

January 1989

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Recommended Citation

Stephen C. McCaffrey, *The Law of International Watercourses: Some Recent Developments and Unanswered Questions*, 17 *Denv. J. Int'l L. & Pol'y* 505 (1989).

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The Law of International Watercourses: Some Recent Developments and Unanswered Questions

Keywords

Environmental Law, International Law: History

The Law of International Watercourses: Some Recent Developments and Unanswered Questions

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The International Law Commission of the United Nations (ILC), a body composed of 34 individuals who serve in their personal capacities, and not as government representatives,¹ is currently engaged in the preparation of drafts on two subjects that relate to transfrontier environmental harm. This work is particularly significant because of the unique nature of the Commission, whose task is "the promotion of the progressive development of international law and its codification."² The ILC fulfills

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1. UNITED NATIONS, *THE WORK OF THE INTERNATIONAL LAW COMMISSION* 6 (4th ed. 1988). Article 2, para. 1 of the Commission's Statute provides that members are to be "persons of recognized competence in international law." *Statute of the International Law Commission* 1, U.N. Doc. A/CN.4/4/Rev.2 (1982) [hereinafter cited as ILC Statute]. Members are elected by the General Assembly unless a vacancy occurs during a five-year term, in which case it is filled by the Commission itself; Article 8 of the Statute provides that "the electors shall bear in mind that the persons to be elected to the Commission should individually possess the qualifications required and that in the Commission as a whole representation of the main forms of civilization and of the principal legal systems of the world should be assured." I.L.C. Statute, at 2.

It is therefore surprising that a recent article should have characterized the Commission as "government-dominated." Allott, *State Responsibility and the Unmaking of International Law*, 29 HARV. INT'L L.J. 1, 2 and 16 (1988). That governments have no power over members of the Commission was demonstrated beyond any doubt when, on several occasions, they have been unsuccessful in efforts to unseat ILC members. See e.g., H. BRIGGS, *THE INTERNATIONAL LAW COMMISSION 78-80* (1965) (attempts to remove Shushi Hsu (China) in the 1950s); and Schwebel, *The Thirty-Second Session of the International Law Commission*, 74 A.J.I.L. 961, 961-62 (1980) (attempt to unseat Abdul Hakim Tabibi (Afghanistan)). A similar attempt to replace a member of Nigerian nationality after a change of government in 1984 was also unsuccessful. Aide-Memoire of 11 May 1984 from the ILC to the Government of Nigeria. "[O]n each occasion, the Commission has politely, but firmly, adhered to the view that its members sit in their personal capacities and cannot be unseated during their term of office by means other than voluntary resignation." I. SINCLAIR, *THE INTERNATIONAL LAW COMMISSION* 20-21 (1987).

While there may be some justification for the view that the election of Commission members has become increasingly politicized. See e.g., H. BRIGGS at 42; Saunders, *The 1971 Elections of the International Law Commission*, 66 A.J.I.L. 356 (1972)], it has been suggested that this actually enhances the possibility that Commission drafts will be acceptable to governments. See e.g., B. RAMCHARAN, *THE INTERNATIONAL LAW COMMISSION* 34 (1977); and EL BARADEI, FRANCK AND TRACHTENBERG, *THE INTERNATIONAL LAW COMMISSION: THE NEED FOR A NEW DIRECTION* 29 (1981). See generally I. SINCLAIR at 16-19.

2. ILC Statute, *supra* note 1, at 1. The Commission, in practice, has not drawn a dis-

this mandate by preparing what amount to draft conventions for submission to the United Nations General Assembly. These drafts have often formed the basis of multilateral treaties adopted at conferences convened by the General Assembly.³ But the Commission's work is of interest even without regard to the final form it may take, since it is the result of efforts to state what the law is (codification) or what it should be (progressive development).⁴

The two subjects on which the ILC is currently working that address problems of transfrontier environmental harm are The Law of the Non-navigational Uses of International Watercourses (International Watercourses) and International Liability for Injurious Consequences Arising out of Acts Not Prohibited by International Law (International Liability).⁵ This article will be confined to reviewing recent developments of

inction between "codification" and "progressive development," although they are treated as separate exercises in the ILC Statute (*supra* note 1, arts. 15, 16-17 (progressive development) and 18-23 (codification)). I. SINCLAIR, *supra* note 1, at 7; McCaffrey, *Codification and Progressive Development: Law and the World Environment*, 7 HARV. INT'L REV. 8 (1984).

3. See, e.g., the 1958 Geneva Conventions on the Law of the Sea which, in turn formed the basis of much of the 1982 U.N. Convention on the Law of the Sea: Convention on the High Seas, April 29, 1958, 13 U.S.T. 2312, T.I.A.S. No. 5200, 450 U.N.T.S. 82; Convention on the Continental Shelf, April 29, 1958, 15 U.S.T. 472, T.I.A.S. No. 5578, 499 U.N.T.S. 311; Convention on the Territorial Sea and Contiguous Zone, April 29, 1958, 15 U.S.T. 1606, T.I.A.S. No. 5639, 516 U.N.T.S. 205; Convention on Fishing and Conservation of Living Resources of the High Seas, April 29, 1958, 17 U.S.T. 138, T.I.A.S. No. 5969, 559 U.N.T.S. 285. See also, the Vienna Convention on Diplomatic Relations, done April 18, 1961, 23 U.S.T. 3227, T.I.A.S. No. 7502, 500 U.N.T.S. 95; the Vienna Convention on Consular Relations, April 24, 1963, 21 U.S.T. 77, T.I.A.S. No. 6820, 596 U.N.T.S. 261; and The Vienna Convention on the Law of Treaties, *opened for signature* May 23, 1969, 8 I.L.M. 169 (1969).

4. *Supra* note 2.

