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Dispute Settlement under the 1997 Convention on the Law of the Non-Navigational Uses of International Watercourses

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SINCE 1971, the law on non-navigational uses of international watercourses has been on the agenda of the International Law Commission. It took thirteen reports, five special rapporteurs, and 26 years before the work led to the UN General Assembly's adoption, on May 21, 1997, of the Convention on the Law of Non-Navigational Uses of International Watercourses¹ (1997 Watercourses Convention). It is a "framework convention," intended to "ensure the utilization, development, conservation, management, and protection of international watercourses, and the promotion of the optimal and sustainable utilization thereof for present and future generations."²

The convention will enter into force after at least 35 States become parties to it. Since it was adopted by a relatively small majority—103 in favor, 3 against, and 27 abstentions—the prospects for such a number of participants are not certain. The convention is nevertheless of considerable interest, not least because some of its principles may constitute a codification of customary rules.³

Provisions on the prevention and settlement of disputes are of particular importance in the sphere of international water agreements for at least two reasons. First, the use of water by several riparian States has to be based on a certain compromise between the interests of the different parties, in particular in areas that suffer from water scarcity. It is a case of distributive justice. In the past, when watercourses served mainly or perhaps exclusively for navigation, the danger of conflict was minimal since the use of the river by one ship did not seriously hamper another vessel from sailing in its wake. Even fishing with traditional techniques failed to hinder fishing activities by another riparian. But today, with the new and expanded non-navigational uses of watercourses on the one hand, and the danger of pollution on the other hand, disputes among neighbors that share an aquifer or a drainage basin system are almost unavoidable.

Second, some conventions and other texts in this field (including the one here under review) prescribe only general, rather flexible, principles, such as "equitable and reasonable utilization and participation."⁴ The implementation of these general notions can easily lead to disagreement and conflict of interests—hence the need for conflict prevention, management, and settlement mechanisms. In fact, a great number of conventions and other texts dealing with international streams include provisions for those purposes.⁵

When studying dispute resolution in the context of international water law, one has to bear in mind certain characteristics of this field.⁶ The questions and problems are of a rather technical nature. Moreover, there is not only a need to reconcile the interests of different States but also to find the right balance between different categories of uses.⁷ In addition, the uses have to be adapted to the requirement of protection of the environment.⁸ These characteristics, and the fact that we are dealing with a joint watercourse, imply that every solution has to be based on cooperation between the parties.⁹ These features have led a great number of experts to conclude that the management of international river systems should be entrusted to permanent joint international commissions, which would also deal with the settlement of disputes.¹⁰

Before proceeding to study in detail the relevant provisions in the 1997 Watercourses Convention, it may be helpful to highlight its main rules: conflict prevention by the exchange of information,¹¹ consultation on equitable utilization,¹² notification concerning planned measures,¹³ communication in reply,¹⁴ and consultation.¹⁵ If, nevertheless, a conflict occurs, it should be solved by negotiations upon the request of one of the parties.¹⁶ If negotiations fail, the parties "may jointly seek the good offices of, or request mediation or conciliation by, a third party, or make use, as appropriate, of any joint watercourse

institutions that may have been established by them, or agree to submit the dispute to arbitration, or to the International Court of Justice.”¹⁷ All these mechanisms, except for negotiations, require the consent of both parties. If the dispute is not solved by one of these methods, there is an obligation, upon one party’s request, to submit it to a Fact-finding Commission.¹⁸ The parties have to consider the latter’s report “in good faith,” but it is not binding. States may also agree in advance to submit disputes to the International Court of Justice or to binding arbitration (“opt-in” procedure). Finally, the text includes a provision on private claims.¹⁹

Dispute Prevention

The first means of preventing disputes is the exchanging of information. “Watercourse states shall on a regular basis exchange readily available data ...”²⁰ “If a watercourse state is requested ... to provide data ... that is not readily available, it shall employ its best efforts to comply with the request.”²¹ It thus seems that supplying readily available data is compulsory, while transmitting information which is not readily available is a relative obligation and may be subject to the payment of reasonable costs.

