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**Preliminary report on the law of the non-navigational uses of international watercourses, by
Mr. Stephen McCaffrey, Special Rapporteur**

Topic:
Law of the non-navigational uses of international watercourses

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THE LAW OF THE NON-NAVIGATIONAL USES OF INTERNATIONAL WATERCOURSES

[Agenda item 7]

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Introduction

1. Upon his election to the International Court of Justice on 7 November 1984, Mr. Jens Evensen, Special Rapporteur for the topic of the law of the non-navigational uses of international watercourses, resigned as a member of the International Law Commission. At its thirty-seventh session, the Commission appointed the present Special Rapporteur to succeed him. The Commission also requested the Special Rapporteur to submit a preliminary report during the same session indicating the current status of the Commission's work on the topic and a future programme of work.¹ The Special Rapporteur is pleased to submit the present report in response to that request.

¹ See *Yearbook ... 1985*, vol. I, p. 203, 1910th meeting, para. 2.

I. Present status of the Commission's work on the topic

A. Background

2. The Commission included the topic "Non-navigational uses of international watercourses" in its general programme of work at its twenty-third session, in 1971,² in response to the recommendation made by the General Assembly in its resolution 2669 (XXV) of 8 December 1970. At its twenty-sixth session, in 1974, the Commission had before it a supplementary report by the Secretary-General on legal problems relating to the non-navigational uses of international watercourses.³ At the same session, the Commission established a Sub-Committee on the Law of the Non-Navigational Uses of International Watercourses, chaired by Mr. Richard D. Kearney. The Sub-Committee submitted a report⁴ which proposed the submission of a questionnaire to States. The Commission adopted the report of the Sub-Committee at the same session and also appointed Mr. Kearney Special Rapporteur for the topic.⁵

3. At its twenty-eighth session, in 1976, the Commission had before it replies from the Governments of 21 Member States⁶ to the questionnaire⁷ which had been circulated to Member States by the Secretary-General, as well as a report submitted by the Special Rapporteur.⁸ At that session, in the Commission's discussion on the topic, attention was devoted mainly to the matters raised in the replies from Governments, and dealt with in the report of the Special Rapporteur, concerning the scope of the Commission's work on the topic and the meaning of the term "international watercourse". The Commission's consideration of the topic at that session

led to general agreement ... that the question of determining the scope of the term "international watercourses" need not be pursued at the outset of the work. Instead, attention should be devoted to beginning the formulation of general principles applicable to legal aspects of the uses of those watercourses.⁹

4. At its twenty-ninth session, in 1977, the Commission appointed Mr. Stephen M. Schwebel Special

² See *Yearbook ... 1971*, vol. II (Part One), p. 350, document A/8410/Rev.1, para. 120.

³ *Yearbook ... 1974*, vol. II (Part Two), p. 265, document A/CN.4/274.

⁴ *Yearbook ... 1974*, vol. II (Part One), p. 301, document A/9610/Rev.1, chap. V, annex.

⁵ *Ibid.*, p. 301, para. 159.

⁶ *Yearbook ... 1976*, vol. II (Part One), p. 147, document A/CN.4/294 and Add.1. At subsequent sessions, the Commission had before it replies received from the Governments of 11 additional Member States; see *Yearbook ... 1978*, vol. II (Part One), p. 253, document A/CN.4/314; *Yearbook ... 1979*, vol. II (Part One), p. 178, document A/CN.4/324; *Yearbook ... 1980*, vol. II (Part One), p. 153, document A/CN.4/329 and Add.1; and *Yearbook ... 1982*, vol. II (Part One), p. 192, document A/CN.4/352 and Add.1.

⁷ The final text of the questionnaire, as communicated to Member States, is reproduced in *Yearbook ... 1976*, vol. II (Part One), p. 150, document A/CN.4/294 and Add.1, para. 6; see also *Yearbook ... 1984*, vol. II (Part Two), pp. 82-83, para. 262.

⁸ *Yearbook ... 1976*, vol. II (Part One), p. 184, document A/CN.4/295.

⁹ *Yearbook ... 1976*, vol. II (Part Two), p. 162, para. 164.

Rapporteur to succeed Mr. Kearney, who had not stood for re-election to the Commission.¹⁰ Mr. Schwebel made a statement to the Commission in 1978 and, at the Commission's thirty-first session, in 1979, submitted his first report,¹¹ which contained 10 draft articles. At that session, the Commission held a general debate on the issues raised in the Special Rapporteur's report and on questions relating to the topic as a whole.

5. Mr. Schwebel submitted a second report, containing six draft articles, at the Commission's thirty-second session, in 1980.¹² At that session, the six articles were referred to the Drafting Committee after discussion of the report by the Commission. On the recommendation of the Drafting Committee, the Commission at the same session provisionally adopted draft articles 1 to 5 and X, which read as follows:

Article 1. Scope of the present articles

1. The present articles apply to uses of international watercourse systems and of their waters for purposes other than navigation and to measures of conservation related to the uses of those watercourse systems and their waters.

2. The use of the waters of international watercourse systems for navigation is not within the scope of the present articles except in so far as other uses of the waters affect navigation or are affected by navigation.

Article 2. System States

For the purposes of the present articles, a State in whose territory part of the waters of an international watercourse system exists is a system State.

Article 3. System agreements

1. A system agreement is an agreement between two or more system States which applies and adjusts the provisions of the present articles to the characteristics and uses of a particular international watercourse system or part thereof.