5. For discussions of the Commission's work on International Liability see, e.g., Magraw, *Transboundary Harm: The International Law Commission's Study of International Liability*, 80 A.J.I.L. 305 (1986); McCaffrey, *The Work of the International Law Commission Relating to the Environment*, 11 ECOLOGY L.Q. 189, 206-211 (1983); *id.* *An Update on the Contributions of the International Law Commission to International Environmental Law*, 15 ENV. L. 667 (1985); and *id.* *The Fortieth Session of the International Law Commission*, 83 A.J.I.L. 153, 169-70 (1989).

The Commission has provisionally adopted an article in the context of its work on a third topic, State Responsibility, which also concerns environmental protection. Article 19 of Part One of the Responsibility draft is entitled "International Crimes and International Delicts." It creates a new category of especially serious internationally wrongful state acts called "international crimes". The article provides that an international crime "may result, *inter alia*, from" an act of aggression, the establishment or maintenance by force of colonial domination, a serious and widespread breach of an obligation for the safeguarding of the human being, such as those prohibiting slavery, genocide and *apartheid*, and finally, (d) a serious breach of an international obligation of essential importance for the safeguarding and preservation of the human environment, such as those prohibiting massive pollution of the atmosphere or of the seas. 2 Y.B. INT'L L. COMM'N 95, 96 (1976). The Commission's commentary to article 19 is contained in *id.* at 96-122. For a brief discussion of subparagraph (d), quoted above, see McCaffrey, *The Work of the International Law Commission Relating to the Environment*, 11 ECOL. L. Q. 189, 211-214 (1983). For an in-depth examination of article 19, see generally *International Crimes of State, A Critical Analysis of the ILC's Draft Article 19 on State Responsibility* (J. Weiler, A. Cassese & M. Spinedi eds.

significance in relation to the Commission's work on International Watercourses and examining some of the questions that work raises.

I. OVERVIEW

The General Assembly first recommended that the International Law Commission study the law of the non-navigational uses of international watercourses in 1970.⁶ The Commission held general discussions of the topic in 1976 and adopted the first six articles of the draft in 1980. While these articles were later withdrawn at the instance of a new special rapporteur,⁷ the Commission in 1987 adopted a fresh set of introductory provisions, as well as the first two articles of Part II, entitled "General Principles."⁸ The Commission made further significant progress at its 1988 session, adopting the remaining general provisions as well as Part III of the draft, which concerns procedural obligations in the case of planned measures.⁹ At the same session, the Commission discussed a set of articles

1989).

6. G.A.O.R. Res. 2669 (XXV) (Dec. 8, 1970). For a historical overview of the ILC's work on international watercourses, see UNITED NATIONS, *THE WORK OF THE INTERNATIONAL LAW COMMISSION* 100-105 (4th ed. 1988).

7. Stephen M. Schwebel resigned from the Commission in 1981 upon his election to the International Court of Justice (ICJ). He was succeeded by Jens Evensen, who was appointed in 1982. In 1985 the Commission appointed the present author special rapporteur after Evensen had himself been elected to the ICJ. Schwebel was in fact the second rapporteur for the topic, having succeeded the original rapporteur, Richard Kearney, in 1977. Since the Commission accords special rapporteurs wide latitude in deciding how work on a topic should proceed, and because it discusses topics only on the basis of reports submitted by the rapporteurs, changes in rapporteurships can result in significant delays in the ILC's work.

8. See *Report of the International Law Commission on the Work of its Thirty-Ninth Session*, 42 U.N. GAOR Supp. (No. 10), U.N. Doc. A/42/10 at 53-88 (1987) [hereinafter 1987 ILC Report], which also contains the Commission's commentaries to these articles. The titles of the articles forming Part I, Introduction, are as follows: Article 1, "[Use of terms]" (action on this article was deferred until a later stage of the Commission's work; *infra* note 10); Article 2, "Scope of the present articles;" Article 3, "Watercourse States;" Article 4, "[Watercourse] [System] agreements;" and Article 5, "Parties to [watercourse] [system] agreements." The articles of Part II, General Principles, adopted in 1977 are Article 6, "Equitable and reasonable utilization and participation," and Article 7, "Factors relevant to equitable and reasonable utilization."

9. The remaining articles of Part II, General Principles, adopted in 1988 are: Article 8, "Obligation not to cause appreciable harm;" Article 9, "General obligation to co-operate;" and Article 10, "Regular exchange of data and information." Part III, Planned Measures, also adopted in 1988, contains the following provisions: Article 11, "Information concerning planned measures;" Article 12, "Notification concerning planned measures with possible adverse effects;" Article 13, "Period for reply to notification;" Article 14, "Obligations of the notifying State during the period for reply;" Article 15, "Reply to notification;" Article 16, "Absence of reply to notification;" Article 17, "Consultations and negotiations concerning planned measures;" Article 18, "Procedures in the absence of notification;" Article 19, "Urgent implementation of planned measures;" Article 20, "Data and information vital to national defence or security;" and Article 21, "Indirect procedures." These articles, together with the Commission's commentaries thereto, are contained in the *Report of the International Law Commission on the Work of its Fortieth Session*, 43 U.N. GAOR Supp. (No. 10), U.N. Doc. A/43/10 at 83-139 (1988) [hereinafter 1988 ILC Report].

proposed by the special rapporteur on environmental protection and pollution. Some of the more controversial issues raised by these articles will be examined after a brief discussion of the general obligations that form their basis.

II. EQUITABLE UTILIZATION AND THE OBLIGATION NOT TO CAUSE APPRECIABLE TRANSFRONTIER HARM

The twin cornerstones of the entire watercourses draft are Articles 6 and 8. They provide as follows:

Article 6: Equitable and reasonable utilization and participation —

1. Watercourse States shall in their respective territories utilize an international watercourse [system]¹⁰ in an equitable and reasonable manner. In particular, an international watercourse [system] shall be used and developed by watercourse States with a view to attaining optimum utilization thereof and benefits therefrom consistent with adequate protection of the international watercourse [system].