Moreover, in emergency situations there is an unconditional obligation to notify other potentially affected States without delay.²² An emergency situation has been defined as “a situation that causes, or poses an imminent threat of causing, serious harm to watercourse states ... and that results suddenly from natural causes ... or from human conduct...”²³ The idea is that early knowledge of an emergency can help potentially affected States to prevent or reduce the damage. For instance, the Chernobyl nuclear disaster amply demonstrated the harm caused by holding back information. However, States are not obligated to provide data or information vital to their national defense and security.²⁴

In the search for “equitable and reasonable utilization” of the watercourse, the parties have, “when the need arises,” to “enter into consultation.”²⁵ Similarly, if “significant harm” is caused to a State by another watercourse State, the latter has to take all appropriate measures, in consultation with the affected state, to eliminate or mitigate the harm.²⁶

The obligation to prevent conflict is even more developed in case of “planned measures” of exploitation or development projects by one State. For such situations, the convention establishes a series of procedures—exchange of information, notification, communication, consultation and, where necessary, negotiations; a State contemplating a new use, a change in an existing use, or

development projects on the watercourse that may have “a significant adverse effect” upon other riparians, shall provide those States with timely notification thereof. The notification has to be accompanied by available technical data, including, most importantly, the results of any environmental impact assessment.²⁷ The potentially affected States are given six months—a period that may be extended an additional six months if it is difficult to evaluate the possible effects of the planned measures—to respond.²⁸ If the relevant States do not respond, the State that planned the new measures may go ahead, but still has to comply with the principles laid down by the convention.²⁹

On the other hand, if the other watercourse States communicate their objection, the parties “shall enter into consultations and, if necessary, negotiations with a view to arriving at an equitable resolution of the situation.”³⁰ Another provision deals with the situation in which there is disagreement on whether other riparian States have to be notified of certain plans.³¹ Only in cases of “the utmost urgency in order to protect public health, public safety or other equally important interests” may a State proceed with planned measures before the necessary notifications and consultations have taken place.³²

To conclude, the convention lays down a considerable set of rules on information, notification, communication, consultation and negotiations intended to prevent conflicts. Conflicting interests are to be adjusted by cooperative means. While each State has to take into consideration the needs and interests of the others, no right of veto has been granted to any riparian.

The process of dispute prevention can take twelve months or even longer. If the matter is not resolved to the satisfaction of all the watercourse States, the dispute settlement procedures would have to be employed.

Dispute Settlement

While all the dispute prevention measures are obligatory, in the field of dispute settlement only two mechanisms are compulsory—negotiations and submission to a fact-finding commission. All others are optional.

The relevant provisions were hotly debated at the last sessions prior to adoption of the convention, namely, in the meetings of the plenary ad hoc working group of the whole, which met in October 1996 and in March–April 1997. Some delegations favored compulsory resort to a diplomatic mechanism—impartial fact-finding, or mediation or conciliation. Should that procedure fail, they argued for an obligation to resort to arbitration and adjudication before the International Court of Justice or another competent court.³³ At the other extreme were States that opposed any compulsory procedures.³⁴ Between these

two poles were various intermediate opinions. For example, one group advocated an “opt-in” procedure, i.e., at the time of depositing the instrument of ratification, each party would state whether it would be bound to compulsory arbitration and/or compulsory adjudication before the International Court of Justice.³⁵ By contrast, the International Law Commission had recommended compulsory fact-finding,³⁶ whereas Drafting Group Chairman Professor Lammers had favored compulsory fact-finding plus an “opt-in” procedure.³⁷ Some supported compulsory fact-finding plus an “opt-in” procedure plus compulsory conciliation.³⁸ These examples show the extent to which opinions on the subject differed.

The reasoning against compulsory binding third-party involvement is obvious. Binding settlement of disputes is considered inappropriate for a framework convention like the 1997 Watercourses Convention, since such a convention only provides guidelines. In addition, one can argue that international watercourse law is not sufficiently developed and that the existing case law is not rich enough to serve as the basis for adjudication by a judge or an arbitrator. Moreover, States might balk at binding solutions because they feel such procedures undermine their sovereignty.³⁹ The opinion has also been expressed that States should be free to choose the appropriate means of dispute settlement according to the nature of the dispute and the circumstances.⁴⁰

On the other hand, there are many considerations in favor of an obligatory binding third party mechanism. Although the text is a framework convention, it nevertheless contains specific obligations. If every State had the power to interpret or apply the provisions of the convention as it saw fit, the convention would be of little value. If disputes are not to drag on endlessly, and if might is not to prevail over law, settlement procedures that yield binding solutions must be provided for. Given the ambiguity or general nature of some of the concepts that are included in the convention, such as the terms “equitable,” “reasonable,” “significant,” and the difficulty in determining how much weight should be given to each of the factors to be taken into consideration when establishing the equitable and reasonable utilization, the presence of a neutral third party with power to adopt binding decisions would be particularly valuable.⁴¹ Moreover, the very existence of a compulsory and binding mechanism can induce States to compromise.

With so many different opinions and considerations, it is little wonder that the relevant article—Article 33—was adopted in the Working Group by only a small majority: 33 in favor, 5 against, and 22 abstentions. In the discussion that follows, optional mechanisms whose activation under the 1997 Watercourses

Convention requires the consent of both parties will be addressed first. Discussion will then turn to the compulsory means that can be activated unilaterally.

