

## CHAPTER 2

### The UN Convention on the Law of the Non-Navigational Uses of International Watercourses: Prospects and Pitfalls

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#### INTRODUCTION

Professor Caflisch has provided an historical and conceptual context for our consideration of the topic, the Regulatory Framework for International Watercourses. I intend to provide an overview of the recently adopted United Nations Convention on the Law of Non-Navigational Uses of International Watercourses, indicating some of its possible strengths and weaknesses.

#### THE UN CONVENTION

The Convention on the Law of the Non-Navigational Uses of International Watercourses was adopted by the United Nations General Assembly on May 21, 1997.<sup>1</sup> It had been negotiated in the Sixth (Legal) Committee of the General Assembly, on the basis of draft articles adopted by the International Law Commission (ILC)<sup>2</sup> after some twenty years' work on the project.<sup>3</sup> The Convention is a general, framework agreement that contains thirty-seven articles, which are divided into seven parts. The most important substantive and procedural provisions are contained in Part II, General Principles, Part III, Planned Measures, and Part IV, Protection, Preservation and Management. Also important is Article 33 on the Settlement of Disputes. In the

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<sup>1</sup> The Convention is annexed to U.N.G.A. Res. 51/229, 21 May 1997, adopted by a vote of 103 for and 3 against, with 27 abstentions. See generally Attila Tanzi, *Codifying the Minimum Standards of the Law of International Watercourses: Remarks on Part One and a Half*, 21 NAT. RESOURCES J. 109 (1997); and John Crook & Stephen McCaffrey, *The United Nations Starts Work on a Watercourses Convention*, 91 AM. J. INT'L. L. 374 (1997).

<sup>2</sup> *Report of the International Law Commission on the Work of its Forty-sixth Session*, U.N. GAOR, 49th Sess., Supp. No. 10, 197, U.N. Doc. A/49/10 (1994) [hereinafter *1994 ILC Report*]. See Stephen McCaffrey, *The International Law Commission Adopts Draft Articles on International Watercourses*, 89 AM. J. INT'L. L. 395 (1995).

<sup>3</sup> The ILC included the topic in its general program of work in 1971. It began study of the topic in 1974 with the establishment of a sub-committee and the appointment of the first of five special rapporteurs. See e.g., [1985] Y.B. INT'L. L. COMM'N, vol. 2, pt. 2, 68 (1986).

following overview, I will pay particular attention to the articles that I believe may be of special significance for the Bank's work.

Perhaps the most logical starting place is the Convention's definition of the term "international watercourse." It is natural to think of this expression as being synonymous with "international river", but as used in the Convention it is much broader. The definition takes into account that most fresh water is in fact underground, and that most of this groundwater is related to, or interacts with, surface water. Thus, for example, pollution of surface water can contaminate groundwater, and vice versa, just as withdrawals of groundwater can affect surface water flows. Article 2, therefore, defines "watercourse" as "a system of surface waters and groundwaters constituting by virtue of their physical relationship a unitary whole..." This definition calls the attention of states to the interrelationship between all parts of the system of surface and undergroundwaters that make up an international watercourse. Thus it should be clear immediately that an effect on one part of the system will generally be transmitted to other parts. Let us assume, for example, that an aquifer is intersected by the border between states A and B. Mining of the groundwater in that aquifer in country A can affect groundwater levels in state B. It may also affect surface flows in state B to the extent that the aquifer contributes to those flows. Nevertheless, the inclusion of groundwater in the Convention was cited as a reason for the abstentions of two states from the vote on the Convention.<sup>4</sup>

The relationship of the Convention to agreements concerning specific watercourses is dealt with in Articles 3 and 4 of the Convention, which have been covered by Professor Caflisch. Article 3 generally encourages states sharing watercourses to enter into agreements that apply and adjust the provisions of the Convention to the particular characteristics of the watercourse concerned. While existing agreements remain unaffected by the Convention, parties are called upon to "consider harmonizing" those agreements with its "basic principles."<sup>5</sup> As you can imagine, some delegations, such as Ethiopia's, believed that harmonization should have been required. But given the vast number and variety of existing agreements, such a requirement would have been impractical. However, this does not mean that the principles reflected in the Convention will be without significance in the *interpretation* of existing agreements.

