 57 (1992).

55. This is the case with both NOLLKAEMPER, *supra* note 52, and HOHMANN, *supra* note 54.

56. See McCaffrey, *supra* note 48, at 510.

57. See the Commission's commentary to Article 7 (numbered Article 8 when initially adopted in 1988), [1988] 2 Y.B. Int'l. L. Comm'n 36 (prima facie, at least, utilization of an international watercourse . . . is not equitable if it causes other watercourse States appreciable harm).

rebuttable presumption that a use causing significant pollution harm is inequitable and unreasonable.⁵⁸ The final version of the draft does not completely reverse the primacy of the no-harm rule but softens the regime considerably. Whereas the version adopted on first reading laid down a flat prohibition ("[w]atercourse States shall utilize an international watercourse in such a way as not to cause appreciable harm to other watercourse States")⁵⁹, the final version "set[s] forth a process aimed at avoiding significant harm as far as possible while reaching an equitable result in each concrete case."⁶⁰ The change from prohibition to process is a major one indeed. It recognizes that reconciling conflicting uses of international watercourses usually cannot be accomplished by the simple expedient of a general rule of law, but must—at least in the more difficult cases—be worked out through discussions between the states concerned. It further recognizes that these discussions are more likely to bear fruit if they are conducted within a framework of legal rules, or at least guidelines, than if they are less structured.

The transformation of Article 7 was effected by making two important changes. The first change, which is textually the less dramatic of the two, is the introduction, at the suggestion of the special rapporteur,⁶¹ of a "due diligence" standard into the text adopted on first reading. The article now reads in relevant part (with new language emphasized): "Watercourse States shall *exercise due diligence* to utilize an international watercourse in such a way as not to cause *significant*⁶² harm to other watercourse States."⁶³ It could be argued with some force that this "change" only makes express what was already implied. That is

58. The revised text of Article 7 proposed by the new special rapporteur read as follows:

Watercourse States shall exercise due diligence to utilize an international watercourse in such a way as not to cause significant harm to other watercourse States, absent their agreement, except as may be allowable under an equitable and reasonable use of the watercourse. A use which causes significant harm in the form of pollution shall be presumed to be an inequitable and unreasonable use unless there is: (a) a clear showing of special circumstances indicating a compelling need for ad hoc adjustment; and (b) the absence of any imminent threat to human health and safety.

Rosenstock, First Report, *supra* note 27, at 10-11; see also Rosenstock, Second Report, *supra* note 27, at 11, which is identical except for the inclusion of transboundary aquifers.

59. Art. 7, as adopted on first reading. [1991] 2 Y.B. Int'l L. Comm'n 67.

60. Report of the International Law Commission on the Work of its Forty-Sixth Session, U.N. GAOR, 49th Sess., Supp. No. 10, U.N. Doc. A/49/10 (1994) (art. 7, ¶ 1 of commentary).

61. See the special rapporteur's proposed re-draft of Article 7, *supra* note 58.

62. The 1994 version replaced "appreciable" with "significant" wherever the former term appeared in the 1991 draft.

63. 1994 ILC Report, *supra* note 60, at 236.

to say, there is scant support in state practice for an obligation of result—i.e., a virtual guaranty that significant harm will not occur—in this context. On the contrary, state practice appears to support a due diligence standard.⁶⁴ Thus the addition of the reference to due diligence is arguably superfluous. Nevertheless, the change is a welcome one in view of the uncertainty suggested by an earlier debate in the Commission over the standard of responsibility in relation to another article.⁶⁵

The second major change in Article 7, and perhaps the most important one, is the addition of a paragraph that directly addresses the relationship between the equitable utilization and "no-harm" principles. It provides:

2. Where, despite the exercise of due diligence, significant harm is caused to another watercourse State, the State whose use causes the harm shall, in the absence of agreement to such use, consult with the State suffering the harm over:
 - (a) the extent to which such use is equitable and reasonable taking into account the factors listed in article 6;⁶⁶
 - (b) the question of ad hoc adjustments to its utilization, designed to eliminate or mitigate any such harm caused and, where appropriate, the question of compensation.⁶⁷

While it is clear that this paragraph does not entirely solve the problem of which rule takes precedence, it strongly suggests that if a state's use is equitable it should be allowed to continue, even if it causes significant harm to another state. If such harm is caused, the reformulation suggests that the harming state would be obligated to minimize the harm to the extent possible and to compensate the other state for any unavoidable harm. This interpretation is supported by the Commission's commentary, which states that "the fact that an activity involves significant harm, would not of itself necessarily constitute a basis for barring it."⁶⁸ Instead, the paragraph recognizes the possibility, well-grounded in state practice, that the states concerned will already have agreed to the use. In that event, there would be no obligation to consult. Failing such an agreement, Paragraph 2 requires that the states involved enter into consultations over the extent to which the use in question is equitable and reasonable, the question of ad hoc adjustments directed to eliminating or mitigating the harm and, "where appropriate, the question

64. See McCaffrey, *supra* note 48, at 523 n.71 and accompanying text.

65. *Id.* at 519-25 (describing this debate).