Optional Mechanisms. The list of optional procedures is quite impressive: good offices, mediation, conciliation, use of any joint watercourse institution, arbitration, submission to the International Court of Justice.⁴² This list does not include one of the mechanisms mentioned in Article 33 of the UN Charter, namely, inquiry—probably because fact-finding is a compulsory means under the convention. On the other hand, the convention does include good offices, a procedure absent from the UN text. Instead of resort to regional agencies or arrangements mentioned in the Charter, the convention refers to the use of any joint watercourse institution.

The convention has also adopted the “opt-in” procedure: when becoming a party to the convention or thereafter, a State may declare that in respect of any dispute not resolved by the above optional mechanisms, it accepts the compulsory jurisdiction of the International Court of Justice or of an arbitration panel.⁴³ For such an arbitration, the convention has also laid down optional rules of procedure.⁴⁴ It is interesting that the reference to arbitration and adjudication has not been limited to conflicts of a legal nature.

Under the optional rules on arbitration, a party may unilaterally submit a dispute to arbitration: “If the parties do not agree on the subject matter of the dispute, the arbitral tribunal shall determine the subject matter.”⁴⁵ The “subject matter” is probably equivalent to the question submitted for arbitration.⁴⁶ The tribunal shall consist of three members. Each of the parties shall appoint one member, and the chairman shall be designated by common agreement. He may not be a national or a habitual resident of any of the parties or the other riparians. Vacancies shall be filled in the same manner. If either a national member or the chairman is not appointed within a certain time, the President of the International Court of Justice shall designate him at the request of a party.⁴⁷

The rules to be applied by the arbitrators have been defined as “...[T]he provisions of this convention and international law.”⁴⁸ Although this provision does not expressly mention equity, the tribunal will have to refer to it, since the convention itself to a large extent provides for “equitable and reasonable utilization and participation.”⁴⁹

Unless the parties to the dispute otherwise agree, the arbitral tribunal shall determine its own rules of procedure.⁵⁰ It may also, at the request of one of the parties, recommend essential interim measures of protection.⁵¹ The term “recommend” implies that these measures are optional. The parties have to

facilitate the work of the tribunal.⁵² Both the parties and the arbitrators are under an obligation to protect the confidentiality of any information they receive in confidence during the proceedings.⁵³ Usually, the expenses of the tribunal shall be borne by the parties in equal shares.⁵⁴

Other parties to the convention that have an interest of a legal nature in the subject matter may intervene in the proceedings with the consent of the tribunal.⁵⁵ This provision is remarkable, since it is usually not possible for a third party to intervene in an arbitration.

When dealing with a case, the tribunal may also hear counterclaims that arise directly out of the subject matter of the dispute.⁵⁶ If a party does not participate in the proceedings, the tribunal may nevertheless go ahead with the case.⁵⁷

The tribunal should render its award within five months, but it may extend that period for another five months. The award should include the reasons on which it is based, and members may add separate as well as dissenting opinions. There lies no appeal against the award unless the parties have agreed in advance to an appellate procedure. Either party may apply to the tribunal if a controversy arises with regard to the interpretation or manner of implementation of the award.⁵⁸

The convention leaves the choice among the optional mechanisms to the parties without recommending a particular procedure for certain kinds of disputes. What are, then, the circumstances to be considered when deciding which procedure should be preferred? One should ascertain the nature of the dispute—whether it is a political or a legal one, namely, whether the parties are at odds over their existing rights or over changes to be introduced in those rights. Second, do the parties disagree on questions of fact, or of law, or both? Third, is the dispute mainly of a technical nature? Fourth, the general relations between the parties have to be taken into consideration. Fifth, does the dispute involve vital interests of a State? Indeed, most States would be reluctant to submit such a dispute to binding third party adjudication. Sixth, should one try to solve the dispute by an ad hoc mechanism, or is it preferable to establish a permanent institution that can from time to time adjust the rights of the parties to accord with changing circumstances?⁵⁹

Examining the conflict in accordance with the above criteria will help the parties to choose the best suited mechanism. If, however, the disagreement is not settled by one of the optional methods, the obligatory measures remain: negotiation and a fact-finding commission.

Negotiation is the most natural and commonly used way to settle a dispute. It is a process which allows the parties to fully retain control over the dispute

and its resolution. It would be beyond the scope of this article to analyze various mechanisms of negotiation.⁶⁰ One should, however, bear in mind that negotiations can be successful only if all the participants wish to reach an agreement and are ready to compromise. Especially in water-related issues, there is usually a great need for compromise.