Article 3 also addresses the situation in which less than all of the states sharing a watercourse enter into an agreement concerning its use. In that case, the agreement may not adversely affect uses of other states on that watercourse without their consent. Then there is the situation in which a riparian state believes the principles of the

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<sup>4</sup> Verbatim record, 99th plenary meeting, U.N. General Assembly, 21 May 1997, U.N. Doc. A/51/PV.99, at 5 (Pakistan) and 12 (Rwanda).

<sup>5</sup> Some delegations believed harmonization should have been required. See, e.g., the statement of Ethiopia in explaining its vote on the Convention, Verbatim record, *id.* at 9-10.

Convention should govern the watercourse it shares with another state or states. Article 3 provides that in such a case, the states sharing the watercourse *must* enter into consultations “with a view to negotiating in good faith for the purpose of concluding a watercourse agreement.”

Article 4 deals with the rights of riparian states to participate in specific agreements that apply to an entire international watercourse and those that apply “only to a part of the watercourse or to a particular project, program or use.” If an agreement is to apply to an entire international watercourse, all states on the watercourse are entitled to participate in the negotiation of, and to become a party to the agreement. As to agreements concerning only a part of a watercourse or particular project, a riparian state whose use of the watercourse may be affected by the implementation of a prospective agreement of this kind may participate in consultations relating to the agreement, “and, where appropriate, in the negotiation thereof in good faith with a view to becoming a party thereto, to the extent that its use is thereby affected.”

Part II, General Principles, is the core of the Convention. It is introduced by Article 5, “Equitable and Reasonable Utilization and Participation.” This article sets forth what many regard as the cornerstone of the law of international watercourses—namely, the principle that a state must use an international watercourse in a manner that is equitable and reasonable vis-à-vis other states sharing the watercourse. Indeed, the International Court of Justice, in its recent decision in the *Gabcikovo-Nagymaros* case, emphasized the importance of operating the project involved in the case “in an equitable and reasonable manner.”<sup>6</sup> According to Article 5, to be equitable and reasonable, the use must also be consistent with adequate *protection* of the watercourse from pollution and other forms of degradation.

But how does upstream State A, for example, know whether its use of an international watercourse is equitable and reasonable vis-à-vis downstream States B and C? The answer is, this may be a very difficult thing for State A to determine, in the absence of a joint mechanism with States B and C, or a very close working relationship with them. Article 6 of the Convention sets forth a non-exhaustive list of factors to be taken into account in making the determination, and Article 9 requires riparian states to exchange data and information concerning the condition of the watercourse on a regular basis. The Article 6 factors will doubtless be of assistance to State A in making the equitable utilization determination, as will the Article 9 data and information—indeed, it would be nearly impossible for a state to ensure its use was equitable without data and information from other riparian states. However, the principle of equitable and reasonable utilization is much better suited to implementation through very close cooperation between the states concerned, ideally through a joint commission, or by a

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<sup>6</sup> Case Concerning the Gabcikovo-Nagymaros Project (Hung./Slovk.), 1997 I.C.J. 92 (Sept. 25), 37 I.L.M. 162 (1998), para. 150, at 69, <<http://www.icj-cij.org/idocket/ihs/ihsjudgment/ihsjudcontent.html7>>.

court or other third party. After all, the doctrine had its origins in decisions of the United States Supreme Court in water disputes between U.S. states. This having been said, however, it seems clear that there is no other general principle that can take into account adequately the wide spectrum of factors that may come into play with regard to international watercourse throughout the world.