2. A system agreement shall define the waters to which it applies. It may be entered into with respect to an entire international watercourse system, or with respect to any part thereof or particular project, programme or use provided that the use by one or more other system States of the waters of an international watercourse system is not, to an appreciable extent, affected adversely.

3. In so far as the uses of an international watercourse system may require, system States shall negotiate in good faith for the purpose of concluding one or more system agreements.

Article 4. Parties to the negotiation and conclusion of system agreements

1. Every system State of an international watercourse system is entitled to participate in the negotiation of and to become a party to any system agreement that applies to that international watercourse system as a whole.

2. A system State whose use of the waters of an international watercourse system may be affected to an appreciable extent by the implementation of a proposed system agreement that applies only to a part of the system or to a particular project, programme or use is en-

¹⁰ *Yearbook ... 1977*, vol. II (Part Two), p. 124, para. 79.

¹¹ *Yearbook ... 1979*, vol. II (Part One), p. 143, document A/CN.4/320.

¹² *Yearbook ... 1980*, vol. II (Part One), p. 159, document A/CN.4/332 and Add.1.

titled to participate in the negotiation of such an agreement, to the extent that its use is thereby affected, pursuant to article 3 of the present articles.

Article 5. Use of waters which constitute a shared natural resource

1. To the extent that the use of waters of an international watercourse system in the territory of one system State affects the use of waters of that system in the territory of another system State, the waters are, for the purposes of the present articles, a shared natural resource.

2. Waters of an international watercourse system which constitute a shared natural resource shall be used by a system State in accordance with the present articles.

Article X. Relationship between the present articles and other treaties in force

Without prejudice to paragraph 3 of article 3, the provisions of the present articles do not affect treaties in force relating to a particular international watercourse system or any part thereof or particular project, programme or use.

As further recommended by the Drafting Committee, the Commission also accepted at its thirty-second session a provisional working hypothesis as to what was meant by the term "international watercourse system". The hypothesis was contained in a note which read as follows:

A watercourse system is formed of hydrographic components such as rivers, lakes, canals, glaciers and groundwater constituting by virtue of their physical relationship a unitary whole; thus, any use affecting waters in one part of the system may affect waters in another part.

An "international watercourse system" is a watercourse system components of which are situated in two or more States.

To the extent that parts of the waters in one State are not affected by or do not affect uses of waters in another State, they shall not be treated as being included in the international watercourse system. Thus, to the extent that the uses of the waters of the system have an effect on one another, to that extent the system is international, but only to that extent; accordingly, there is not an absolute, but a relative, international character of the watercourse.¹³

6. In its report to the General Assembly on its thirty-second session, the Commission drew attention to the fact that, from the outset of its work on the topic, it had recognized the diversity of international watercourses, in terms both of their physical characteristics and of the human needs they served. It also noted, however, that the existence of certain common watercourse characteristics had been recognized, and that it was possible to identify certain principles of international law already existing and applicable to international watercourses in general. Mention was made in that regard of such concepts as the principle of good-neighbourliness and *sic utere tuo ut alienum non laedas*, as well as of the sovereign rights of riparian States.

7. By its resolution 35/163 of 15 December 1980, the General Assembly, noting with appreciation the progress made by the Commission in the preparation of draft articles on the law of the non-navigational uses of international watercourses, recommended that the Commission proceed with the preparation of draft articles on the topic.

8. The Commission did not consider the topic at its thirty-third session, in 1981, owing to the resignation of Mr. Schwebel from the Commission upon his election to

the ICJ. At its thirty-fourth session, in 1982, the Commission appointed Mr. Jens Evensen Special Rapporteur for the topic.¹⁴ Also at that session, the Commission had before it the third report of Mr. Schwebel, who had begun its preparation prior to his resignation from the Commission.¹⁵

9. At its thirty-fifth session, in 1983, the Commission had before it the first report submitted by Mr. Evensen.¹⁶ That report contained an outline for a draft convention, to serve as a basis for discussion, consisting of 39 articles arranged in six chapters. At that session, the Commission discussed the report as a whole, focusing in particular on the question of the definition of the term "international watercourse system" and on that of an international watercourse system as a shared natural resource.

B. Consideration of the topic by the Commission at its thirty-sixth session¹⁷

10. At its thirty-sixth session, in 1984, the Commission had before it the second report submitted by Mr. Evensen.¹⁸ That report contained the revised text of the outline for a draft convention on the law of the non-navigational uses of international watercourses; that text consisted of 41 draft articles arranged in six chapters, as follows:

CHAPTER I. INTRODUCTORY ARTICLES

Article 1. Explanation (definition) of the term "international watercourse" as applied in the present Convention

Article 2. Scope of the present Convention

Article 3. Watercourse States

Article 4. Watercourse agreements

Article 5. Parties to the negotiation and conclusion of watercourse agreements

CHAPTER II. GENERAL PRINCIPLES, RIGHTS AND DUTIES OF WATERCOURSE STATES

Article 6. General principles concerning the sharing of the waters of an international watercourse

Article 7. Equitable sharing in the uses of the waters of an international watercourse

Article 8. Determination of reasonable and equitable use

¹⁴ *Yearbook ... 1982*, vol. II (Part Two), p. 121, para. 250.

¹⁵ *Yearbook ... 1982*, vol. II (Part One), p. 65, document A/CN.4/348. That report contained, *inter alia*, the following draft articles: "Equitable participation" (art. 6); "Determination of equitable use" (art. 7); "Responsibility for appreciable harm" (art. 8); "Collection, processing and dissemination of information and data" (art. 9); "Environmental pollution and protection" (art. 10); "Prevention and mitigation of hazards" (art. 11); "Regulation of international watercourses" (art. 12); "Water resources and installation safety" (art. 13); "Denial of inherent use preference" (art. 14); "Administrative management" (art. 15); and "Principles and procedures for the avoidance and settlement of disputes" (art. 16).