Compulsory Means. If the parties cannot solve their dispute by a means of their choice or by negotiations, it shall be submitted, at the request of any of the parties to the dispute, to impartial fact-finding.⁶¹ When the exhaustion of negotiations is a prerequisite for resorting to another means of dispute settlement, it is not easy to establish when and whether the possibilities for a negotiated settlement have been exhausted. The 1997 Watercourses Convention has established an objective criterion related to time: “[I]f after six months from the time of the request for negotiations ... the Parties concerned have not been able to settle their dispute through negotiations or any other means ... the dispute shall be submitted, at the request of any of the parties to the dispute, to impartial fact-finding.”⁶² I assume the same applies if a party refuses to negotiate, despite its obligation. Interestingly, the six months are counted from the date of the “request for negotiations” and not from the time the negotiations have actually started.

The text lays down a certain number of rules for the fact-finding mechanism: the commission is to be composed of one member appointed by each of the parties to the dispute, and a third person chosen by the two members nominated by the parties. The third member may not have the nationality of either party and he will serve as chairman.⁶³ In order to prevent frustration of the process by failure to agree on a chairman, the text provides that if within three months of the request for the establishment of the commission the chairman has not been chosen, the Secretary-General of the United Nations will appoint him. Moreover, the convention even foresees the possibility that a party may refuse to appoint its own member—a situation that has happened in the past when a party wished to avoid an arbitration to which it was committed.⁶⁴ In that case, under the Watercourses Convention, the Secretary-General of the UN will appoint a person who does not have the nationality of the parties to the dispute nor of any riparian State of the watercourse concerned, and this person will constitute “a single-member commission.”⁶⁵

However constituted, the commission shall determine its own procedure.⁶⁶ The parties have to provide the commission with information that it may require, and permit it to visit their respective territories to inspect relevant structures and equipment as well as natural features.⁶⁷

The commission shall adopt its report by a majority vote, unless it is a single-member commission, and submit it to the parties. The report should set forth "its findings and the reasons therefore and such recommendations as it deems appropriate for an equitable solution of the dispute."⁶⁸ Probably, the "equitable solution" does not necessarily have to be in accordance with the legal situation. The parties do not have to adopt the report and implement it, but they must consider it "in good faith."⁶⁹

In order to better understand and evaluate the procedure established as obligatory by the convention, it may be worthwhile to examine the notion of fact-finding in international law. The forerunner of fact-finding was the institution of inquiry, established by the 1899 and 1907 Convention on the Peaceful Settlement of International Disputes.⁷⁰ The great affinity between these two concepts has also been recognized by the International Bureau of the Permanent Court of Arbitration: the revised rules on the subject established by the International Bureau, which entered into force in 1997, are called "Optional Rules for Fact-Finding Commissions of Inquiry." According to the introduction to the text, "the denomination 'Fact-finding Commission of Inquiry' satisfies the need for modernization...."⁷¹

Most international disputes include, *inter alia*, disagreement over facts. A disinterested third party that tries to solve the dispute, whether it is a conciliation commission, arbitral tribunal, court of justice, or United Nations organ, has to resolve the issue of fact by an inquiry. A commission of inquiry or fact-finding panel, on the other hand, is an institutional arrangement intended to clarify only a specific point of fact. This mechanism is based on the assumption that if the factual disagreement is solved by an authoritative impartial third party, the solution of the dispute is self-evident.

The case of the *Tiger*, a Norwegian ship sunk in 1917 by a German submarine off the coast of Spain, serves as an example. Both Norway and Spain were neutral in that war, but the Norwegian vessel allegedly carried contraband. The crucial question was the vessel's location; Spain claimed that the attack had taken place in her waters (and hence was illegal), while Germany maintained that it had taken place on the high seas (and hence was lawful). The commission of inquiry had difficulties in ascertaining where the attack had actually taken place, but in the end concluded that it had happened in Spanish waters.⁷² The obvious conclusion was that the act was unlawful; however, the commission did not have to deal with the issue of legality, but only with the factual question.

The specific procedure established by the Hague Convention has been followed in only very few cases (about six), but other fact-finding mechanisms

have been used on an ad hoc basis by various international organizations. The League of Nations set up its own commissions of inquiry in seven cases, including the Aland Islands dispute between Finland and Sweden in 1921, and the Mosul dispute between Britain and Turkey in 1925. The United Nations has similarly resorted to inquiry. For instance, in 1982 the Security Council established a fact-finding commission to investigate an attempted coup led by foreign mercenaries in the Seychelles, and in 1984 Secretary General Perez de Cuellar sent a commission of neutral experts to investigate whether chemical weapons had been used in the Iran-Iraq war. Moreover, the UN General Assembly has expressly recommended the resort to fact-finding as a means to settle disputes.⁷³