2. Watercourse States shall participate in the use, development and protection of an international watercourse [system] in an equitable and reasonable manner. Such participation includes both the right to utilize the international watercourse [system] as provided in paragraph 1 of this article and the duty to co-operate in the protection and development thereof, as provided in article [9].¹¹

Article 8: Obligation not to cause appreciable harm —

Watercourse States shall utilize an international watercourse [system] in such a way as not to cause appreciable harm to other watercourse States.¹²

The obligations embodied in Articles 6 and 8 are firmly rooted in the practice of states.¹³ Article 6 obligates states to use international water-

10. The term "system" appears in brackets as a result of a Commission decision to postpone until a later date the precise definition of the scope of the draft. The basic question is whether the draft should apply to the concept of an "international watercourse system," which would include not only tributaries but also such watercourse components as groundwater and glaciers, or to the potentially much narrower concept of an "international watercourse" which, in the view of some ILC members, would include only the main stem of a river. See 1987 ILC Report, *supra* note 8, at 54.

11. 1987 ILC Report, *supra* note 8, at 69-70. The Commission's commentary to article 6 is contained in *id.* at 70-82.

12. 1988 ILC Report, *supra* note 9, at 83. The Commission's commentary to article 8 is contained in *id.* at 83-101.

13. See the Commission's commentaries to article 6, 1987 ILC Report, *supra* note 8, at 70-82; and article 8, 1988 ILC Report, *supra* note 9, at 83-101. See also the authorities surveyed in S. McCaffrey, *Second Report on the Law of the Non-navigational Uses of International Watercourses*, U.N. Doc. A/CN.4/399 44-81, and *id.* at Add.1, 1-52 (1986) [hereinafter McCaffrey, *Second Report*]; and S. Schwebel, *Third Report on the Law of the Non-navigational Uses of International Watercourses*, [1982] 2 Y.B. INT'L L. COMM'N 65, 75-87 (1982) [hereinafter Schwebel, *Third Report*].

courses in a manner that is "equitable" viv-a-vis other states using the same watercourse. "The scope of a State's rights of equitable utilization depends upon the facts and circumstances of each individual case, and specifically upon a weighing of all relevant factors, as provided in article 7."¹⁴ Article 8 "is a specific application of the principle of the harmless use of territory, expressed in the maxim *sic utere tuo ut alienum non laedas*, which is itself a reflection of the sovereign equality of States."¹⁵

In the view of many specialists, the most fundamental principle of international water law is that of equitable utilization. Thus, for example, a downstream state that was first to develop its water resources could not foreclose later development by an upstream state by demonstrating that the later development would cause it harm; under the doctrine of equitable utilization, the fact that the downstream state was "first to develop" (and thus had made prior uses that would be adversely affected by new upstream uses) would be merely one of a number of factors to be taken into consideration in arriving at an equitable allocation of the uses and benefits of the watercourse.¹⁶ These observers believe that if the "no harm" principle took precedence over that of equitable utilization the effect would be to freeze the development of many riparian states to international watercourses ("watercourse states").

The approach of the International Law Commission to this problem is illustrated in the following excerpt from the commentary to Article 8:

[P]rima facie, at least[,] utilization of an international watercourse [system] is not equitable if it causes other watercourse States appreciable harm. . . . The Commission recognizes, however, that in some instances the achievement of equitable and reasonable utilization will depend upon the toleration by one or more watercourse States of a measure of harm. In these cases, the necessary accommodations would be arrived at through specific agreements.¹⁷

This solution will probably not be completely satisfying to adherents of

14. 1987 ILC Report, *supra* note 8, at 73.

15. 1988 ILC Report, *supra* note 9, at 83. Compare Principle 21 of the Stockholm Declaration on the Human Environment, adopted by the United Nations Conference on the Human Environment on June 16, 1972 which provides as follows:

States have, in accordance with the charter of the United Nations and the principles of international law, the sovereign right to exploit their own resources pursuant to their own environmental policies, and the responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other States or of areas beyond the limits of national jurisdiction.

Report of the United Nations Conference on the Human Environment, at 325 U.N. Sales No. E.73.II.A.14.

16. See text *supra* note 14. See the indicative list of factors contained in Article 7, adopted by the ILC in 1987. 1987 ILC Report, *supra* note 8, at 82. See also Article V of the Helsinki Rules on the Uses of Waters of International Rivers, adopted by the International Law Association (ILA) at its fifty-second Conference held in Helsinki in 1966, ILA, *Report of the fifty-second Conference, Helsinki, 1966*, 484 (1967) [hereinafter Helsinki Rules].

17. 1988 ILC Report, *supra* note 9, at 84.

the school of thought referred to above. Several points must be recognized in its defense, however. First, the ILC's approach affords a measure of protection to the weaker state that has suffered harm. It is not open to the stronger state to justify a use giving rise to the harm on the ground that it is "equitable." A second, and related, point is that it is far simpler to determine whether the "no harm" rule has been breached than is the case with the obligation of equitable utilization. Thus, primacy of the "no harm" principle means that the fundamental rights and obligations of states with regard to their uses of an international watercourse are more definite and certain than they would be if governed in the first instance by the more flexible (and consequently less clear) rule of equitable utilization. And finally, the "no harm" rule is preferable in cases involving pollution and other threats to the environment. While a state could conceivably seek to justify an activity resulting in such harm as being an "equitable use," the "no harm" principle would — at least *prima facie*¹⁸ — require abatement of the injurious activity.

Irrespective of whether primacy is accorded to the "no harm" principle, however, the question remains whether it is enough for an injured state to show that it has been harmed by another state's use of a shared watercourse. That is, is the standard of responsibility for breach of Article 8 a strict one, or is responsibility based on the "fault" of the source state? The Commission side-stepped this important issue. It decided to determine the extent to which a state could be held strictly liable (i.e., liable for the injurious consequences of an act not prohibited by international law) in the context of its work on the International Liability topic. Within the context of the ILC's overall program of work,¹⁹ this decision can be defended as a means of avoiding duplication of effort. But those who look to the Commission's work-product for guidance in dealing with problems relating to international watercourses would doubtless have welcomed some treatment of the standard of responsibility in the context of the watercourses draft itself. The Commission's discussion of this issue will be reviewed in part IV, below.

