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THE INTERNATIONAL LAW COMMISSION ADOPTS DRAFT
ARTICLES ON INTERNATIONAL WATERCOURSES

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THE INTERNATIONAL LAW COMMISSION ADOPTS DRAFT ARTICLES ON INTERNATIONAL WATERCOURSES

At its 1994 session, the International Law Commission (ILC) completed the final adoption ("second reading") of a complete set of thirty-three draft articles on the law of the non-navigational uses of international watercourses, together with a resolution on transboundary confined ground water. The Commission submitted the draft articles and the resolution to the General Assembly and recommended that a convention on international watercourses be elaborated by the Assembly or by an international conference of plenipotentiaries on the basis of the Commission's draft.

The draft articles as finally approved are similar in most respects to those the Commission adopted on first reading in 1991. However, several important changes were made. These modifications, together with the resolution on confined ground water, enhance the Commission's contribution to the law in this field. After briefly describing the background of the draft, this Note will offer a general overview of its provisions and indicate the principal changes made to the articles adopted in 1991. While it is still too early to predict the ultimate fate of the articles, the Note will conclude by outlining some of the most likely possibilities.

BACKGROUND

The impetus for the ILC's work on international watercourses came from the General Assembly, which in 1970 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."¹ By 1974 the Commission had begun preliminary work on the subject; it established a subcommittee whose report² proposed—as is customary for new agenda items—that the views of governments be sought on various issues, 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 was accordingly circulated to United Nations member states.³ Also in 1974 the Commission appointed Ambassador Richard D. Kearney of the United States⁴ as the first special rapporteur for its work on international watercourses.

The Commission returned to the watercourses topic in 1976, when it considered the responses of twenty-one states to the questionnaire,⁵ as well as a report submitted by Ambassador Kearney.⁶ The discussion led the ILC to agree that it was not necessary to decide upon the scope of the expression "international watercourse" at the outset of the work and that attention should be devoted instead to beginning the formulation of general principles.⁷

In 1977 the Commission appointed then Professor (now Judge) Stephen M. Schwebel of the United States to succeed Ambassador Kearney, who had not been a candidate for reelection to the Commission.⁸ This was the first of what would eventually be four changes in the special rapporteurship,⁹ changes that were unavoidable but undoubtedly delayed the completion of the draft. The Schwebel rapporteurship resulted in the adop-

¹ GA Res. 2669 (XXV), para. 1 (Dec. 8, 1970).

² [1974] 2 Y.B. Int'l L. Comm'n, pt. 1, at 301, UN Doc. A/CN.4/SER.A/1974/Add.1 (pt. 1).

³ For the questionnaire and a discussion of other questions on which the views of states were sought, see *id.* at 303-04.

⁴ *Id.* at 301.

⁵ [1976] 2 Y.B. Int'l L. Comm'n, pt. 1, at 147. The Commission later received replies from eleven additional states. See 1978 *id.* at 253; 1979 *id.* at 178; 1980 *id.* at 253; and 1982 *id.* at 192.

⁶ 1976 *id.* at 184.

⁷ *Id.* at 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, "Use of terms." Report of the International Law Commission on the work of its forty-sixth session, UN GAOR, 49th Sess., Supp. No. 10, at 199, UN Doc. A/49/10 (1994) [hereinafter 1994 ILC Report].

⁸ [1977] 2 Y.B. Int'l L. Comm'n, pt. 2, at 124, UN Doc. A/CN.4/SER.A/1977/Add.1 (pt. 2).