Also well known are the International Labor Organization's commissions of fact-finding, which investigate complaints related to labor conventions. Among the commissions established by the International Civil Aviation Organization, the most famous is the one established in 1983 to investigate the KAL 007 incident, which involved the shooting down of a South Korean jumbo jet over Soviet territory.⁷⁴

A *permanent* international fact-finding commission was established by the parties to the 1977 Geneva Protocol I Additional to the Geneva Conventions of 1949 Relating to the Protection of Victims of International Armed Conflicts.⁷⁵ The provision on fact-finding became operative in 1990 after 20 States had expressed consent to the jurisdiction of the commission.⁷⁶ The commission is to

- (i) enquire into any facts alleged to be a grave breach as defined in the Conventions and this Protocol or other serious violation of the Conventions or of this Protocol;
- (ii) facilitate, through its good offices, the restoration of an attitude of respect for the Conventions and this Protocol.⁷⁷

Although the text of the Protocol does not say so expressly, according to the Commentary prepared by the International Committee of the Red Cross the commission is authorized to enquire only into the facts and not to decide matters of law or pass judgment.⁷⁸

So far we have seen that by definition the mechanism of inquiry or fact-finding is limited to the establishment of the facts. However, under the 1997 Watercourses Convention as quoted above, the commission is also to include in its report "recommendations as it deems appropriate for an equitable solution of the dispute."⁷⁹ Is this still in the realm of fact-finding? It seems that

although the commission envisaged by the convention is a fact-finding one, it also has some ingredients of conciliation (a formal impartial commission to investigate a dispute and to suggest possible ways to settle it). Moreover, a study of the various precedents shows that in certain other instances fact-finding commissions have submitted reports that actually included conclusions that went beyond mere fact-finding.⁸⁰

Like all other diplomatic means for the settlement of disputes, fact-finding does not lead to a binding decision. However, under the 1997 Watercourses Convention, the parties have an obligation to consider the report in good faith. That is probably a general obligation which applies even in cases in which it is not expressly mentioned.

The text includes only a few guidelines as to how the commission should proceed, and authorizes it to determine its own procedure. There are certain rules which may be helpful for any fact-finding organ:

A fact-finding mission should not begin its quest without clearly defined terms of reference that circumscribe the precise area in which it is to operate. These terms of reference should be neutrally stated in the form of questions of fact. The mission should insist that within this area it be free to apply the best available tools of perceptive objectivity, insulated from socio-political passions and assumptions. Ordinarily, the members should be distinguished individuals not beholden to governments—certainly not to governments with a direct stake in the issues. Appointment to a fact-finding panel should be irrevocable until the completion of the mission. Evidence should be taken in such a way as to facilitate informed cross-examination and rebuttal, and at the same time to protect witnesses against reprisal. The panel should have its own staff capable of researching issues as well as preparing agendas and itineraries independently. The fact-finders' on-site freedom of movement and access should be assured *ab initio*. Draft findings should be circulated to the parties for comment. The final product should accurately reflect the result, whether it is a consensus, a majority, or a wide diversity of views as to the facts. Members should be free to write separate or dissenting reports.⁸¹

Private Remedies

So far we have dealt with the prevention and solution of inter-state conflicts. The 1997 Watercourses Convention also deals to some extent with private remedies. Under Article 32, entitled, "Non-discrimination," natural as well as juridical persons who have suffered or may suffer significant transboundary harm as a result of activities related to an international watercourse, should be granted equal access to, and non-discriminatory treatment

at, judicial or other (probably administrative) procedures in the State where the harmful activity was carried out. No discrimination on the basis of the nationality or residence of the claimant, nor in view of the place where the injury occurred, is permitted. The watercourse States concerned may, however, agree to provide otherwise for the interests of the relevant persons.

The 1997 Watercourses Convention has provided for conflict prevention and for dispute resolution. States must endeavor to prevent conflicts by the exchange of information, notification, communication, consultation, and, where necessary, negotiations. These means of prevention are obligatory.

On the other hand, in the field of dispute settlement, some mechanisms are optional: good offices, mediation, conciliation, the use of a watercourse institution, arbitration, or the International Court of Justice. Only two procedures are obligatory: negotiation and establishment of a fact-finding commission. Even though resort to the latter two mechanisms is obligatory, the outcome is not binding.