66. Article 6, entitled *Factors Relevant to Equitable and Reasonable Utilization*, contains a non-exhaustive list of seven factors to be taken into account in implementing the rule of equitable utilization. 1994 ILC Report, *supra* note 60, at art. 6.

67. *Id.* at 236.

68. *Id.*

implement its plans, subject always to its obligations of equitable utilization and harmless use. If the notifying state does receive a response in which the notified states object to the planned change,⁷⁴ the states concerned are to "enter into consultations and, if necessary, negotiations with a view to arriving at an equitable resolution of the situation."⁷⁵ If so requested by the notified state when making its reply, the notifying state must suspend implementation of its plans for six months so that consultations and negotiations may proceed in an atmosphere free of the kind of pressure a commencement of construction could impose. Thus, the entire process could take twelve months, or longer if the states concerned had not completed good-faith consultations and negotiations⁷⁶ within the second six-month period. If the matter is not resolved to the satisfaction of the states concerned, the dispute settlement procedures of Article 33, discussed below, would be applicable.

E. Protection of the Ecosystems of International Watercourses

Part IV of the draft deals not only with water pollution but, more widely, with protection and preservation of the ecosystems of international watercourses. The first article of that part, Article 20, provides simply that "[w]atercourse States shall, individually or jointly, protect and preserve the ecosystems of international watercourses."⁷⁷ This powerful statement may prove to be one of the Commission's most significant contributions to the law of international watercourses. It was modeled upon Article 192 of the United Nations Convention on the Law of the Sea and reflects a recognition of the importance of the protection of ecosystems to sustainable development. Article 20 fairly cries out for further elaboration, though that would not have been appropriate in a framework instrument of this sort. It is hoped that states will tackle this

74. Specifically, the notified states must find that the change would violate the notifying state's obligations of equitable utilization (Article 5) or harmless use (Article 7) and provide the notifying state within six months of the initial notification with a "documented explanation setting forth the reasons for the finding." *Id.* at 279 art. 15.

75. *Id.* at 273 art. 17. The words "if necessary" were added at the second reading stage because "[s]ome members [of the Commission] saw a distinction between consultations and negotiations." *Id.* at 273 (commentary to Article 17). Negotiations would only be "necessary" if consultations failed to resolve the matter.

76. It is clear that the Commission did not intend that the notifying state could simply proceed with the implementation of its plans after the expiration of the second six-month period without having engaged in meaningful consultations and negotiations. Such a course of action would violate the notifying state's obligation to consult and negotiate in good faith. See the Fisheries Jurisdiction Case (U.K. v. Ice.) 1974 I.C.J. 3 (July 25); the North Sea Continental Shelf Cases (F.R.G. v. Den., F.R.G. v. Neth.) 1969 I.C.J. 3 (Feb. 20); the Lake Lanoux Award, 12 R.I.A.A. 281 (1957).

77. 1994 ILC Report, *supra* note 60, at 280.

difficult but critical task in specific agreements. Subsequent articles in this part deal with water pollution, exotic species, and protection of the marine environment against pollution from international watercourses. Part IV also contains provisions on measures to regulate watercourses,⁷⁸ water installations, and the crucial subject of cooperative management of international watercourses. It is unfortunate that the Commission's draft articles do not provide more guidance on management, since this will become an increasingly vital issue as fresh water supplies continue to dwindle on a per capita basis.⁷⁹ But while there is ample state practice in the field of management of international watercourses,⁸⁰ it is difficult to speak of obligations of states in that regard, beyond the obligation contained in the draft: to consult, at the request of any state sharing an international watercourse, concerning the management of that watercourse.⁸¹

F. Harmful Conditions and Emergency Situations

Part V of the draft deals with "harmful conditions" and emergency situations. The expression "harmful conditions" includes such phenomena as floods, erosion, siltation and water-borne diseases. States are required to take "all appropriate measures" to prevent or mitigate such conditions when they may be harmful to other states, whether the conditions result from natural causes or human conduct.⁸² The article on emergency situations also applies to both naturally-caused incidents and those brought about by human conduct. It requires that a state within whose territory an emergency situation originates immediately notify potentially affected states and take all practicable measures to prevent, mitigate and eliminate the harmful effects of the emergency.⁸³

G. Other Provisions

Part VI contains provisions on the protection of international

78. "Regulation" in this context is a technical term meaning "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." *Id.* at 304 art. 25(3).