18. The extent to which other states would tolerate harm so long as the source state was taking reasonable measures to abate it is discussed in S. McCaffrey, *Fourth Report on the Law of the Non-Navigational Uses of International Watercourses*, U.N. Doc. A/CN.4/412/Add.2, 12-13 (1988) [hereinafter McCaffrey, *Fourth Report*]; and J. LAMMERS, *POLLUTION OF INTERNATIONAL WATERCOURSES*, 349 (1984) [hereinafter LAMMERS]. See *infra* note 67.

19. There are seven substantive items on the Commission's active agenda. They are: state responsibility, Jurisdictional immunities of states and their property, status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier, the Draft Code of Crimes against the Peace and Security of Mankind, the law of the non-navigational uses of international watercourses, international liability for injurious consequences arising out of acts not prohibited by international law, and relations between states and international organizations (second part of the topic). 1988 ILC Report, *supra* note 9, at 3-4.

III. THE OBLIGATIONS OF NOTIFICATION, CONSULTATION AND NEGOTIATION CONCERNING PLANNED MEASURES

A survey of the ILC's work on International Watercourses relating to the environment would not be complete without at least a brief mention of the articles adopted at the Commission's 1988 session on procedural obligations in the case of planned measures relating to an international watercourse.²⁰ Such provisions are indispensable to any scheme of prevention. Their aim is to provide an "early warning" of potentially adverse changes in the regime of an international watercourse so that the states concerned will have an opportunity to effect any necessary adjustments in advance, before human and financial resources are irrevocably committed and positions become entrenched.

The provisions on prior notification and consultation concerning planned measures are contained in Part III of the watercourses draft.²¹ That chapter begins with Article 11, a general article requiring states riparian to an international watercourse to "exchange information and consult each other on the possible effects of planned measures on the condition of the watercourse. . . ."²² Unlike the other articles in Part III, Article 11 requires the exchange of information concerning all potential effects of planned measures, whether they be positive or negative. This will facilitate planning by affected watercourse states and may help to avoid problems associated with unilateral interpretations of whether a new project will have negative or beneficial impacts.

Articles 12 and following establish a system of prior notification concerning planned measures that may adversely affect other watercourse states and procedures for resolving any disputes that may arise concerning those measures. The Commission's commentary explains that the expression "planned measures" includes "new projects or programmes of a major or minor nature, as well as changes in existing uses of an international watercourse. . . ."²³ The obligation to notify is triggered by the criterion that the contemplated measures may have "an appreciable adverse effect" upon other watercourse states.²⁴ It is therefore incumbent upon

20. The titles of these articles are set forth in *supra* note 9. The articles themselves, together with the Commission's commentary thereto, are contained in 1988 ILC Report, *supra* note 9, at 114-139.

21. *Id.*

22. Article 11, *Information concerning planned measures*, 1988 ILC Report, *supra* note 9, at 114.

23. 1988 ILC Report, *supra* note 9, at 115 (para. (4) of commentary to Article 11).

24. Article 12. 1988 ILC Report, *supra* note 9, at 115. The meaning of the expression "appreciable adverse effect" is discussed in para. (2) of the commentary to article 12. *Id.* at 115-116. As there explained, "[t]he threshold established by this standard is intended to be lower than that of 'appreciable harm' under article 8." *Id.* The purpose of using a different standard is to encourage notification in order to allow bilateral determinations of whether a project (or change in an existing use) will have harmful consequences in other watercourse states, without forcing the notifying state to admit that it is planning measures that may give rise to a violation of article 8.

the state planning the measures to undertake its own assessment of the impact of the project upon other states using the watercourse. This evaluation would include possible effects upon the environment of other states; it would thus function as a "transfrontier" environmental impact assessment.

The system established by Part III functions in the following manner: After a state has received a notification of the kind described above it has six months (unless another period is agreed upon) within which to evaluate the potential effect of the project upon it and to communicate its findings to the notifying state (Articles 12 and 13). The notifying state may not proceed with the implementation of its plans during this period without the consent of the notified state (Article 14). If the latter state determines that implementation of the plans would put the notifying state in violation of Articles 6 (equitable utilization) or 8 (no appreciable harm), and so informs the notifying state within the 6-month period, Article 17 requires that the states enter into consultations and negotiations with a view to arriving at an equitable resolution of the matter. Implementation of the project must be suspended for an additional 6 months if the notified state so requests, in order to permit meaningful discussions (Article 17). If, on the other hand, the notifying state does not receive a "negative" reply within the initial 6-month period, it may go forward with the implementation of its plans (Article 16).

Of course, it may happen that the state in whose territory the measures would be implemented (for convenience, the "planning state") provides no notification at all. This would presumably be due to a finding by that state that the planned measures would have no appreciable adverse effect upon other watercourse states. If another state nonetheless learns of the plans and wishes information concerning them, it may set in motion the procedures outlined above by requesting the planning state to apply the provisions of Article 12 (Article 18, para. 1) — i.e., to determine whether the plans could have an appreciable adverse effect upon other watercourse states. If the planning state answers this question in the negative, but that determination is not accepted by the other state, the states are required to enter into consultations and negotiations (Article 18, para. 2). Once again, implementation of the plans is to be suspended for 6 months, at the request of the potentially affected state, to allow meaningful talks (Article 18, para. 3). It goes without saying that even if no information is provided to other states before the plans are actually implemented, the state permitting the implementation remains bound to comply with its obligations under Articles 6 and 8.