In dealing with water-related issues, the parties to the dispute as well as those helping them to solve it should bear in mind some special features of this area. There may be a conflict not only between the interests of riparians for a similar use of the water, e.g., the allocation of water for irrigation, but there may also be a need to reconcile different uses of the water, e.g., agricultural versus industrial ones.⁸² Other matters, not directly related to the distribution of benefits, may have to be envisaged, in particular the protection of the environment and the interests of future generations.⁸³ Considerations of efficiency may have to be weighed against the need for equitable solutions, as well as the search for "equitable and reasonable utilization and participation" against the "obligation not to cause significant harm."⁸⁴ Moreover, one has to remember that with regard to water, there may exist psychological factors, as well as religious sensitivities.⁸⁵

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Notes

1. The Convention is annexed to UNGA Res. 51/229, May 21, 1997. It was also published in 36 INTERNATIONAL LEGAL MATERIALS (1997), p. 700. See also Lucius Caflisch, *Regulation of the Uses of International Watercourses*, in Salman M.A. Salman and Laurence Boisson de Chazournes, eds., INTERNATIONAL WATERCOURSES: ENHANCING COOPERATION AND MANAGING CONFLICT, World Bank Technical Paper No. 414 (1998), pp. 3–16; Stephen McCaffrey, *The UN Convention on the Law of the Non-Navigational Uses of International Watercourses: Prospects and Pitfalls*, *ibid.*, pp. 17–28. The Convention was negotiated in a Committee of the Whole of the Sixth (Legal) Committee of the UN General Assembly on the basis of draft articles adopted by the International Law Commission. See Report of the International Law Commission on the Work of its Forty-sixth Session, UNGA OR, 49th Session, Supp. No. 10, p. 197, UN Doc. A/49/10 (1994).

2. Preamble, 5th paragraph.

3. Stephen McCaffrey, *supra* note 1, at p. 26. On the impact the Convention may have on the development of general customary law, see Attila Tanzi, *The UN Convention on International Watercourses as a Framework for the Avoidance and Settlement of Waterlaw Disputes*, 11 LEIDEN JOURNAL OF INTERNATIONAL LAW (1998), pp. 441–472, at pp. 442–443. The International Court of Justice has already referred to the Convention. See the Gabčíkovo-Nagymaros case (Hungary/Slovakia), Judgment of September 25, 1997, 1997 I.C.J. Reports and 37 INTERNATIONAL LEGAL MATERIALS (1998) at p. 162.

4. Article 5.

5. See, e.g., B.R. Chauhan, *Settlement of International Water Law Disputes in International Drainage Basins*, WASSERRECHT UND WASSERWIRTSCHAFT, vol. 19, Berlin: Erich Schmidt Verlag 1981. See also the overview by Professor Stephen C. McCaffrey, Special Rapporteur, in his Sixth Report to the International Law Commission, UN Doc. A/CN.4/427 and Add. 1, of February 23 and June 7, 1990, YEARBOOK OF THE INTERNATIONAL LAW COMMISSION, 1990 (II), p. 41, at pp. 66–75; Resolutions adopted by the Institute of International Law at its Session at Salzburg September 4–13, 1961, Utilization of Non-maritime International Waters (except for navigation), ANNUAIRE DE L'INSTITUT DE DROIT INTERNATIONAL, 1961, at p. 381, Articles 6–9; The Helsinki Rules, adopted by the International Law Association in 1966, Report of the Fifty-Second Conference, held at Helsinki, August 14–20, 1966, p. 484, Articles XXVI–XXXVII and Annex; Dominique Alheritiere, *Settlement of Public International Disputes on Shared Resources: Elements of a Comparative Study of International Instruments*, 25 NATURAL RESOURCES JOURNAL (1985), p. 7.

6. See also Ruth Lapidoth, *Some Reflections on Peaceful Means for the Settlement of Interstate Disputes with Special Reference to the 1997 Convention on the Law of the Non-navigational Uses of International Watercourses*, in Robin Sanchez, Jeff Woled, and Darle Tilly, eds., Proceedings of the First Biennial Rosenberg International Forum on Water Policy, Water Resources Report No. 93, University of California Centers for Water and Wildland Resources, 1998, pp. 59–74, at p. 71.

7. Article 10 of the 1997 Watercourses Convention.

8. Articles 20–23. See also Gretta Goldenman, *Adapting to Climate Change: A Study of International Rivers and Their Legal Arrangements*, 17 ECOLOGY LAW QUARTERLY (1990), p. 741.

9. McCaffrey, *supra* note 1, p. 22.

10. McCaffrey, *supra* note 5, pp. 42–48; Eyal Benvenisti, *Collective Action in the Utilization of Shared Freshwater: The Challenges of International Water Resources Law*, 90 AMERICAN JOURNAL OF INTERNATIONAL LAW (1996), p. 384. See also the reports to the International Law

Commission by Professor Stephen Schwebel, Special Rapporteur, (YEARBOOK OF THE ILC, 1982 (II) (Part One), p. 175), and by Professor Jens Evensen, Special Rapporteur, (YEARBOOK OF THE ILC, 1983 (II) (Part One), p. 178, and 1984 (II) (Part One), p. 116). See also the judgement of the International Court of Justice in Gabcikovo–Nagymaros case, *supra* note 3, at para. 147.