What this underlines is the importance of *cooperation* between riparian states with a view to achieving a regime of equitable and reasonable utilization and participation for an international watercourse system as a whole. Thus, Article 8 of the Convention lays down a general obligation to cooperate “in order to attain optimal utilization and adequate protection of an international watercourse.” It is interesting to note that the delegations negotiating the Convention attached such significance to cooperation *through joint mechanisms* that they added a paragraph to Article 8 calling for states to “consider the establishment of [such] mechanisms or commissions...”

Returning for a moment to Article 5, that provision also introduces the new concept of equitable *participation*. The basic idea behind this concept is that in order to achieve a regime of equitable and reasonable utilization, riparian states must often cooperate with each other by taking *affirmative* steps, individually or jointly, with regard to the watercourse. While this idea is, in effect, a feature of some well-developed cooperative relationships between river basin countries, it had not been reflected as such in attempts to codify the law in this field until the International Law Commission included it in Article 5. Its acceptance as a part of the Convention is welcome, because it helps to convey the message that a regime of equitable utilization of an international watercourse system, together with the protection and preservation of its ecosystems, cannot be achieved solely through individual action by each riparian state acting in isolation; again, affirmative cooperation will often be necessary. The utility of this concept is illustrated by the fact that the ICJ quoted the entire paragraph of Article 5 that sets forth the obligation of equitable participation in its judgment in the *Gabcikovo-Nagymaros* case.<sup>7</sup>

I now come to the most controversial provision of the entire Convention, the obligation not to cause significant harm, which is set forth in Article 7. That article was treated as being closely linked with Articles 5 and 6 throughout the negotiations in the U.N. The three-article package was finally adopted by a vote of 38 to 4, with 22 abstentions.

At first blush it seems obvious that one state should not cause significant harm to another state, whether through its use of a watercourse or otherwise. But at least in the case of international watercourses, it is not so simple. Suppose, for example, that—as is often the case—upstream State A has not significantly developed its water resources because of its mountainous terrain. The topography of the downstream states

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<sup>7</sup> *Id.*, para. 147. See also Chapter 7 of this Report.

on the watercourse, B and C, is flatter, and they have used the watercourse extensively for irrigation for centuries, if not millennia. State A now wishes to develop its water resources for hydroelectric and agricultural purposes. States B and C cry foul, on the ground that this would significantly harm their established uses. How should the positions of State A, on the one hand, and States B and C, on the other—neither of which seems unreasonable on its face—be reconciled?

This question is at the heart of the controversy over Article 7 and its relationship with Article 5 on equitable and reasonable utilization. I will take up each of these points in turn—albeit only briefly. First, as to how the so-called “no significant harm” obligation should be formulated: The International Law Commission’s first draft of the article, adopted in 1991, was the essence of simplicity. It provided: “Watercourse States shall utilize an international watercourse in such a way as not to cause appreciable harm to other watercourse States.” The Commission’s final draft, adopted in 1994, introduced considerable flexibility into the text, in two principal respects. First, it expressly made the obligation one of “due diligence”: “Watercourse States shall *exercise due diligence* to utilize an international watercourse in such a way as not to cause significant harm ... [etc.]” (You will notice, incidentally, that it also changed “appreciable” to “significant.” I don’t regard this as a terribly “significant” change, however.) But the insertion of the “due diligence” modifier made it clear beyond any doubt that this was not in any way an *absolute* obligation, but rather one of due diligence, or best efforts under the circumstances.

The second way in which flexibility was introduced was by adding a lengthy paragraph 2, which converted the “no harm” obligation into what the ILC described as “a process aimed at avoiding significant harm as far as possible while reaching an *equitable result* in each concrete case.” Paragraph 2 did this by requiring that if significant harm was caused despite the exercise of due diligence, the states involved must enter into consultations concerning two things: first, the extent to which the harmful use is equitable and reasonable; and second, whether the harming state should adjust its use to eliminate or mitigate the harm, and, “where appropriate, the question of compensation.”