These articles represent acceptance by the Commission of the principles of prior notification, consultation and negotiation in relation to new watercourse uses or modifications of existing ones. While the procedures they establish are quite general, they provide a framework within which states sharing international watercourses can develop specific regimes tailored to their particular needs and to the characteristics of the watercourse and the uses being made of it. The articles cover all potentially

adverse effects of planned measures, including environmental impacts. The particular obligations of watercourse states in relation to pollution and environmental protection were the subject of articles proposed by the special rapporteur in 1988. These articles, and some of the issues they raise, are the subject of the following section.

IV. ENVIRONMENTAL PROTECTION AND POLLUTION

A. *The Articles Proposed by the Special Rapporteur*

In 1988, the special rapporteur for international watercourses proposed a set of three draft articles (initially submitted as Articles 16-18²⁵ on the subtopic of "Environmental protection, pollution and related matters." At the rapporteur's suggestion the Commission focused its discussion upon draft Articles 16 and 17; action on draft Article 18 was postponed until the ILC's next session. The latter article, entitled "Pollution or environmental emergencies," will not be discussed further in this paper.²⁶ The Commission ultimately decided to refer draft Articles 16 and 17 to the Drafting Committee. That body attempts to produce formulations of draft articles, on the basis of proposals submitted by the rapporteurs, that take into account points of view expressed in the Commission's debates. The Committee was unable to take up the two articles at the 1988 session for lack of time. It will presumably examine them during the course of the ILC's 1989 session.

Draft Articles 16 and 17, which would be contained in a separate chapter, provide as follows:

Article 16 - Pollution of international watercourse[s] [systems] —

1. As used in these draft articles, 'pollution' means any physical, chemical or biological alteration in the composition or quality of the waters of an international watercourse [system] which results directly or indirectly from human conduct and which produces effects detrimental to human health or safety, to the use of the waters for any beneficial purpose or to the conservation or protection of the environment.

2. Watercourse States shall not cause or permit the pollution of an international watercourse [system] in such a manner or to such an extent as to cause appreciable harm to other watercourse States or to the ecology

25. These articles will eventually be renumbered to conform to the numerical sequence of the articles already adopted.

26. The special rapporteur suggested deferring detailed discussion of the article so he would have an opportunity to incorporate it into a more general article on water-related hazards and dangers. 1988 ILC Report, *supra* note 9, at 54. After defining the term "pollution or environmental emergency," the draft article requires the state in whose territory such an incident has occurred to notify immediately all potentially affected watercourse states and to provide them with all available data and information relevant to the emergency. It further obligates that state to take immediate steps to prevent, neutralize or mitigate the danger or damage to other watercourse states resulting from the incident. McCaffrey, *Fourth Report*, *supra* note 18, at 23.

of the international watercourse [system].

3. At the request of any watercourse State, the watercourse States concerned shall consult with a view to preparing and approving lists of substances or species, the introduction of which into the waters of the international watercourse [system] is to be prohibited, limited, investigated or monitored, as appropriate.²⁷

Article 17 - Protection of the environment of international watercourse[s] [systems] —

1. Watercourse States shall, individually and in co-operation, take all reasonable measures to protect the environment of an international watercourse [system], including the ecology of the watercourse and of surrounding areas, from impairment, degradation or destruction, or serious danger thereof, due to activities within their territories.

2. Watercourse States shall, individually or jointly and on an equitable basis, take all measures necessary, including preventive, corrective and control measures, to protect the marine environment, including estuarine areas and marine life, from any impairment, degradation or destruction, or serious danger thereof, occasioned through an international watercourse [system].²⁸

The three paragraphs forming Article 16 contain a definition of pollution, a core obligation not to cause appreciable pollution harm to other watercourse states, and a requirement that watercourse states consult, on request, with a view to agreeing upon lists of substances or species which, due to their especially dangerous qualities, should be subjected to special regulation. A summary of the Commission's discussion of this article is contained in its report to the General Assembly.²⁹ Only its most controversial aspects will be considered here. Draft Article 17 begins by requiring watercourse states to protect the environment of the watercourse. This affirmative obligation of protection goes further than the "no appreciable harm" rule of draft Article 16, since it requires the taking of positive steps; such steps may be necessary even if no pollution harm would be caused to other states. The obligation is mitigated, however, by the qualification that a state need only take "all reasonable measures" to protect the watercourse environment. While such qualifications weaken the rule to which they pertain and are thus generally undesirable, in this case the term "reasonable" is intended to reflect the nascent character of the obligation itself.³⁰ Equivalent language is employed, perhaps for the same reason, in the environmental provisions of the Law of the Sea Conven-

27. McCaffrey, *Fourth Report*, *supra* note 18, at 2; 1988 ILC Report, *supra* note 9, at 57; *supra* note 49.

28. McCaffrey, *Fourth Report*, *supra* note 18, at 20; 1988 ILC Report, *supra* note 9, at 69; *supra* note 61.

29. 1988 ILC Report, *supra* note 9, at 57-69.

30. See the authorities surveyed in McCaffrey, *Fourth Report*, *supra* note 18, at 8-57 (A/CN.4/412/Add.2).

tion.³¹ Paragraph 2 of draft Article 17 addresses the increasingly serious problem of harm to the marine environment resulting from watercourse pollution. Like paragraph 1, it lays down an affirmative obligation of protection. In the case of paragraph 2, the duty is based on the Law of the Sea Convention³² and other, regional agreements that proscribe pollution damage to the marine environment from land-based sources.³³ In some respects this provision seems to go further than paragraph 1, in that it requires that "all measures *necessary*" (rather than "all reasonable measures") be taken, and specifies that these are to include "preventive, corrective and control measures." In employing the expression "on an equitable basis," however, paragraph 2 may seem to be softening the obligations of watercourse states in the case of actual or threatened harm to the marine environment. But the expression is used here for a different purpose, namely, to indicate that while a watercourse state is not internationally responsible for harm to the marine environment caused by pollution originating in another state, all states riparian to the watercourse share an obligation to cooperate with each other in developing and establishing arrangements designed to avoid such harm. The intent of the provision is that the costs and other burdens of such arrangements be shared equitably among the riparian states.