⁹ In 1982 Ambassador Jens Evensen of Norway succeeded Judge Schwebel, who had resigned from the ILC on his election to the International Court of Justice. [1982] 2 Y.B. Int'l L. Comm'n, pt. 2, at 121. The author was appointed special rapporteur in 1985 following Evensen's election to the Court. 1985 *id.* at 70. Professor Robert Rosenstock of the United States was appointed special rapporteur in 1992, the author not having stood for reelection to the Commission. Report of the International Law Commission on the work of its forty-fourth session, UN GAOR, 47th Sess., Supp. No. 10, at 130, UN Doc. A/47/10 (1992).

tion in 1980 of the first articles on the topic¹⁰ and in a remarkable report that strongly influenced the shape of the Commission's subsequent work on watercourses.¹¹

The six articles adopted in 1980 were in effect withdrawn by Special Rapporteur (now Judge) Jens Evensen, when he presented a complete draft convention in his first report in 1983.¹² This draft, which appears to have been inspired in large measure by the proposals made in the Schwebel report referred to above,¹³ was revised by Evensen the following year.¹⁴ Unfortunately, before the Commission had an opportunity to take action on his draft convention, Evensen moved to the International Court of Justice. The author was appointed to succeed him in 1985.

Thus, when it resumed work on international watercourses in the mid-1980s, the Commission began with a clean slate but had over ten years' experience with the subject. This background served the Commission well: from the adoption in 1987 of the first articles¹⁵ of what ultimately became the present draft, it took what for it was a relatively brief period of five years to complete the provisional adoption of a full set of draft articles.¹⁶

The draft adopted on first reading in 1991 consisted of thirty-two articles arranged in six parts, or chapters.¹⁷ In accordance with standard ILC procedure, it was sent to governments for comments. The Commission then gave the draft articles a second reading in which it took into account the comments of member states¹⁸ and proposals of the special rapporteur.¹⁹

¹⁰ The articles, adopted in 1980, were 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, pt. 2, at 110-36. Four of these six articles have counterparts in the present draft. The two that do not are Articles 5 and "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.

¹¹ The report was not submitted until after Judge Schwebel's departure for the Court. Stephen Schwebel, Third Report on the Law of the Non-Navigational Uses of International Watercourses, [1982] 2 Y.B. Int'l L. Comm'n, pt. 1, at 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 (ILA) in 1966. 52 ILA, CONFERENCE REPORT 484 (1966).

¹² [1983] 2 Y.B. Int'l L. Comm'n, pt. 1, at 155.

¹³ See note 11 *supra*.

¹⁴ [1984] 2 Y.B. Int'l L. Comm'n, pt. 1, at 101.

¹⁵ 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, pt. 2, at 25-38.

¹⁶ 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 10 years or more to complete.

¹⁷ See Report of the International Law Commission on the work of its forty-third session, UN GAOR, 46th Sess., Supp. No. 10, at 161, UN Doc. A/CN.4/46/10 (1991), [1991] 2 Y.B. Int'l L. Comm'n 66 [hereinafter 1991 ILC Report]. 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).

¹⁸ See The Law of the Non-Navigational Uses of International Watercourses, Comments and Observations Received from States, UN Doc. A/CN.4/447 and Add.1, 2 and 3 (1993) (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 Sixth Committee in 1991.

¹⁹ 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, UN Doc. A/CN.4/451 (1993); and *idem*, Second Report on the Law of the Non-Navigational Uses of International Watercourses, UN Doc. A/CN.4/462 (1994) [hereinafter First Report and Second Report].

OVERVIEW OF THE DRAFT ARTICLES

As finally approved in 1994, the draft contains thirty-three articles organized in six parts: 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 27–28); and Part VI, Miscellaneous Provisions (Articles 29–33). As indicated earlier, the Commission also adopted a companion resolution on confined transboundary ground water. The following paragraphs will summarize the main features of the draft, giving particular attention to changes made at the second-reading stage.²⁰

The 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. 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.” An “international watercourse” is defined as “a watercourse, parts of which are situated in different states.” Thus, the draft would apply not only to the main stem of a river or stream forming or crossing an international boundary but also, e.g., to tributaries of such watercourses, boundary-straddling lakes and ground water that is connected with other parts of an international watercourse, whether or not the ground water is intersected by a boundary. The draft makes no distinction between watercourses that are “contiguous” (those forming a boundary) and “successive” (those crossing one).