11. Article 9.

12. Article 6(2).

13. Article 12. Notification is also obligatory with respect to emergency situations—Article 28.

14. Article 15.

15. Article 17. The commitment for consultation for various purposes has been included in several articles.

16. Article 33(2).

17. *Ibid.*

18. *Ibid.*

19. Article 33(10).

20. Article 9(1).

21. Article 9(2).

22. Article 28.

23. Article 28(1).

24. Article 31.

25. Article 6(2).

26. Article 6(2).

27. Article 12. On notification, see also J. PRUHACS, *THE LAW OF NON-NAVIGATIONAL USES OF INTERNATIONAL WATERCOURSES*, Dordrecht, Nijhoff, 1993, p. 172.

28. Article 13.

29. Article 16.

30. Articles 15 and 17. See also J. PRUHACS, *supra* note 27, at p. 176; C.B. Bourne, *Procedure in the Development of International Drainage Basins: The Duty to Consult and Negotiate*, 10 CANADIAN YEARBOOK OF INTERNATIONAL LAW (1972), p. 212.

31. Article 18.

32. Article 19.

33. See, e.g., Proposal for Article 33 by the Syrian Arab Republic and Switzerland, UN Doc. A/C.6/51/NUW/DC/CRP.10, of March 24, 1997; proposal by Hungary, June 25, 1996, in Report of the Secretary-General, UN Doc. A/51/275, of August 6, 1996, p. 68; Greece, *ibid.*, p. 24; Finland, proposal of October 14, 1996, UN Doc. A/C.6/51/NUW/WG/CRP.45.

34. E.g., China, Turkey and Israel. Report of the Secretary General, UN Doc. A/51/275, of August 6, 1996, p. 68 (Turkey); UN Doc. A/C.6/51/NUW/WG/CRP.82, of March 27, 1997 (China); oral statement by Israel on May 14, 1997. See also verbatim record, 99th plenary meeting, UN General Assembly, May 21, 1997, UN Doc. A/51/PV.99, at p. 7 (China), p. 9 (India), p. 8 (France), p. 11 (Israel), p. 12 (Rwanda).

35. E.g., proposal by Finland, Greece, and Italy submitted on October 24, 1996 to the Working Group; Proposals submitted by Guatemala, A/C.6/51/NUW/WG/CRP.62, of October 18 and 22, 1996.

36. *Supra* note 1.

37. A/C.6/51/NUW/WG/CRP.83, of March 27, 1997.

38. E.g., proposal by Finland, Greece, and Italy, *supra* note 35.

39. See, e.g., Note on the need to amend Article 33 of the draft convention on the law of the non-navigational uses of international watercourses, prepared by the Syrian Arab Republic and Switzerland, *supra* note 33, at p. 5; Statement by the Chairman of the Drafting Committee, Professor Lammers, Introducing the Report of the Drafting Committee, March 31, 1997, at p. 6.

40. Professor Lammers, *ibid.*

41. Note by Syria and Switzerland, *supra* note 39, at p. 5; Professor Lammers, *supra* note 39.

42. Article 33(2). See also C.B. Bourne, *Mediation, Conciliation and Adjudication in the Settlement of International Drainage Disputes*, 9 CANADIAN YEARBOOK OF INTERNATIONAL LAW (1971), p. 114.

43. Article 33(10).

44. Annex to the Convention.

45. Annex, Article 2.

46. Thus, in the Beagle Channel Arbitration between Argentina and Chile (1977), when the parties could not reach an agreement on the formulation of the question to be submitted for arbitration, each party formulated its own version, and the tribunal determined the subject matter. 17 INTERNATIONAL LEGAL MATERIALS (1978), p. 634.

47. Annex, Articles 3 and 4.

48. Annex, Article 5.

49. Articles 5–6 of the Convention.

50. Annex, Article 6.

51. Annex, Article 7.

52. Annex, Article 8(1).

53. Annex, Article 8(2).

54. Annex, Article 9.

55. Annex, Article 10.

56. Annex, Article 11.

57. Annex, Article 13.

58. Annex, Article 14.

59. *Supra* note 10.

60. On negotiations, see, e.g., J.G. MERRILLS, *INTERNATIONAL DISPUTE SETTLEMENT*, third edition, Cambridge University Press, 1998, p. 3; Daniel Druckman, *Negotiating in the International Context*, in I. William Zartmann and J. Lewis Rasmussen, eds., *PEACEKEEPING IN INTERNATIONAL CONFLICT: METHODS AND TECHNIQUES*, Washington: United States Institute of Peace Press, 1997, p. 81, and bibliography on p. 115.