The ILC’s text was changed in the U.N. negotiations. Undoubtedly, scholars will spill much ink over the extent to which the changes are “significant.” I, personally, don’t think they are. In my view the deletion of “due diligence” from paragraph 1 and its replacement with “take all appropriate measures” is merely saying the same thing in different words. The real fight was over the second paragraph. The question there was whether equitable utilization should prevail over the “no-harm” obligation, or vice-versa. To illustrate, allow me to return to our hypothetical fact situation. If equitable utilization is the controlling legal principle, upstream State A may develop its water resources in an equitable and reasonable manner vis-à-vis downstream States B and C, even though that development would cause significant harm to their established uses. If, on the other hand, the obligation not to cause

significant harm is dominant, State A could engage in no development, no matter how equitable and reasonable, that would cause States B and C significant harm.

To some delegations at the U.N. negotiations, the ILC's final text—which represents an effort to strike a balance between the two principles—favored equitable utilization too heavily. They argued for a text that more clearly gave precedence to the “no-harm” principle. Other delegations took the opposite view. For them the basic rule was equitable utilization; at most, any harm to another riparian state should merely be one factor to be taken into account in determining whether the harming state's use was equitable. You see before you the compromise formula arrived at in the U.N. negotiations. Perhaps not surprisingly, the final text is somewhat like a basket of Halloween candy: there is something in it for everyone. No matter whether you are from the equitable utilization or the no-harm school, you can claim at least partial victory. In my view, however, paragraph 2 of Article 7 of the Convention gives precedence to equitable utilization over the no-harm doctrine. The very existence of a second paragraph implicitly acknowledging that harm may be caused without engaging the harming state's responsibility supports this conclusion. Also indicating a recognition that significant harm may have to be tolerated by a watercourse state are the numerous mitigating clauses in paragraph 2, especially the phrase “having due regard for the provisions of articles 5 and 6”—the two equitable utilization articles. Finally, the proposition that the “no-harm” rule does not enjoy inherent preeminence is supported by Article 10 of the Convention, which provides that any conflict between uses of an international watercourse is to be resolved “with reference to articles 5 to 7...” This would presumably mean that if State A's hydroelectric use conflicts with State B's agricultural use, the conflict is not to be resolved solely by applying the “no-harm” rule of Article 7, but rather through reference to the “package” of articles setting forth the principles of both equitable utilization and “no-harm.”

But in actual disputes, it seems probable that the facts and circumstances of each case, rather than any *a priori* rule, will ultimately be the key determinants of the rights and obligations of the parties. Difficult cases, of which there are bound to be more in the future, will be solved by cooperation and compromise, not by rigid insistence on rules of law. This is one of the lessons of the World Court's judgment in the *Gabcíkovo/Nagymaros case*.

Before leaving the “General Principles” part of the Convention, I should say an additional word about Article 10. Originally conceived as a provision that would clearly specify that navigational uses no longer enjoy inherent priority over non-navigational ones—if they ever did—this article now has a much richer texture. In particular, paragraph 2 provides that a conflict between different kinds of uses of an international watercourse is to be “resolved with reference to articles 5 to 7, with special regard being given to the requirements of vital human needs.” The expression “vital human needs” was discussed at some length in the U.N. negotiations. The final text maintains the ILC's language but a “statement of understanding” accompanying the text of the Convention indicates that: “In determining ‘vital human need,’ special

attention is to be paid to providing sufficient water to sustain human life, including both drinking water and water required for production of food in order to prevent starvation." This is no doubt right. What some countries may fear is that the concept of "vital human needs" could become a loophole, enabling a state to argue that its use should prevail on this ground when in fact it was highly debatable whether vital human needs were involved at all. But since the "statement of understanding" is based on the ILC's commentary, which would in any event be relevant to an interpretation of paragraph 2, the "statement" probably adds no new problems.