The “common terminus” requirement was controversial.²¹ 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.”²² To illustrate the point concretely: without the “common terminus” requirement, the Rhine and Danube systems, connected by the Rhine-Main Canal, would conceivably be viewed as a single international watercourse; with the requirement, they would presumably be viewed as two independent watercourses, even though activities in one could be felt in the other (e.g., through transfer of pollution or biota).²³ The word “normally” 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

²⁰ The articles adopted on first reading were reported on in Current Developments Notes in this *Journal* on the Commission's 1987–1991 sessions.

²¹ This requirement was also one of the elements of the definition of “international drainage basin” in Article II of the Helsinki Rules, *supra* note 11.

²² 1991 ILC Report, *supra* note 17, at 175.

²³ 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 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, opened for signature May 23, 1969, 1155 UNTS 331, 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 7, at 202.

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.²⁴

Apart from its compromise function, the word "normally" is also a convenient way of dealing with hydrological conditions that are well-known but not generally present, and that would not strictly satisfy the "common terminus" requirement.²⁵

The cornerstone 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 and that have been the focus of much debate:²⁶ Article 5 on equitable utilization of international watercourses and Article 7 on the obligation not to cause significant harm to other riparian states. Discussion had 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 prevailed, a later-developing upstream state would not be permitted to construct a dam that would cause significant harm to its downstream neighbor.²⁷ If the equitable utilization doctrine took precedence, harm to the downstream state would be one factor to be taken into account in determining whether the dam would be permissible.

The draft adopted on first reading in 1991 accorded primacy to the no-harm rule.²⁸ The new special rapporteur proposed reversing that regime. However, his proposed text would have raised, in effect, a rebuttable presumption that a use causing significant pollution harm is inequitable and unreasonable.²⁹ The final version of the draft does not reverse the primacy of the no-harm rule but softens the regime by making two important changes in Article 7. The first change is the introduction, at the suggestion of the special rapporteur,³⁰ of a "due diligence" standard. 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* harm to other watercourse States."³¹ It could be argued with some force that this "change" only makes express what was already implied, on the ground that 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. Nevertheless, the change is a welcome

²⁴ 1994 ILC Report, *supra* note 7, at 201.

²⁵ In addition to the phenomenon of deltas discussed in note 23 *supra*, 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.* at 202.

²⁶ See, e.g., the comments and observations of Switzerland on the draft articles as adopted on first reading, UN Doc. A/CN.4/447, at 44 (1993); and Stephen C. McCaffrey, *The Law of International Watercourses: Some Recent Developments and Unanswered Questions*, 17 DENV. J. INT'L L. & POL'Y 505, 508-13 (1989).

²⁷ Since upper riparian states generally develop their water resources later than their downstream neighbors, this would make such development by upstreamers difficult, at best.

²⁸ 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, pt. 2 at 36: "[P]rima facie, at least—utilization of an international watercourse . . . is not equitable if it causes other watercourse States appreciable harm."

²⁹ The revised text of Article 7 proposed by the new special rapporteur reads 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 19, at 10-11. See also *idem*, Second Report, *supra* note 19, at 11, which is identical except for the inclusion of transboundary aquifers.

³⁰ See the special rapporteur's proposed redraft of Article 7, *supra* note 29.

³¹ The 1994 version replaced "appreciable" with "significant" wherever the former term appeared in the 1991 draft. 1994 ILC Report, *supra* note 7, at 236.

one in view of the uncertainty suggested by an earlier debate in the Commission over the standard of responsibility in relation to another article.³²

The second major change in Article 7 is the addition of a new paragraph 2, which directly addresses the relationship between the equitable utilization and no-harm principles. It provides that where a state exercises due diligence but its use still causes significant harm, it must, unless the harmed state has agreed to the use, consult with that state on "(a) the extent to which such use is equitable . . . ; (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."³³