61. Article 33(3).

62. *Ibid.*

63. Article 33(4).

64. Interpretation of Peace Treaties with Bulgaria, Hungary and Romania, Advisory Opinion, First Phase (1950), International Court of Justice, Reports, 1950, p. 65; Second Phase, *ibid.*, p. 221.

65. Article 33(5).

66. Article 33(6).

67. Article 33(7).

68. Article 33(8).

69. *Ibid.* This obligation does not appear in the draft of the International Law Commission, *supra* note 1.

70. Articles 9–14 of the 1899 Convention and Articles 9–35 of the 1907 Convention; Clive Parry, 205 CONSOLIDATED TREATY SERIES (1907), p. 234; NISSIM BAR-YAACOV, *THE*

HANDLING OF INTERNATIONAL DISPUTES BY MEANS OF INQUIRY, Oxford University Press, 1974.

71. PERMANENT COURT OF ARBITRATION, BASIC DOCUMENTS: CONVENTIONS, RULES, MODEL CLAUSES AND GUIDELINES, The Hague, 1998, p. 175.

72. N. BAR-YAACOV, *supra* note 70, p. 156; J.G. MERRILLS, *supra* note 60, p. 49.

73. UNGA Resolution 2329 (XXII), December 18, 1967. See also UNITED NATIONS, HANDBOOK ON THE PEACEFUL SETTLEMENT OF DISPUTES BETWEEN STATES, New York, 1992, chapter 2B.

74. For these examples, see J.G. MERRILLS, *supra* note 60 at pp. 59–60 and references.

75. Article 90. See J. Ashley Roach, *The International Fact-Finding Commission*, 31 INTERNATIONAL REVIEW OF THE RED CROSS (1991), p. 167; Francoise Krill, *The International Fact-Finding Commission: The ICRC's Role*, *ibid.*, p. 190.

76. Article 90(1)(b) of the Protocol I; J.A. Roach, *supra* note 75, at 168.

77. Article 90(2)(c).

78. CLAUDE PILLOUD, JEAN DE PREUX, YVES SANDOZ, BRUNO ZIMMERMANN, PHILIPPE EBERLIN, HANS-PETER GASSER, CLAUDE F. WENGER, COMMENTARY ON THE ADDITIONAL PROTOCOL I OF 8 JUNE 1977 TO THE GENEVA CONVENTIONS OF 12 AUGUST 1949, Geneva, International Committee of the Red Cross, Martinus Nijhoff, 1987, paragraph 3620.

79. Article 33(8).

80. See J.G. MERRILLS, *supra* note 60, at pp. 47, 49, 54, 58; Thomas M. Franck and H. Scott Fairley, *Procedural Due Process in Human Rights Fact-Finding by International Agencies*, 74 AMERICAN JOURNAL OF INTERNATIONAL LAW (1980), p. 308. N. Bar-Yaacov makes a distinction between what he calls “enlarged inquiry,” namely, a commission that is to investigate and report on all aspects of the dispute, and conciliation where the commission is empowered to recommend to the parties a scheme for the settlement of the dispute. *Supra* note 70, p. 109.

81. Thomas M. Franck and H.S. Fairley, *supra* note 80, at pp. 344–345. See also the guidelines included in a Working Paper submitted to the Special Committee on the Charter of the United Nations and on the Strengthening of the Role of the Organization, UN Doc. A/AC.182/L.66, reproduced in the Report of the Special Committee on its 1990 session (UNGA OR, 45th Session, Supplement no. 33; A/45/33); UNITED NATIONS, HANDBOOK ON THE PEACEFUL SETTLEMENT OF DISPUTES BETWEEN STATES, New York, 1992; Permanent Court of Arbitration, Optional Rules for Fact-Finding Commissions of Inquiry, *supra* note 71.

82. See B.R. CHAUHAN, *supra* note 5, at p. 143. David H. Getches, *Sectoral Conflicts over Water: Resolving Tensions among Agricultural, Municipal and Industrial, and Ecological Demands*, in Sanchez, Woled and Tilly, eds., *supra* note 6, pp. 35–48. The 1997 Watercourses Convention has given preference to “the requirements of vital human needs”—Article 10(2).

83. On the protection of the environment, see Articles 20–23 of the Convention. On the protection of the rights of future generations, see Preamble, 5th paragraph, and Edith Brown Weiss, *International Fairness for Fresh Water Resources*, 25 ENVIRONMENTAL POLICY AND LAW (1995), p. 231.

84. Articles 5–6 versus Article 7.

85. E.g., with regard to the Ganges and the Jordan.