Part III of the Convention, Planned Measures, contains a set of procedures to be followed in relation to a new activity in one state that may have a significant adverse effect on other states sharing an international watercourse. The fact that the basic obligation to provide prior notification of such changes was accepted as a part of the Convention by most delegations<sup>8</sup> is, in itself, important: it provides further evidence that the international community as a whole emphatically rejects the notion that a state has unfettered discretion to do as it alone wishes with the portion of an international watercourse within its territory.<sup>9</sup>

While the Working Group made a number of drafting changes, the essence of the system envisaged in Part III is unchanged from the ILC's draft. It essentially provides that a state contemplating a new use or a change in an existing use of an international watercourse that may have a significant adverse effect on other riparian states must provide prior notification to the potentially affected states. Those states are then given six months within which to respond. If they object to the planned use, they are to enter into discussions with the notifying state "with a view to arriving at an equitable resolution of the situation." This entire process could take twelve months or longer. If the matter is not resolved to the satisfaction of any of the states concerned, the dispute settlement procedures of Article 33 would be applicable. A final important point concerning Part III is that it seems clear that, of necessity, it is premised on the assumption that the planning state will conduct an environmental impact assessment to identify, possible adverse effects on co-riparian states.<sup>10</sup>

Part IV of the Convention, entitled "Protection, Preservation and Management," contains the "environmental" provisions of the Convention. While a variety of proposals were made in the U.N. negotiations for the strengthening of these

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<sup>8</sup> Three that did not were Ethiopia, Rwanda and Turkey. Verbatim record, 99th plenary meeting, *supra* note 4, at 4-5 (Turkey), 12 (Rwanda) and 9 (Ethiopia). In explaining its negative vote on the Convention, Turkey stated that Part III introduces a "veto". *Id.*, at 5. While it is true that the articles provide for a temporary suspensive effect upon implementation of measures by the planning state (see Articles 13 and 17), no veto is provided for in Part III.

<sup>9</sup> The doctrine of "absolute territorial sovereignty", which would support such unfettered discretion, has long been rejected by the state that invented it. See Stephen McCaffrey, *The Harmon Doctrine One Hundred Years Later: Buried, Not Praised*, 36 NAT. RESOURCES J. 725 (1996).

<sup>10</sup> *But cf.* art. 12.

provisions, in the end only minor changes were made to the ILC's text. Article 20, Protection and Preservation of Ecosystems, is a simple but potentially quite powerful provision. It says that riparian states have an obligation to "protect and preserve the ecosystems of international watercourses." Like Article 192 of the United Nations Convention on the Law of the Sea, on which it is modeled, this obligation is not qualified. For example, it does not say that the ecosystems must be protected only if failure to do so may harm another riparian state. Since the "ecosystems" of international watercourses include land areas contiguous to them, Article 20 requires that such land areas be maintained in such a way that the watercourses they border are not harmed by, for example, excessive agricultural runoff. Doubtless this is not an absolute obligation, however. That is, it is an obligation to exercise due diligence to protect and preserve watercourse ecosystems. This standard takes into account the sensitivity of the ecosystem as well as the capability of the state involved.

Pollution of international watercourses is dealt with in Article 21, Prevention, Reduction and Control of Pollution. After defining the term "pollution," it uses the standard formula—also employed in Article 194 of the Law of the Sea Convention—that riparian states must "prevent, reduce and control" pollution of international watercourses. Unlike Article 20, however, this obligation is qualified. It is triggered *only* if the pollution "may cause significant harm to other watercourse States or to their environment..." Of course, it is at least arguable that pollution that would harm only the environment of the state of origin would have to be controlled pursuant to Article 20.

Article 22 requires riparian states to prevent the introduction of alien or new species into international watercourses. Like Article 21, the obligation contained in Article 22 applies only where significant harm will be caused to other riparian states.

Article 23 addresses, in a very general way, the problem of marine pollution from landbased sources. Like Article 20, the obligation applies whether or not other states are injured. Article 23 actually goes beyond the problem of pollution, however. Since it requires riparian states to "protect and preserve the marine environment," it would presumably apply also to such things as the protection of anadromous species and of coral reefs.