¹⁶ *Yearbook ... 1983*, vol. II (Part One), p. 155, document A/CN.4/367.

¹⁷ A brief summary of the Commission's debate on the topic at its 1984 session. A full account is given in the Commission's report on that session (*Yearbook ... 1984*, vol. II (Part Two), pp. 87 *et seq.*, paras. 279-343).

¹⁸ *Yearbook ... 1984*, vol. II (Part One), p. 101, document A/CN.4/381.

¹³ *Yearbook ... 1980*, vol. II (Part Two), p. 108, para. 90.

Article 9. Prohibition of activities with regard to an international watercourse causing appreciable harm to other watercourse States

CHAPTER III. CO-OPERATION AND MANAGEMENT IN REGARD TO INTERNATIONAL WATERCOURSES

Article 10. General principles of co-operation and management

Article 11. Notification to other watercourse States. Content of notification

Article 12. Time-limits for reply to notifications

Article 13. Procedures in case of protest

Article 14. Failure of watercourse States to comply with the provisions of articles 11 to 13

Article 15. Management of international watercourses. Establishment of commissions

Article 15 bis. Regulation of international watercourses

Article 15 ter. Use preferences

Article 16. Collection, processing and dissemination of information and data

Article 17. Special requests for information and data

Article 18. Special obligations in regard to information about emergencies

Article 19. Restricted information

CHAPTER IV. ENVIRONMENTAL PROTECTION, POLLUTION, HEALTH HAZARDS, NATURAL HAZARDS, SAFETY AND NATIONAL AND REGIONAL SITES

Article 20. General provisions on the protection of the environment

Article 21. Purposes of environmental protection

Article 22. Definition of pollution

Article 23. Obligation to prevent pollution

Article 24. Co-operation between watercourse States for protection against pollution. Abatement and reduction of pollution

Article 25. Emergency situations regarding pollution

Article 26. Control and prevention of water-related hazards

[Article 27 of the original draft was replaced by article 15 bis]

Article 28. Safety of international watercourses, installations and constructions, etc.

Articles 28 bis. Status of international watercourses, their waters and constructions, etc. in armed conflicts

[Article 29 of the original draft was replaced by article 15 ter]

Article 30. Establishment of international watercourses or parts thereof as protected national or regional sites

CHAPTER V. PEACEFUL SETTLEMENT OF DISPUTES

Article 31. Obligation to settle disputes by peaceful means

Article 31 bis. Obligations under general, regional or bilateral agreements or arrangements

Article 32. Settlement of disputes by consultations and negotiations

Article 33. Inquiry and mediation

Article 34. Conciliation

Article 35. Functions and tasks of the Conciliation Commission

Article 36. Effects of the report of the Conciliation Commission. Sharing of costs

Article 37. Adjudication by the International Court of Justice, another international court or a permanent or ad hoc arbitral tribunal

Article 38. Binding effect of adjudication

CHAPTER VI. FINAL PROVISIONS

Article 39. Relationship to other conventions and international agreements

11. On the suggestion of the Special Rapporteur, the Commission focused its discussion on draft articles 1

to 9 as contained in the second report and on questions related thereto. At the conclusion of the discussion, the Commission decided to refer draft articles 1 to 9 to the Drafting Committee. It was understood that the Drafting Committee would also have available the text of the provisional working hypothesis accepted by the Commission at its thirty-second session, in 1980 (see para. 5 above), the texts of articles 1 to 5 and X provisionally adopted by the Commission at the same session (*ibid.*) and the texts of draft articles 1 to 9 submitted by the Special Rapporteur in his first report.¹⁹

1. THE GENERAL APPROACH SUGGESTED BY THE SPECIAL RAPPORTEUR

12. The outline for a draft convention proposed by the Special Rapporteur in his first report had seemed broadly acceptable. Consequently, the Special Rapporteur had made only minor changes in and a few additions to the outline itself in his second report. More significant changes were proposed, however, in the texts of certain draft articles, as indicated below.

13. The "framework agreement" approach had likewise seemed to be broadly acceptable to the Commission and was also the approach that had been endorsed by the Sixth Committee of the General Assembly (see paras. 32-33 below). The Special Rapporteur believed that the term "framework agreement" should be applied in a broad and flexible manner, and shared the position of his predecessor, Mr. Schwebel, that

... the product of the Commission's work should serve to provide ... the general principles and rules governing international watercourses in the absence of agreement among the States concerned and to provide guidelines for the negotiation of future specific agreements. ...²⁰

It seemed to be generally recognized by the Commission that, in a framework text, it would be necessary or useful to use, to a reasonable extent, general legal formulations or standards such as "good-neighbourly relations", "good faith", participation in the benefits of a resource "in a reasonable and equitable manner" and the duty not to cause "appreciable harm" to the rights or interests of others. While some members supported this broad approach to the topic, others believed that the legal principles proposed were formulated too generally. Furthermore, certain members felt that recommendations and guidelines did not belong in a framework agreement, while others were of the view that recommendations and guidelines might be useful for the elaboration of specific watercourse agreements.

14. Finally, it was recognized that the general approach suggested by the Special Rapporteur in his second report was based on certain changes which he had introduced in his revised draft articles, most notably in article 1, where the term "international watercourse system" had been replaced by the term "international watercourse", and in article 6, where the expression "the watercourse system and its waters are ... a shared natural resource" had been changed to "the water-

¹⁹ *Yearbook ... 1983*, vol. II (Part Two), pp. 68 *et seq.*, footnotes 245 to 250.