It may be said immediately that paragraph 2 of article 16 provoked a more lively debate within the Commission than any other paragraph of either article. This may be because it contains the "hardest" obligation of any of the five paragraphs. It may also be due in part to questions raised as to the standard of responsibility the paragraph entails. But it is at least somewhat ironic that an obligation which is found in numerous treaties, dating from the middle of the last century,³⁴ proved more controver-

31. 1982 U.N. Convention on the Law of the Sea on the Protection of Marine Environment, Art. 194, ¶1 (1982) (states shall use "the best practicable means at their disposal and in accordance with their capabilities") [hereinafter 1982 U.N. Convention on the Law of the Sea]. *Id.* at 70.

32. *Id.* Art. 194(1) & (3)(a) & Art. 207.

33. See, e.g., Convention for Cooperation in the Protection and Development of the Marine and Coastal Environment of the West and Central African Region, March 23, 1981, Natural Resources/Water Series No. 13, *supra* note 13, p. 2; 1974 Convention on the Prevention of Pollution from Land-Based Sources, 13 I.L.M. 352 (1974); 1974 Convention on the Protection of the Marine Environment of the Baltic Sea Area, 13 I.L.M. 546 (1974); 1976 Convention on the Protection of the Mediterranean Sea Against Pollution, 15 I.L.M. 290 (1976); 1978 Kuwait Regional Convention for Cooperation in the Protection of the Marine Environment from Pollution, 17 I.L.M. 511 (1978).

34. One study identifies 88 different international agreements "containing substantive provisions concerning pollution of international watercourses." LAMMERS, *supra* note 18, at 124. Early agreements containing provisions on water pollution include the 1868 Final Act of the Delimitation of the International Frontier of the Pyrenees between France and Spain, sec. I, clause 6, reprinted in *Legislative Texts and Treaty Provisions concerning the Utilization of International Rivers for other Purposes than Navigation*, 674, 676, U.N. Sales No. 63.V.4 (1963)(Treaty No. 186)[hereinafter *Legislative Texts*]; see also the following conventions in *Legislative Texts*: 1887 convention between Switzerland and the Grand Duchy of Baden and Alsace-Lorraine, art. 10, at 397 (Treaty No. 113); the 1904 Convention between

sial than one which has been recognized only recently.³⁵

B. *Salient Issues*

The Commission's discussion of Article 16 revealed differences of views on several important issues,³⁶ three of which will be the focus of this section: (1) The question whether the draft should contain a strict obligation concerning transfrontier water pollution harm; (2) the criterion of "appreciable (pollution) harm;" and (3) the standard of responsibility for breach of the article. These points, all of which relate to paragraph 2 of Article 16, will be taken up in turn.

1. The Strictness of the Obligation

Most members of the Commission who addressed the issue agreed that the draft should contain a strict obligation not to cause transfrontier water pollution harm, along the lines of Article 16, paragraph 2. Some of these members believed the principle to be so important that it deserved to be placed in a separate article; in the view of others, the obligation was sufficiently central to warrant its inclusion in Part II of the draft among the other general principles.³⁷ Not all members believed that such emphasis should be given to prohibiting pollution, however. Thus it was suggested that the obligation not to cause transfrontier water pollution harm was actually only an aspect of the more fundamental duty to cooperate in the equitable utilization of international watercourses. According to this view, international cooperation was the best means of controlling pollution. It was therefore proposed that paragraph 2 of Article 16 could provide as follows: "Watercourse States shall co-operate to prevent, reduce

France and Switzerland for the Regulation of Fishing in their Frontier Waters, art. 17, at 701, 706 (Treaty No. 196); the 1906 Agreement between Switzerland and Italy Establishing Provisions in Respect of Fishing in Frontier Waters, art. 12, at 839, para. 5, (Treaty No. 230); and the 1909 Boundary Waters Treaty between Canada and the United States, art. IV, at para. 2, 260, 36 Stat. 2448, T.S. 548, 12 Bevans 319, (Treaty No. 79).

35. A number of relatively recent international agreements contain provisions on the protection of the environment of international watercourses. See, e.g. the 1975 Statute of the Uruguay River, especially arts. 36, 37 and 41 reprinted in URUGUAY, MINISTERIO DE RELACIONES EXTERIORES, ACTOS INTERNACIONALES URUGUAY-ARGENTINA, 1830-1980, 600-602 (Montevideo, ed. 1981); the Accord de 1977 portant creation de l'organisation pour l'amenagement et le developpement du bassin de la Riviere Kagera (Burundi, Rwanda, Tanzania and Uganda), art. 2, para. 1, Natural Resources/Water Series, No. 13, U.N. Doc. ST/TCD/4, 32 (1987); and the 1978 convention relating to the Status of the River Gambia (Gambia, Guinea and Senegal), art. 4, Natural Resources/Water Series No. 13, at 39. For a more general view, see the provisions of the 1982 United Nations Convention on the Law of the Sea, *supra* note 31 at 70-73 (arts. 192, 194 and 207). U.N. Sales No. 83.V.5, 70-73 (1983)(Article 207 specifically addresses pollution from land-based sources, "including rivers, estuaries, pipelines and outfall structures").