In a "statement of understanding" the Working Group in which the Convention was negotiated indicated that Articles 21-23 "impose a due diligence standard on watercourse States." It is interesting that this statement does not cover Article 20. But, as I have already indicated, I believe Article 20 must also be read to reflect an obligation of due diligence.

Article 24, Management, is a provision believed by many specialists to be too modest in view of the importance of joint commissions. But the ILC did not feel it could go any further than this in a general, framework instrument. It was of the view that while international law may require riparian states to cooperate with each other, it



does not go so far as to require them to form joint commissions. I believe the Commission was correct in this assessment, although in my view the article could have gone somewhat further in indicating the concrete forms that institutionalized cooperation between riparian states might take. But some states—and indeed some members of the Commission—were somewhat uncomfortable even with the article as it presently stands, let alone a more specific provision.

Regulation of watercourses, international or national, is a common phenomenon, as any hydraulic engineer will tell you. This often takes the form of fortifying banks to prevent erosion, straightening the course of a river, building up embankments, and the like. Article 25 deals with these activities, requiring riparian states to cooperate in responding to needs for regulation, and to participate in the required works on an equitable basis.

The proper construction and maintenance of dams and similar works is dealt with in Article 26, Installations. Since a faulty dam may pose great danger to downstream states, this article requires that a state in whose territory a dam is located maintain it and protect it from forces that may result in harm to other riparian states.

Part V is entitled “Harmful Conditions and Emergency Situations.” It contains one article on each of those topics. By “harmful conditions” is meant such things as water-borne diseases, ice floes, siltation and erosion. Article 27 requires riparian states to take “all appropriate measures” to prevent or mitigate such conditions, where they may be harmful to other states sharing the watercourse. Article 28 deals with emergency situations. This term is defined broadly to include both natural phenomena such as floods, and those that are caused by humans, such as chemical spills. A state within whose territory such an emergency originates must notify other potentially affected states as well as competent international organizations. It must also take “all practicable measures ... to prevent, mitigate and eliminate harmful effects of the emergency.”

Part VI, Miscellaneous Provisions, contains Articles 29 to 33. Article 29, dealing with armed conflict, serves as a reminder that there are rules of international law that protect international watercourses and related installations, facilities and other works during hostilities.

Article 30 provides for riparian states to utilize indirect procedures to fulfill their obligations of cooperation under the Convention when there are serious obstacles to direct contacts between them, such as where they do not have diplomatic relations with each other.

Article 31 simply safeguards classified information that is “vital to ... national defense or security.”

Article 32 deals essentially with private remedies. Its intent was to ensure equal access and nondiscrimination, so that an injured or threatened party could have access to judicial or administrative procedures in the state of origin, regardless of whether that was on the other side of an international boundary. The article provoked controversy in the U.N. negotiations, including a proposal that it be deleted. Evidently not all states are yet comfortable with the idea of granting private persons from other (usually neighboring) countries nondiscriminatory access to their judicial and administrative procedures relating to transboundary harm or the threat thereof.

Article 33 on the settlement of disputes was also somewhat controversial, principally because it provides for compulsory fact-finding at the request of any party to a dispute. Any compulsory dispute-settlement procedure is bound to draw strong objection from certain countries,<sup>11</sup> even if all that is compulsory is fact-finding, and even if that only becomes compulsory after negotiations have failed to settle the dispute within six months. The ranks of these “automatic objectors” were swelled somewhat by a few upstream states,<sup>12</sup> who were evidently reluctant to surrender whatever leverage their position on an international watercourse conferred upon them. Yet facts are of critical significance with regard to the core obligations of the Convention. For example, how can states determine whether their utilization is “equitable and reasonable” under article 5 without an agreed factual basis? And how can a state establish that it has sustained significant harm if the state that is alleged to have caused the harm denies that it has caused it or that any harm has been suffered? The importance of facts in this field is no doubt what led the ILC to depart from its usual practice by including an article on dispute settlement in its draft. Article 33 also provides for states to declare upon becoming parties to the Convention that they accept as compulsory the submission of disputes to the International Court of Justice or to arbitration in accordance with procedures set out in the Annex to the Convention.