²⁰ *Yearbook ... 1982*, vol. II (Part One), p. 67, document A/CN.4/348, para. 2.

course States concerned shall share in the use of the waters of the watercourse in a reasonable and equitable manner". These changes also were the subject of different views within the Commission, as indicated below. While no final resolution of the various issues was achieved during the thirty-sixth session, in 1984, it was expected that further discussions on those issues would assist the Commission in its future work. As stated in the Commission's report on its thirty-sixth session:

... the Commission anticipates that it will continue its work on this topic in the light of the debate to be held in the Sixth Committee of the General Assembly on the report of the Commission on the work of its present session, in the light of future proposals and suggestions to be made by the Special Rapporteur, and on the basis of future reports of the Drafting Committee on its consideration of draft articles 1 to 9.²¹

2. ARTICLES 1 TO 9 AS SUBMITTED BY THE SPECIAL RAPPORTEUR IN HIS SECOND REPORT

15. As proposed by the Special Rapporteur, articles 1 to 9 comprise the first two chapters of the draft. Chapter I, entitled "Introductory articles", contains articles 1 to 5, and chapter II, entitled "General principles, rights and duties of watercourse States", contains articles 6 to 9. As indicated above (para. 11), the Commission focused its discussion at its thirty-sixth session, in 1984, on draft articles 1 to 9 and referred those articles to the Drafting Committee. Consequently, the present summary of the Commission's consideration of the topic at its 1984 session will concentrate on those articles.

16. Views were divided in the Commission on the revised text of draft article 1²² submitted in the Special Rapporteur's second report. While article 1 as submitted in his first report²³ had been patterned closely on the provisional working hypothesis adopted by the Commission in 1980 as to what was meant by the expression "international watercourse system" (see para. 5, *in fine*, above), the Special Rapporteur, in his second report, had recommended abandonment of the "system" concept in favour of the simpler notion of an "international watercourse". The Special Rapporteur had recommended this change because of his conclusion that there was opposition to the "system" concept, both in the Commission and in the Sixth Committee of the

General Assembly, on the ground that it represented a doctrinal approach similar to the "drainage basin" concept earlier discarded by the Commission.

17. Some members of the Commission endorsed the change in approach suggested by the Special Rapporteur in the revised text of article 1. They believed the abandonment of the "system" concept removed a major stumbling-block to progress on the topic and resulted in a purely geographical definition which could form the basis of a comprehensive draft, while avoiding the territorial connotations which, in their view, the "system" concept had implied.

18. Some members viewed the abandonment of the "system" concept as regrettable but indicated that they did not object to the suggested change, provided it represented nothing more than a change of wording. In their view, however, the elimination of the "system" concept presented the conceptual problem of dealing with the relativity aspect highlighted in the provisional working hypothesis adopted by the Commission in 1980: there could be different systems with respect to different uses of the same watercourse at one and the same time.

19. To other members, the revised draft article 1 represented a major departure from the approach adopted by the Commission at its thirty-second session, in 1980. Those members were of the view that the articles provisionally adopted in 1980 (see para. 5 above) constituted a coherent whole and that the elimination of the "system" concept necessitated a rethinking of all the provisions, in particular articles 4, 5 and 6.

20. Finally, certain members questioned the omission from the text proposed by the Special Rapporteur of an indication, even a non-exhaustive one, of the possible hydrographic components of an international watercourse. Those members thought it preferable to include in the text of the article the examples given in the Special Rapporteur's second report (rivers, lakes, canals, tributaries, streams, brooks and springs, glaciers and snow-capped mountains, swamps, ground water and other types of aquifers),²⁴ with a view to determining whether they should form the subject of separate articles or at least a very detailed commentary.

21. Draft articles 2²⁵ and 3²⁶ as submitted in the Special Rapporteur's second report did not give rise to

²¹ *Yearbook ... 1984*, vol. II (Part Two), p. 89, para. 290, *in fine*.

²² Revised draft article 1 as submitted in the second report read as follows:

"Article 1. Explanation (definition) of the term 'international watercourse' as applied in the present Convention

"1. For the purposes of the present Convention, an 'international watercourse' is a watercourse—ordinarily consisting of fresh water—the relevant parts or components of which are situated in two or more States (watercourse States).

"2. To the extent that components or parts of the watercourse in one State are not affected by or do not affect uses of the watercourse in another State, they shall not be treated as being included in the international watercourse for the purposes of the present Convention.

"3. Watercourses which in whole or in part are apt to appear and disappear (more or less regularly) from seasonal or other natural causes such as precipitation, thawing, seasonal avulsion, drought or similar occurrences are governed by the provisions of the present Convention.

"4. Deltas, river mouths and other similar formations with brackish or salt water forming a natural part of an international watercourse shall likewise be governed by the provisions of the present Convention."

²³ *Yearbook ... 1983*, vol. II (Part Two), p. 68, footnote 245.

²⁴ *Yearbook ... 1984*, vol. II (Part One), p. 106, document A/CN.4/381, para. 24.

²⁵ Revised draft article 2 as submitted in the second report read as follows:

"Article 2. Scope of the present Convention

"1. The present Convention applies to uses of international watercourses and of their waters for purposes other than navigation and to measures of administration, management and conservation related to the uses of those watercourses and their waters.

"2. The use of the waters of international watercourses for navigation is not within the scope of the present Convention except in so far as other uses of the waters affect navigation or are affected by navigation."