36. For a summary of the Commission's discussion of Article 16, see 1988 ILC Report, *supra* note 9, at pp. 57-69.

37. *Id.* at 61.

and control pollution of international watercourse[s] [systems]."³⁸

There is nothing objectionable about such a formulation, as far as it goes. Indeed, cooperation among all states sharing an international watercourse system is essential not only to the maintenance of acceptable water quality but also to the smooth functioning of procedural rules and the very development of the resource.³⁹ The problem is that the proposed language, by itself, does not go far enough. It is a general principle that must be implemented through specific obligations. It could therefore complement, but should not replace, a concrete prohibition of trans-frontier pollution harm. "Soft law"⁴⁰ may be useful for certain purposes, such as paving the way for the development of new norms.⁴¹ But a "soft" obligation such as the one proposed, standing alone, lacks the "determinacy,"⁴² or "ability . . . to convey a clear message,"⁴³ necessary for states to take it seriously, if indeed they are able to ascertain from its text exactly what it requires them to do or refrain from doing. It is a classic example of a norm "whose substance is so vague, so unconvincing, that A's obligation and B's right all but elude the mind."⁴⁴ Thus its value as a deterrent of state caused or permitted transfrontier pollution harm would be slight. And since it would be difficult to determine whether such a general obligation had been violated, the proposed provision would provide only a very slender reed of support for a state claiming to have suffered harm as a result of another state's breach of an obligation to prevent pollution of an international watercourse. Finally, substituting an obligation to cooperate in controlling harmful pollution of international watercourses for a prohibition of such pollution seems out of line with treaty practice. This is important for the following reasons: Even though the Commission's draft on watercourses is foreseen as a "framework agreement,"⁴⁵ one of its chief purposes is to clarify the fundamental obli-

38. *Id.*

39. See the discussion of the importance of cooperation in the use and development of international watercourse systems in S. McCaffrey, *Third report on the law of the non-navigational uses of international watercourses* 7-34, U.N. Doc. A/CN.4/406 and Corr.1 (1987) [hereinafter McCaffrey, *Third Report*].

40. See generally Weil, *Towards Relative Normativity in International Law?*, 77 A.J.I.L. 413, 414 (1983) ("alongside 'hard law,' made up of the norms creating precise legal rights and obligations, the normative system of international law comprises . . . more and more norms whose substance is so vague, so unconvincing, that A's obligation and B's right all but elude the mind. One does not have to look far for examples of this 'fragile,' 'weak,' or 'soft law,' as it is dubbed at times: . . . a recent Advisory Opinion of the International Court of Justice includ[ed] obligations 'to co-operate in good faith' and 'to consult together' among the 'legal principles and rules' governing the relations between an international organization and a host country.").

41. See 1988 Annual Meeting of the American Society of International Law (April 20-23, 1988) to be published in *Proceedings of the Society* (1988) (remarks of Professor Dupuy during panel discussion).

42. See Franck, *Legitimacy in the International System*, 82 A.J.I.L. 705, 713 (1988).

43. *Id.* at 713.

44. Weil, *supra* note 40, at 414.

45. See, e.g., [1986] 2(2) Y.B. INT'L L. COMM'N 63, ¶ 242; [1980] 2(1) Y.B. INT'L L.

gations of states with regard to the non-navigational uses of international watercourses.⁴⁶ These obligations may be distilled, in part, from similar provisions in a wide range of international agreements.⁴⁷ Many such agreements, some of which are quite venerable,⁴⁸ contain prohibitions of harmful transfrontier water pollution.⁴⁹ It seems unwise to ignore the lessons of this treaty practice, especially in this era of increasing pollution and environmental problems. Moreover, retreating from a specific obligation that states have demonstrated a willingness to accept, to a more general and vague obligation whose contours are blurred at best, would do little to promote clarification of the rights and obligations of watercourse states — one of the chief purposes of the draft. For these reasons, it is submitted that the first question identified above should be answered in the affirmative, i.e., the draft should contain a strict obligation concerning transfrontier water pollution harm, such as that contained in paragraph 2 of draft article 16.

2. The "Appreciable Harm" Criterion

The second issue concerns the criterion of "appreciable (pollution) harm." The standard of "appreciable harm" was first considered in relation to article 8, set out above.⁵⁰ The Commission accepted the special rapporteur's proposals that (a) the purely factual standard of "harm" was preferable to the legal concept of "injury" because of its greater clarity; and (b) some qualifier was necessary so that the article would not be interpreted to proscribe all harm, no matter how minor.⁵¹ These factors are

COMM'N 161, ¶ 11 (The idea of a "framework agreement" is that "the Commission should produce a set of articles which would provide a legal framework for the negotiation of treaties to govern the use of water of individual watercourses by the watercourse States.").

46. [1986] 2(1) Y.B. INT'L L. COMM'N 94-95 ¶ 32, ("[S]ince political relationships and disposition to co-operate 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." Summarizing comments made in the Sixth [Legal] Committee of the General Assembly).

47. L. HENKIN, R. PUGH, O. SCHACHTER & H. SMIT, *INTERNATIONAL LAW* 87 (2d ed. 1987) (This is especially true when, as in the case of the non-navigational uses of international watercourses, the agreements "deal with matters generally regulated by international law," as opposed to "treaties which deal with matters which are clearly recognized as within the discretion of the states . . ."). See also 1 HACKWORTH, *DIGEST OF INTERNATIONAL LAW* 17 (1940); and 1 HYDE, *INTERNATIONAL LAW* 10-11 (2d ed. 1945).

48. See, e.g., agreements cited in *supra* note 35.

49. See the agreements surveyed in McCaffrey, *Fourth Report*, *supra* note 18, at 8-18.

50. See text *supra* note 12. The adjective "appreciable" is also employed in articles 4 and 5 of the watercourses draft.

51. 1988 ILC Report, *supra* note 9, at 85. McCaffrey, *Second Report*, *supra* note 13, U.N. Doc. A/CN.4/399/Add.2 at 1-3. Another approach to the problem of formulating a general criterion is found in the newly adopted Antarctic Minerals Convention, which employs the standard of "significant adverse effect." ("significant adverse effects on air and water quality"). Convention on the Regulation of Antarctic Mineral Resource Activities, 27 I.L.M. 868, 871 (1988)(Art. 4, para. 2 (a)). The Convention also incorporates the expression "damage to the Antarctic environment or dependent or associated ecosystems." See, e.g., *id.* at

recognized in a number of agreements, which employ the expression "appreciable harm" or its linguistic counterpart.⁵²

Some members of the Commission nevertheless expressed doubts as to the "appreciable harm" criterion, either because it was too subjective or on the ground that it was a potential obstacle to industrial development. The adjective "substantial" was proposed as being preferable to "appreciable." In the end the Commission seemed to agree with the special rapporteur that an expression should be employed that provided as factual and objective a standard as could be formulated in the context of a framework agreement. Since the criterion of "appreciable harm" has already been employed in Article 8, it seems likely that the same standard will be used to measure the permissible limits of transfrontier water pollution.