While it is clear that this paragraph does not entirely solve the problem, it at least strongly suggests that a state's use that causes significant harm is not per se a breach of the state's international obligations. This is confirmed in the commentary, which states that "the fact that an activity involves significant harm, would not of itself necessarily constitute a basis for barring it."³⁴ 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 of compensation." By requiring consultations the article enhances the possibility that the concerned states will resolve the problem by agreement. And if consultations do not resolve the problem, the draft's new article on dispute resolution would apply. 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 an important and useful addition to the draft articles. The Commission describes the article as a whole as "setting forth a process aimed at avoiding significant harm as far as possible while reaching an equitable result in each concrete case."³⁵

Neither the text of Article 7 nor the Commission's commentary makes clear whether a showing that the use is equitable and reasonable would relieve the harm-causing state of its obligation under the article. According to the commentary, at least some kinds of serious harm could never qualify as being equitable and reasonable: "A use which causes significant harm to human health and safety is understood to be inherently inequitable and unreasonable."³⁶ But 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, could assist the state engaging in that 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. But both the lack of such words as "where appropriate"

³² This debate is described in McCaffrey, *supra* note 26, at 519-25.

³³ 1994 ILC Report, *supra* note 7, at 236. Article 6, Factors Relevant to Equitable and Reasonable Utilization, contains a nonexhaustive list of seven factors to be taken into account in implementing the rule of equitable utilization.

³⁴ *Id.*

³⁵ *Id.*

³⁶ *Id.* at 242.

and the commentary to the article³⁷ suggest that the subparagraphs are conjunctive rather than disjunctive. Thus, one could conclude 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. Indeed, there appears to be no good reason why consultations should have to focus first on whether the use was 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, the states concerned might find it difficult to come to an agreement on 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 subparagraphs 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, seems 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 resolves. And 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 dispute resolution procedures. The adjustment of conflicting uses of an international watercourse, especially where the watercourse is "successive" in character, is a highly complex affair that is unlikely to be accomplished satisfactorily through the simple expedient of a no-harm rule.

Part III of the draft addresses a subject that has been problematic in the practice of states: 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 essentially requires the state planning to undertake a change "which may have a significant adverse impact" upon other states to notify such states in a timely fashion of its plans. If within six months of the notification it has received no reply from the notified states,³⁸ it may 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,³⁹ the states concerned are to "enter into consultations and, if necessary, negotiations with a view to arriving at an equitable resolution of the situation."⁴⁰ If so requested by the notified state when making its reply, the notifying state must suspend implementation of its plans

³⁷ See, in particular, paragraph 18 of the Commentary, *id.* at 243, 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).

³⁸ A change was made at the second-reading stage to encourage an early response by the notified state. See Art. 16(2), *id.* at 272.

³⁹ 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 must provide the notifying state within six months of the initial notification with a "documented explanation setting forth the reasons for the finding." Art. 15, *id.* at 279.

⁴⁰ Art. 17, *id.* at 273. 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." Commentary to Art. 17, para. 2, *id.* at 273. Negotiations would only be "necessary" if consultations failed to resolve the matter.

for six months to permit serious consultations and negotiations. Thus, the entire process could take twelve months, or longer if the states concerned have not completed good faith consultations and negotiations⁴¹ within the second six-month period. If the matter is not resolved to the satisfaction of any of the states concerned, the dispute settlement procedures of Article 33, discussed below, would be applicable.

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: "Watercourse States shall, individually or jointly, protect and preserve the ecosystems of international watercourses."⁴²

This is a powerful statement. It was modeled on 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. 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 the crucial subject of cooperative management of international watercourses, on measures to regulate watercourses and on water installations.

Harmful conditions, including floods, are dealt with in part V, which also contains a provision on emergency situations such as chemical spills. Part VI consists of articles on armed conflict, indirect procedures, data vital to national security, and nondiscrimination, as well as a new article on the settlement of disputes. The article on "nondiscrimination" 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.

The new article on dispute settlement applies to "any watercourse dispute concerning a question of fact or the interpretation or application of the present articles."⁴³ 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, 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.