## TO WHAT EXTENT DOES THE CONVENTION REFLECT CUSTOMARY INTERNATIONAL LAW?

I would now like to turn very briefly to the question of the extent to which the Convention reflects rules of customary international law. I think it may be said with some confidence that the most fundamental obligations contained in the Convention do indeed reflect customary norms. Indeed, in the *Gabcikovo-Nagymaros* judgment the Court said that the adoption of the Convention “strengthened” the “principle” of the

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<sup>11</sup> E.g., China and India. Verbatim record, 99<sup>th</sup> plenary meeting, *supra* note 4, at 7 (China) and 9 (India).

<sup>12</sup> E.g., France, Israel (effectively upstream on the Jordan) and Rwanda. These states, together with China and India, generally maintained that the principle of free choice of means should have been followed in Article 33. Verbatim record, 99<sup>th</sup> plenary meeting, *supra* note 4, at 8 (France), 11 (Israel) and 12 (Rwanda). In a separate vote on Article 33 in the Working Group, the following five countries voted in the negative: China, Colombia, France, India and Turkey. The tally was 33 for, 5 against, with 25 abstentions.

“community of interests” in an international watercourse.<sup>13</sup> While the International Law Commission does not take a position on whether a particular article or paragraph is a codification of international law or an effort to progressively develop that law, it seems reasonable to conclude on the basis of state practice that at least three of the general principles embodied in the Convention correspond to customary norms. These are the obligations to use an international watercourse in an equitable and reasonable manner, not to cause significant harm, and to notify potentially affected riparian states of planned measures on an international watercourse. Of course, other provisions of the Convention, such as some of those relating to the environment, are closely related to, or even flow from these principles. To the extent that these provisions are based on the fundamental principles, they too might be said to reflect custom.

I will add just one additional word on this subject, and it relates to the World Court’s judgment in the *Gabcikovo-Nagymaros* case. As I have already indicated, the Court referred several times in its judgment to the right to an equitable and reasonable share of the uses and benefits of an international watercourse.<sup>14</sup> Notable for its absence was any reference to the “no-harm” principle. Hungary had relied fairly heavily upon this concept in its pleadings, but the Court did not accept its invitation to use it as a basis of its judgment. I do not believe that means the “no-harm” rule has been significantly weakened; but it suggests that the Court views the principle of equitable utilization to be the more important of the two.

#### CONCLUSION: THE CONVENTION’S ENVIRONMENTAL PROVISIONS

As a conclusion, I would like to comment upon the environmental provisions of the Convention in terms of how they compare with similar provisions in other instruments. First and foremost, it must be borne in mind that this is a universal, framework agreement. Because of this fact, one cannot expect either the level of detail or the degree of “Greenness” that one might find in a bilateral or regional instrument. Indeed, a number of proposals were made during the U.N. negotiations for strengthening and, it was said, “updating” the provisions of the Convention from an environmental standpoint. Most of these proposals came from Western European delegations, but a few came from other regions, such as Latin America. Very few of these proposals were ultimately accepted. One cannot say, therefore, that stronger environmental provisions are missing from the Convention because they were not thought of in the negotiations. The fact is, they *were* thought of, but were simply not acceptable to a sufficient number of delegations.

A second point also relates to the fact that this is a *framework* instrument. It is therefore intended to be supplemented by more detailed agreements concerning specific watercourses shared by two or more countries. The level of protection that might be

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<sup>13</sup> *Supra* note 6, para. 85, slip op. at 47.

<sup>14</sup> *Id.* para. 78 and 85.