²⁶ Revised draft article 3 as submitted in the second report read as follows:

"Article 3. Watercourse States

"For the purposes of the present Convention, a State in whose territory relevant components or parts of the waters of an international watercourse exist is a watercourse State."

significant differences of view. Draft article 4²⁷ was the subject of some comment, principally on the question whether the revised text of paragraph 1 was preferable to that submitted in the first report.²⁸ There was general agreement, however, that the article should safeguard and protect existing agreements and give every possible encouragement to States to enter into agreements concerning international watercourses.

22. Comments on draft article 5²⁹ focused particularly on paragraph 2. The usefulness of the criterion of "an appreciable extent", although it had been taken verbatim from article 4, paragraph 2, as provisionally adopted by the Commission in 1980 (see para. 5 above), was questioned by some members of the Commission. Others expressed doubts concerning the fact that paragraph 1 allowed watercourse States to become parties to watercourse agreements, whereas paragraph 2 allowed them only to participate in the negotiation thereof.

23. Chapter II, containing articles 6 to 9, was considered by some members to be the most important chapter of the draft articles, since it set out the rights and obligations of watercourse States. Draft article 6³⁰

²⁷ Revised draft article 4 as submitted in the second report read as follows:

"Article 4. Watercourse agreements"

"1. Nothing in the present Convention shall prejudice the validity and effect of a special watercourse agreement or special watercourse agreements which, taking into account the characteristics of the particular international watercourse or watercourses concerned, provide measures for the reasonable and equitable administration, management, conservation and use of the international watercourse or watercourses concerned or relevant parts thereof.

"The provisions of this article apply whether such special agreement or agreements are concluded prior to or subsequent to the entry into force of the present Convention for the watercourse States concerned.

"2. A special watercourse agreement should define the waters to which it applies. It may be entered into with respect to an international watercourse in its entirety, or with respect to any part thereof or particular project, programme or use, provided that the use by one or more other watercourse States of the waters of such international watercourse is not, to an appreciable extent, affected adversely.

"3. In so far as the uses of an international watercourse may require, watercourse States shall negotiate in good faith for the purpose of concluding one or more watercourse agreements or arrangements."

²⁸ For the text of draft article 4 submitted in the first report, see *Yearbook ... 1983*, vol. II (Part Two), p. 70, footnote 247.

²⁹ Revised draft article 5 as submitted in the second report read as follows:

"Article 5. Parties to the negotiation and conclusion of watercourse agreements"

"1. Every watercourse State is entitled to participate in the negotiation of and to become a party to any watercourse agreement that applies to that international watercourse as a whole.

"2. A watercourse State whose use of the waters of an international watercourse may be affected to an appreciable extent by the implementation of a proposed watercourse agreement that applies only to a part of the watercourse or to a particular project, programme or use is entitled to participate in the negotiation of such an agreement, to the extent that its use is thereby affected."

³⁰ Revised draft article 6 as submitted in the second report read as follows:

"Article 6. General principles concerning the sharing of the waters of an international watercourse"

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

was the subject of extensive discussion relating in particular to the replacement of the words "the watercourse system and its waters are ... a shared natural resource"³¹ by the words "the watercourse States concerned shall share in the use of the waters of the watercourse in a reasonable and equitable manner". The Special Rapporteur indicated that, while it had been accepted in the Commission and in the Sixth Committee that watercourse States were entitled to a reasonable and equitable share of the benefits arising from an international watercourse, the use of the term "shared natural resource" as a concept had given rise to strong objection.

24. Some members of the Commission considered that the revised text of article 6 constituted a major improvement, since the new wording provided a more acceptable basis for an equitable international watercourse régime. Some members, however, thought it should not be excluded that a watercourse agreement for a particular project could be facilitated by using the concept of shared natural resources, if the watercourse States concerned so agreed.

25. Other members of the Commission questioned the deletion of the "shared natural resource" concept. According to this view, the proposition that water constituted a shared natural resource was supported by various international instruments and was only a reflection of a fact of nature. It was also remarked that it would be necessary to determine how the removal of this central concept would affect the remainder of the draft.

26. In his summing-up on draft article 6, the Special Rapporteur said that the deletion of the "shared natural resource" concept in the revised text appeared to be generally acceptable. He stated, however, that he could not accept the suggestion made during the debate that all reference to "sharing" be deleted from article 6. According to the Special Rapporteur, the whole idea of drawing up a framework agreement was that there existed a unity of interests and an interdependence between watercourse States which, by their very nature, entailed the sharing of the utilization and benefits of the waters of an international watercourse.

27. Draft article 7³² was generally supported by some members, who noted that it introduced the important

"2. To the extent that the use of the waters of an international watercourse within the territory of one watercourse State affects the use of the waters of the watercourse in the territory of another watercourse State, the watercourse States concerned shall share in the use of the waters of the watercourse in a reasonable and equitable manner in accordance with the articles of the present Convention and other agreements and arrangements entered into with regard to the management, administration or uses of the international watercourse."

³¹ For the text of draft article 6 submitted in the first report, see *Yearbook ... 1983*, vol. II (Part Two), p. 70, footnote 248.