79. See generally PETER GLEICK, *WATER IN CRISIS: A GUIDE TO THE WORLD'S FRESH WATER RESOURCES* (1993); La Rivière, *Threats to the World's Water*, SCI. AM., Sept. 1989, at 80, 84 (graph); see also Linden, *The Last Drops*, TIME, Aug. 20, 1990, at 58.

80. See, e.g., UNITED NATIONS, *MANAGEMENT OF INTERNATIONAL WATER RESOURCES: INSTITUTIONAL AND LEGAL ASPECTS* 33-36 (1987); Stephen McCaffrey, *Sixth Report*, [1990] 2 Y.B. Int'l L. Comm'n 41.

81. 1994 ILC Report, *supra* note 60, at 300 art. 24(1).

82. *Id.* at 309 art. 27.

83. *Id.* at 312 art. 28.

watercourses and installations in time of armed conflict,⁸⁴ indirect procedures,⁸⁵ data vital to national security,⁸⁶ and non-discrimination,⁸⁷ as well as a new article on the settlement of disputes.⁸⁸ The article on "non-discrimination" has been modified since the first reading. It requires states to grant private persons equal access, regardless of nationality or residence, to judicial or other procedures for compensation or other relief for injuries from watercourse-related activities. This is not a new idea. It was the subject of recommendations by both the United Nations Environment Programme (UNEP)⁸⁹ and the Organization for Economic Cooperation and Development (OECD)⁹⁰ in the 1970s. Yet a few members of the Commission still objected to the inclusion of such a provision in the draft. Remarkably, certain of these objections were based on the very idea of equal substantive and procedural treatment.⁹¹ This serves as a sobering reminder that in some states and indeed entire regions of the world, the idea of equal treatment of aliens is still a novel and sometimes unwelcome one.

At the first reading stage the Commission had balked at including a set of provisions on dispute avoidance and settlement as proposed by the special rapporteur.⁹² The general view seemed to be that the ILC does not traditionally include dispute settlement clauses in its drafts because dispute settlement is essentially a political matter that should be dealt with by any conference to which the articles are submitted. Yet in the case of international watercourses, the rights and obligations of states sharing an international watercourse are so often

84. *Id.* at 315 art. 29.

85. *Id.* at 317 art. 30. This article covers cases in which two or more of the states sharing an international watercourse refuse for political reasons to communicate directly with each other. *Id.*

86. *Id.* at 318 art. 31.

87. *Id.* at 319 art. 32.

88. *Id.* at 322 art. 33.

89. See Principle 14 of the 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, Governing Council of the United Nations Environment Programme (UNEP), decision 6/14 of May 19th, 1978, Environmental Law Guidelines and Principles, G.A. Res. 3129, U.N. GAOR, 28th Sess., Supp. No. 30, at 48, U.N. Doc. A/9030 (1978), reprinted in 17 ILM 1097 (1978).

90. See Recommendation on Implementation of a Regime of Equal Right of Access and Non-Discrimination in Relation to Transfrontier Pollution, OECD Doc. C(77) (final, annex), in OECD, OECD AND THE ENVIRONMENT 150 (1986).

91. 1994 ILC Report, *supra* note 60, at 320.

92. See McCaffrey, Sixth Report at 48, U.N. Doc. A/CN.4/427, Feb. 23, 1990; Stephen McCaffrey, Sixth Report, Corr. 1, at 5-9 (May 22, 1990); see also the discussion of this and other provisions that were proposed but not adopted in Stephen McCaffrey, *Background and Overview of the International Law Commission's Study of the Non-Navigational Uses of International Watercourses*, 3 COLO. J. INT'L ENVTL. L. & POL'Y 17, 25-27 (1992).

dependent upon the ascertainment of facts and the balancing of a wide range of factors. Procedures for dispute settlement and avoidance are therefore tied directly to the implementation of the obligations involved, which is not always true in other fields. It is, therefore, to the credit of the Commission and the special rapporteur that the final draft includes a provision on dispute resolution.

The new article applies to "any watercourse dispute concerning a question of fact or the interpretation or application of the present articles."⁹³ It provides for a series of stages of dispute settlement, beginning with consultations and negotiations through any existing joint watercourse institutions. If, after six months, the states concerned have not been able to resolve the dispute through these means, they must submit it, at the request of any of them, to impartial fact-finding or, if mutually agreed, to mediation or conciliation. The article contains provisions on the establishment of a Fact-Finding Commission as well as its procedure, powers, report and expenses. The states concerned "may by agreement" submit their dispute to arbitration or judicial settlement if the dispute has not been resolved through the other procedures mentioned within specified time limits. These procedures represent a step forward, particularly as they provide for compulsory fact-finding, which will often be a necessary starting point for the establishment of an equitable allocation.