THE RESOLUTION ON CONFINED TRANSBOUNDARY GROUND WATER

The definition of "watercourse" adopted on first reading included ground water 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 ground water, that is, ground water that is not related to surface water. The Commission took this position despite the importance of transboundary aquifers⁴⁴ because members gen-

⁴¹ 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 *Fisheries Jurisdiction (UK v. Ice.)* (Merits), 1974 ICJ REP. 3 (July 25); *North Sea Continental Shelf cases* (FRG v. Den.; FRG v. Neth.), 1969 ICJ REP. 3 (Feb. 20); and *Lake Lanoux*, 12 R.I.A.A. 281 (1957).

⁴² 1994 ILC Report, *supra* note 7, at 280.

⁴³ Art. 33, *id.* at 322.

⁴⁴ See generally *The Law of International Groundwater Resources*, in 62 ILA, CONFERENCE REPORT 8 (1986); and *Rules on International Groundwaters*, *id.* at 21.

erally had not had this form of ground water in mind during the elaboration of the draft articles. During the second reading of the draft, the new special rapporteur, Professor Rosenstock, proposed that confined ground water be included in 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."⁴⁵ Moreover, including such ground waters was important "in order to encourage their management in a rational manner and prevent their depletion and pollution."⁴⁶

Despite this strong recommendation, the Commission declined to bring confined ground water 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 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.⁴⁷

One is led to wonder why the Commission, having gone this far, could not bring itself simply to include confined ground water in the scope of the draft. One hopes that this omission will be corrected in further work on the draft by governments.

OUTLOOK

As indicated at the outset of this Note, in submitting the draft articles and resolution to the General Assembly the Commission recommended that a convention be elaborated "by the Assembly or by an international conference of plenipotentiaries on the basis of the draft articles."⁴⁸ On the recommendation of the Sixth (Legal) Committee,⁴⁹ the General Assembly decided to "convene a Working Group of the Whole, open to States Members of the United Nations or members of specialized agencies, . . . to elaborate a framework convention on the law of the non-navigational uses of international watercourses on the basis of the draft articles adopted by the International Law Commission."⁵⁰

It remains to be seen whether the working group will be able to agree upon a text or whether, if it does, the articles will depart significantly from the ILC's draft. The reactions of states thus far suggest that the draft strikes a good balance between the interests of upper and lower riparian states. That is to say, while neither group has embraced the entire draft warmly, neither has wholly rejected it, either. But as the new special

⁴⁵ Rosenstock, Second Report, *supra* note 19, at 4. The annex is found in *id.* at 22.

⁴⁶ *Id.* at 35.

⁴⁷ 1994 ILC Report, *supra* note 7, at 326.

⁴⁸ *Id.* at 196-97.

⁴⁹ Draft resolution adopted by the Sixth Committee on November 29, 1994, UN Doc. A/C.6/49/L.27/Rev.1 (1994).

⁵⁰ *Id.*, operative para. 3. The resolution was adopted without change by the General Assembly as Resolution 49/52, on December 9, 1994, by a vote of 143 for, 0 against, with 8 abstentions.

rapporteur noted in his first report, the utility of a framework convention will depend on the strength and depth of its acceptance.⁵¹

Regardless of the outcome, however, the Commission's draft represents a milestone. The Helsinki Rules, adopted by the International Law Association in 1966,⁵² were an influential attempt to codify and progressively develop rules of international law in the field, but they are now nearly thirty years old and fail to deal with key issues. Furthermore, the ILA did not have the benefit of government comment during the elaboration of those rules. States will undoubtedly look to the Commission's draft articles and commentaries, as a modern draft prepared by a UN expert body, for guidance regarding their rights and obligations. In addition, they may well use the draft as a model for agreements with other riparian states. Even if no more than this occurs, the ILC's draft articles will 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.

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⁵¹ Rosenstock, First Report, *supra* note 19, at 4.

⁵² See note 11 *supra*.

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