³² Revised draft article 7 as submitted in the second report read as follows:

"Article 7. Equitable sharing in the uses of the waters of an international watercourse"

"The waters of an international watercourse shall be developed, used and shared by watercourse States in a reasonable and equitable manner on the basis of good faith and good-neighbourly relations with a view to attaining optimum utilization thereof consistent with adequate protection and control of the international watercourse and its components."

concept of development, use and sharing of the waters of an international watercourse in a reasonable and equitable manner. Different views were expressed on the inclusion in the article of the principles of good faith and good-neighbourly relations: while certain members approved of their inclusion, certain others considered those concepts, particularly the latter, to be too vague and uncertain. Doubts were also voiced concerning the reference to "optimum utilization". The Special Rapporteur concluded that at least the first part of the article had received considerable support and thus merited retention. He recognized that the second part posed certain difficulties, which he hoped could be satisfactorily resolved. He also expressed the view that the notion of "good-neighbourly relations" had emerged as a concept of international law.

28. Draft article 8³³ was viewed by some members of the Commission as an important element of the draft,

³³ Revised draft article 8 as submitted in the second report read as follows:

"Article 8. Determination of reasonable and equitable use

"1. In determining whether the use by a watercourse State of the waters of an international watercourse is exercised in a reasonable and equitable manner in accordance with article 7, all relevant factors shall be taken into account, whether they are of a general nature or specific for the international watercourse concerned. Among such factors are:

"(a) the geographic, hydrographic, hydrological and climatic factors together with other relevant circumstances pertaining to the watercourse concerned;

"(b) the special needs of the watercourse State concerned for the use or uses in question in comparison with the needs of other watercourse States;

"(c) the attainment of a reasonable and equitable balance between the relevant rights and interests of the watercourse States concerned;

"(d) the contribution by the watercourse State concerned of waters to the international watercourse in comparison with that of other watercourse States;

"(e) development and conservation by the watercourse State concerned of the international watercourse and its waters;

"(f) the other uses of the waters of an international watercourse by the State concerned in comparison with the uses by other watercourse States, including the efficiency of such uses;

"(g) co-operation with other watercourse States in projects or programmes to obtain optimum utilization, protection and control of the watercourse and its waters, taking into account cost-effectiveness and the costs of alternative projects;

"(h) pollution by the watercourse State or States concerned of the international watercourse in general or as a consequence of the particular use, if any;

"(i) other interference with or adverse effects, if any, of such use for the uses, rights or interests of other watercourse States including, but not restricted to, the adverse effects upon existing uses by such States of the waters of the international watercourse and its impact upon protection and control measures of other watercourse States;

"(j) availability to the State concerned and to other watercourse States of alternative water resources;

"(k) the extent and manner of co-operation established between the watercourse State concerned and other watercourse States in programmes and projects concerning the use in question and other uses of the waters of the international watercourse in order to obtain optimum utilization, reasonable management, protection and control thereof.

"2. In determining, in accordance with paragraph 1 of this article, whether a use is reasonable and equitable, the watercourse

since it would facilitate the determination of what constituted "reasonable and equitable" use in concrete situations. Other members considered a non-exhaustive list of factors such as that contained in article 8 to be of limited value. The latter members were of the view that article 8 should be limited essentially to the first sentence of paragraph 1.

29. Draft article 9³⁴ was the subject of extensive comment. Certain members generally approved of the text submitted in the Special Rapporteur's second report and considered that the entire draft could be built upon the basic principle enunciated in this article, namely *sic utere tuo ut alienum non laedas*, which was the basis of the principles contained in articles 7 and 8. Some members, however, urged that the article be clarified in order to specify that the obligation to refrain from an activity that might cause "appreciable harm" was not applicable where a watercourse agreement provided for the equitable apportionment of benefits resulting from that activity. Moreover, certain members believed that the criterion of "appreciable harm" was too strict and that a formula such as "exceeding a State's equitable share" or "depriving another State of its equitable share" would be preferable. It was pointed out in that connection that the use of the term "harm" could give rise to a conflict between the concept of an "equitable share" under article 6 and that of not causing "appreciable harm" under article 9. It was suggested that those two articles could be reconciled by having article 9 prohibit the infliction of appreciable harm except to the extent allowable under an agreed determination of equitable allocation of the watercourse concerned. Finally, it was pointed out that the article as drafted did not clearly cover future harm in the sense of lost opportunity to construct a project or to put the water to a given use.

30. In his summing-up of the discussion on the topic at the thirty-sixth session, the Special Rapporteur recognized that, on certain basic issues concerning draft articles 1 to 9, opinions seemed to vary considerably. He therefore proposed that those articles be "provisionally referred" to the Drafting Committee so as to give him the opportunity to receive guidance from the Committee as to the drafting of formulations that might be more acceptable to the Commission for its future work. It was so agreed by the Commission.³⁵

States concerned shall negotiate in a spirit of good faith and good-neighbourly relations in order to resolve the outstanding issues.

"If the watercourse States concerned fail to reach agreement by negotiation within a reasonable period of time, they shall resort to the procedures for peaceful settlement provided for in chapter V of the present Convention."

³⁴ Revised draft article 9 as submitted in the second report read as follows:

"Article 9. Prohibition of activities with regard to an international watercourse causing appreciable harm to other watercourse States

"A watercourse State shall refrain from and prevent (within its jurisdiction) uses or activities with regard to an international watercourse that may cause appreciable harm to the rights or interests of other watercourse States, unless otherwise provided for in a watercourse agreement or other agreement or arrangement."

³⁵ *Yearbook ... 1984*, vol. II (Part Two), p. 98, para. 343.

C. Comments and observations in the Sixth Committee of the General Assembly on the Commission's consideration of the topic at its thirty-sixth session³⁶

I. GENERAL OBSERVATIONS

31. The Commission was congratulated for having achieved appreciable progress in its consideration of the topic. It was stressed that, despite certain conceptual difficulties which had arisen both in the Commission and in the Sixth Committee, the revised draft articles provided a general basis on which further work on the topic could be pursued. Despite certain disagreements which seemed to remain within the Commission, it appeared that the draft articles had already reached an advanced stage and that work on the topic constituted a priority task for the Commission.