III. THE RESOLUTION ON CONFINED TRANSBOUNDARY GROUNDWATER

By far the largest share of earth's accessible fresh water is underground. Ten percent of the world's fresh water resources are located within 800 meters of ground level while lakes contain only 0.33 percent, soil moisture 0.18 percent, and rivers a comparatively minuscule 0.004 percent. Groundwater makes up about ninety-seven percent of the fresh water on Earth, excluding polar ice caps and glaciers.⁹⁴ Much of Earth's groundwater is contained in transboundary aquifers, many of which are not related to surface water.⁹⁵ It will therefore become increasingly necessary that states' use of shared aquifers be regulated by an accepted normative order. Transboundary groundwater that is related to surface water, or groundwater that feeds or is fed by internationally

93. 1994 ILC Report, *supra* note 60, at 322 art. 33.

94. 20 ENCYCLOPEDIA BRITANNICA 789 (15th ed. 1987).

95. See *The Law of International Groundwater Resources*, Report of the Committee on International Water Resources Law, in 62 INT'L L. ASSOC. REP. 238, 256 (Seoul Conf. 1986); see also Robert Hayton & Albert Utton, *Transboundary Groundwaters: The Bellagio Draft Treaty*, 29 NAT. RESOURCES J. 663, 673-76 (1989).

shared surface water, is covered by the Commission's draft articles. Shared aquifers that are not related to surface waters are outside the scope of the draft, however. The definition of the term "watercourse" adopted on first reading included groundwater only to the extent that it interacts in some way with surface water. The Commission was unwilling at that stage to include in the scope of the draft so-called "confined" groundwater, that is, groundwater that is not related to surface water. The Commission took this position despite the importance of transboundary aquifers⁹⁶ because members generally had not had this form of groundwater in mind during the elaboration of the draft articles. Indeed, it is likely that it did not occur to many members that the draft articles would apply to any form of groundwater. During the second reading of the articles, the new special rapporteur proposed that confined groundwater be included in the scope of the draft. On the basis of a survey of state practice contained in an annex to his second report, the special rapporteur concluded: "The recent trend in the management of water resources has been to adopt an integrated approach. Inclusion of 'unrelated' confined groundwaters is the bare minimum in the overall scheme of the management of all water resources in an integrated manner."⁹⁷ Moreover, including such groundwaters was important "in order to encourage their management in a rational manner and prevent their depletion and pollution."⁹⁸

Despite this strong recommendation, the Commission declined to bring confined groundwater within the scope of the draft articles. In an apparent compromise, however, the ILC adopted a resolution expressing its:

View that the principles contained in its draft articles . . . may be applied to transboundary confined groundwater and stating that the Commission:

1. *Commends* States to be guided by the principles contained in the draft articles on the law of the non-navigational uses of international watercourses, where appropriate, in regulating transboundary groundwater;
2. *Recommends* States to consider entering into agreements with the other State or States in which the confined transboundary groundwater is located;
3. *Recommends also* that, in the event of any dispute involving transboundary confined groundwater, the States concerned

96. See Hayton & Utton, *supra* note 95, at 8. See also *id.* at 21 (Rules on International Groundwaters).

97. Robert Rosenstock, *Second Report on the Law of the Non-Navigational Uses of International Watercourses*, U.N. Doc. A/CN.4/462 (1994) (the Annex is found at 22).

98. *Id.* at 35.

should consider resolving such dispute in accordance with the provisions contained in article 33 of the draft articles, or in such other manner as may be agreed upon.⁹⁹

Adoption of this resolution is certainly preferable to the Commission's having done nothing at all on the subject of transfrontier confined groundwater. Yet the resolution represents, at best, a rather equivocal attempt at dealing with a subject that will be of growing importance to states in the future. It appears to be exactly what it is: a hasty effort tacked onto the draft articles at the conclusion of the Commission's work. The ILC adopted this course of action in preference not only to including confined transboundary groundwater within the scope of the draft, but also to considering this subject as a separate topic on its agenda. This is regrettable. One can only hope that the Working Group of government representatives convened by the General Assembly will correct this omission.

CONCLUSION

The International Law Commission's draft articles will be an important source of law for states sharing international watercourses. The principles contained in the draft are, for the most part, general, but they provide useful guidance to states concerning the subjects that should be addressed in agreements concerning specific watercourses. In default of applicable agreements, the draft articles will provide states with valuable guidance as to the Commission's view of their rights and obligations and may assist them in avoiding disputes. The Commission has laid to rest any lingering doubt as to whether non-navigational uses of international watercourses are governed by international law and has provided a clear indication of how international law treats those uses. Therefore, regardless of whether the General Assembly succeeds in elaborating a convention or whether any convention the Assembly produces is widely ratified, the ILC's draft articles have made an important contribution to the strengthening of the rule of law in international relations and to the protection and preservation of international watercourses.

99. 1994 ILC Report, *supra* note 60, at 326.