2. COMMENTS ON THE GENERAL APPROACH SUGGESTED BY THE SPECIAL RAPPORTEUR

32. Many representatives who addressed themselves to the issue commended the "framework agreement" approach to the topic, which followed the approach adopted by the Commission in 1980. It was said that, since political relationships and disposition to cooperate among riparian States varied greatly, the general rules included in a framework agreement should be precise and detailed enough to safeguard the rights of interested parties in the absence of specific agreements. With regard to whether the framework agreement should consist strictly of legal rules, some representatives supported the Special Rapporteur's view that such an agreement should contain, in addition to such rules, guidelines and recommendations which might be adapted to specific watercourse agreements. But it was stated that the general concepts and language had to be complemented by precise mechanisms that could give them specific content and avoid conflict in actual cases.

33. Certain representatives expressed doubts concerning the framework agreement approach. One view was that it was difficult to envisage cases in which all States sharing the same watercourse would become parties to the framework agreement and not conclude a specific watercourse agreement. The idea that the draft articles could serve as a set of model rules still had some appeal. Whatever their final form, however, the draft articles could serve as a guide for the conclusion of watercourse agreements and for crystallizing the few substantive rules on the subject. The view was expressed that it was far from evident that the draft under consideration quite fitted the definition of a framework agreement that States could adapt to their particular needs. According to that view, such an agreement should be a more flexible and freer text.

34. Some representatives expressed concern that the Special Rapporteur had reworked some of the basic concepts underlying the draft articles, such as the "system" concept, the definition of an "international watercourse" and the concept of "shared natural

resources". It was asked whether the new definitions really constituted progress. Finally, the Commission and the Special Rapporteur were urged to avoid an annual reconsideration of texts that had already been provisionally adopted by the Commission.

3. COMMENTS ON ARTICLES 1 TO 9 AS SUBMITTED BY THE SPECIAL RAPPORTEUR IN HIS SECOND REPORT

35. Comments in the Sixth Committee on draft articles 1 to 9 largely paralleled the views expressed in the Commission. A brief summary will be provided here for ease of reference. Particular attention will be devoted to the articles that received most attention both in the Commission and in the Sixth Committee, namely articles 1, 6 and 9.

36. Views expressed in the Sixth Committee on draft article 1, and specifically on the deletion of the "system" concept, varied. Some representatives endorsed the Special Rapporteur's replacement of the term "international watercourse system" by the term "international watercourse". Specifically, it was said that the use of the "system" concept had been somewhat ambiguous because it might have connoted the idea of jurisdiction over land areas. Certain representatives welcomed the Special Rapporteur's assurances that the new wording in draft article 1 was a purely terminological and not a conceptual change. Other representatives, however, expressed regret at the abandonment of the "system" concept, which they considered to be a rich, modern notion. The abandonment of that concept, in their view, meant that one of the corner-stones of the draft had been removed. It was thus urged that the Commission return to the "system" approach, since the natural connection between various elements—namely that they formed a system—could not be overlooked.

37. The few observations made in the Sixth Committee on draft articles 2 and 3 largely echoed those made in the Commission. Among other comments on draft article 4, some representatives criticized the new paragraph 1 as going too far towards giving the provisions of the framework agreement a status from which watercourse States would be unable to derogate by special agreement. With regard to paragraph 2 of article 4, several representatives criticized the vague import of the expression "to an appreciable extent" and suggested that criteria be set down to clarify the expression. Similar observations were made with respect to the same expression appearing in draft article 5. With regard to draft article 5 as a whole, certain representatives expressed their qualified approval of it, whereas others expressed doubts or reservations.

38. Several representatives welcomed the Special Rapporteur's replacement in draft article 6 of the concept of a "shared natural resource" by the notion of "sharing in the use of waters in a reasonable and equitable manner" and considered the revised text a major improvement which struck a better balance in the article as a whole. Some representatives welcomed the Special Rapporteur's assurances that the changes introduced were of a terminological nature and not intended to affect substance. They considered that, while the notion of sharing still formed the basis of the draft, it did so in a

³⁶ This survey is based on section F of the "Topical summary, prepared by the Secretariat, of the discussion in the Sixth Committee on the report of the Commission during the thirty-ninth session of the General Assembly" (A/CN.4/L.382), to which the reader is referred for a more detailed account.

more general manner and avoided the doctrinal overtones implicit in the concept of a "shared natural resource".

39. Certain representatives believed that the revised draft still did not strike the right balance, since it appeared to place more emphasis on the "sharing" notion than on the principle of permanent sovereignty over natural resources, on which greater emphasis was required. Thus, according to certain representatives, the notion of sharing in any form should be eliminated altogether from the article.

40. On the other hand, certain other representatives regretted or deplored the elimination of the concept of a "shared natural resource". In their view, the concept underlined the necessary interrelationship between the rights of adjacent riparian States and was the basis for certain essential obligations in that area. They believed that the abandonment of the concept, coupled with the deletion of the "system" concept in draft article 1, called into question the arguments underlying some of the draft articles. Doubts were also voiced with regard to the notion of "reasonable and equitable" sharing.

41. Draft article 7 was supported by some representatives as a necessary corollary to draft article 6. Doubts were, however, expressed regarding the terms "optimum utilization", "good-neighbourly", "protection and control" and "shared", because they could give rise to misinterpretation or abuse. Draft article 8 was the subject of mixed views. Certain representatives considered that the factors laid down therein could provide non-binding, non-exhaustive reference points for determining whether waters were used in a reasonable and equitable manner. Other representatives questioned the utility of including a long non-exhaustive list of factors and requested the Commission to re-examine the matter.

42. Draft article 9 was approved of by some representatives, who considered it to be one of the core provisions of the draft as a whole. They believed that the maxim *sic utere tuo ut alienum non laedas* should occupy a privileged place in the draft, since the obligation not to cause harm to other States was a basic obligation which was recognized as a generally accepted principle of international law. At the same time, the draft reflected modern trends by excluding from the scope of the prohibition those injurious effects which did not exceed the threshold of "appreciable harm", thus creating a link between the article and the topic of international liability for injurious consequences arising out of acts not prohibited by international law.

43. Certain representatives considered that the term "appreciable harm" required further clarification in order to become acceptable. Other representatives

found the notion of "appreciable harm" to be too vague to be appropriately employed in article 9. Finally, certain representatives referred to a potential conflict between the determination of reasonable and equitable use of a watercourse under articles 6 to 8 and the prohibition of activities causing appreciable harm under article 9.

44. Chapters III, IV, V and VI of the Special Rapporteur's revised draft were also commented upon in the Sixth Committee, although less extensively than chapters I and II. Since attention was focused on the first two chapters both in the Commission and in the Sixth Committee, the comments on the other chapters are not summarized in this preliminary report.

D. Summary of the present status of the Commission's work on the topic

45. As indicated earlier (paras. 2 *et seq.* above), the topic of the law of the non-navigational uses of international watercourses has been on the Commission's active agenda since 1974. At its thirty-second session, in 1980, the Commission provisionally adopted a set of six articles (para. 5 above). Certain modifications to those articles were proposed by the previous Special Rapporteur, Mr. Evensen, who submitted a first report containing a complete set of 39 draft articles to the Commission at its thirty-fifth session, in 1983, and a second report containing a revised set of 41 draft articles at the thirty-sixth session, in 1984. The Commission discussed the draft articles at both of those sessions, concentrating in 1984 on articles 1 to 9 and related questions.

46. At its 1984 session, the Commission referred to the Drafting Committee draft articles 1 to 9 as submitted in Mr. Evensen's second report. It was understood that the Drafting Committee would also have available the texts of the provisional working hypothesis accepted by the Commission in 1980, of the six articles provisionally adopted in 1980, and of draft articles 1 to 9 submitted in Mr. Evensen's first report (see para. 11 above).

47. The outline for a draft convention proposed by Mr. Evensen seems to be broadly acceptable, both in the Commission and in the Sixth Committee, as a general basis on which further work on the topic could proceed. At the same time, it is recognized in both bodies that certain conceptual difficulties remain to be resolved. The "framework agreement" approach to the topic also seems to have been generally endorsed as the most practical way of taking into account the special requirements relating to specific watercourses and allowing ample latitude for specific watercourse agreements, while providing general standards applicable to international watercourses in general.

II. Future programme of work

48. As noted in the introduction to this report, upon the appointment of the present Special Rapporteur during its thirty-seventh session, the Commission requested that he submit a preliminary report indicating the status of its work on the topic and lines of further action.³⁷ Bearing in mind the importance and delicacy of the subject, and pending a full study of the topic as a whole, the Special Rapporteur offers below his preliminary views as to the general lines along which the Commission's work on the topic might proceed.

49. The survey of the present status of the Commission's work on the topic contained in section I of this report reveals that considerable time and effort have already been devoted to the elaboration of draft articles and commentaries. While certain issues have not been fully resolved, there is broad agreement on the vital nature of the topic itself. That being the case, the Special Rapporteur believes that the Commission's future work on the topic should build as much as possible upon such progress as has already been achieved and should be aimed at making further concrete progress in the form of the provisional adoption of draft articles.

50. Accordingly, while it would seem appropriate for the Special Rapporteur to provide in his second report, in 1986, a brief statement of his views concerning the articles referred to the Drafting Committee in 1984, he would recommend that those articles not be the subject of another general debate in 1986. Rather, it would appear that the Commission's work could be expedited most effectively if any discussion of those articles in plenary were confined, in principle, to any responses

there might be to the views expressed on them in the Special Rapporteur's second report. Of course, if the Commission, as a result of its discussion of the topic at its thirty-seventh session, should wish the Special Rapporteur to include in his second report observations or proposals concerning specific issues raised by articles before the Drafting Committee, he would naturally be prepared to do so.

51. Moreover, in the light of the fact that the outline, if not all the draft articles, formulated by the previous Special Rapporteur seems broadly acceptable as a general basis for further work, the present Special Rapporteur would propose, for the time being at least, following the general organizational structure provided by the outline in elaborating further draft articles. Specifically, he would propose that the body of his second report be devoted to the formulation of draft articles on a limited number of the issues dealt with in chapter III of the outline—i.e. the chapter immediately following those containing the nine articles referred to the Drafting Committee in 1984. In this way, the Special Rapporteur would hope to be able to submit to the Commission at its thirty-eighth session in 1986, a set of draft articles of manageable size and scope, together with commentaries reviewing their legal basis.

52. The Special Rapporteur considers it a high honour to have been entrusted with the important task of assisting the Commission in its work on the law of the non-navigational uses of international watercourses. He recognizes that the Commission's task is a challenging one and looks forward to working closely with the Commission to produce legal texts which are generally acceptable on a topic of great importance to the international community.

³⁷ See footnote 1 above.