3. Standard of Responsibility

The final issue to be discussed here is that of the standard of responsibility for breach of the obligation not to cause appreciable pollution harm to another watercourse state. The Commission also confronted this issue with regard to the more general obligation of Article 8. In that case it was ultimately decided not to address the point in the commentary,⁵³ presumably on the ground that the problem should be dealt with in the context of the Commission's work on other topics on its agenda more directly concerned with issues of responsibility, viz., State Responsibility and International Liability.⁵⁴ It is likely that the Commission will follow the same approach with regard to draft Article 16.⁵⁵ But because the ILC's work on these two topics may never provide a clear answer to the question of the standard of responsibility in the specific case of transfrontier water pollution, brief consideration of the issue here seems appropriate.

During the Commission's consideration of draft Article 16, a number of members addressed the issue of standard of responsibility. As one might expect, opinion in the Commission was divided between those that favored a strict standard and those that would apply a more flexible

art. 1 (15), at 869-70.

52. See the agreements cited in 1988 ILC Report, *supra* note 9, at 86-87.

53. The Commission deleted a paragraph of the draft commentary to Article 8 which developed the proposition that a breach of that article would engage the international responsibility of the watercourse state in question, thus in effect deciding not to address the issue. *Provisional Summary Record of the 2092nd Meeting of the International Law Commission, 28 July 1988*, U.N. Doc. A/CN.4/SR.2092 at 11 (Oct. 3, 1988).

54. In its discussion of the issue of standard of responsibility in the context of draft Article 16, para. 2 (prohibition of appreciable pollution harm), the Commission seemed to agree that the matter was best left to be resolved in the context of its work on the two other topics. 1988 ILC Report, *supra* note 9, at 69, para. 168. It is reasonable to infer that this was also the motivation for not dealing with the issue in the commentary to Article 8, since the latter was considered after the Commission's discussion of draft Article 16.

55. See *id.*, and accompanying text.

test.⁵⁶ In his report, the special rapporteur had stated that "the obligation set forth in paragraph 2 [of Article 16] is proposed as one of due diligence to see that appreciable harm is not caused to other watercourse States or to the ecology of the international watercourse [system]."⁵⁷ A number of members agreed with this approach, noting that since the concept of due diligence was well rooted both in domestic tort law and in the law of state responsibility it would be easy for states to apply. Moreover, these members believed that it was the appropriate standard in the specific case of responsibility for transfrontier water pollution harm.

Other members, however, opposed the use of a due diligence test. For some, it was simply too vague and subjective to serve as a standard of responsibility. Others maintained that such a criterion could place,

[t]oo heavy a burden on the victim State since only the source State would have access to the means of proving whether or not it had exercised due diligence to prevent appreciable harm from being caused to another watercourse State. It was suggested in this connection that the burden of proving due diligence should be placed on the source State.⁵⁸

Some members went so far as to label the due diligence standard "dangerous" on the ground that "it made responsibility rest on wrongfulness rather than on risk and that States would be tempted to evade responsibility simply by trying to prove that they had complied with their obligation of due diligence."⁵⁹ According to this view, responsibility for breach of paragraph 2 should be strict. These members went on to urge that, in any event, the question of responsibility should be tackled within the framework of the International Liability topic rather than that of International Watercourses.

This tendency to treat the standard-of-responsibility question as such a hot potato is unfortunate, even if it is understandable. It is unfortunate because it leaves an important question in this field unanswered, robbing the "no harm" rule of much of its "determinacy" and thus undermining its "legitimacy."⁶⁰ For in an actual case, whether the injured state will be legally entitled to relief will often come down to how the responsibility of the source state must be established. If the standard is a strict one, responsibility is established by showing appreciable harm that resulted from, e.g., pollution emanating from the source state. If a lower standard is applied, there may be no final determination of responsibility as a practical matter, in the absence of agreed dispute settlement machinery, especially if the burden of proof rests entirely upon the victim state.

56. See 1988 ILC Report, *supra* note 9, at 64-66.

57. McCaffrey, *Fourth Report*, *supra* note 18.

58. 1988 ILC Report, *supra* note 9, at 66.

59. *Id.*

60. As explained by Professor Franck, the "legitimacy" of a rule of international law is largely dependent upon its "determinacy," or the clarity of the obligation it creates. Franck, *supra* note 42, at 713. See text at *supra* note 39.

Instead, the question will be left to be resolved, as so many are, through negotiations between the governments concerned. And since it will be very difficult for the victim state to prove, e.g., that the source state failed to comply with its obligation of due diligence, the outcome for it will probably be less than satisfactory. This situation would be ameliorated, but not eliminated, if the burden of proving due diligence shifted to the source state upon a *prima facie* showing by the victim state of harm caused by water pollution emanating from the former state.⁶¹

Side-stepping the standard-of-responsibility question is, however, understandable in the context of the ILC's program of work as a whole. The very fact that it is a pivotal issue means that much time and energy would have to be expended before it was resolved; even then, the likelihood is that the "resolution," like most compromises, would not be definitive. The question is, then, whether the resources that would have to be dedicated to the effort would be worth an end result that would likely be inconclusive. Two considerations suggest a negative answer to this question: first, taking on this issue could prevent the Commission from attaining its objective of completing the provisional adoption of the entire watercourses draft by 1991;⁶² and second, examining this issue in the context of watercourses, at the same time it is being studied in the context of two other topics, would entail an undesirable duplication of effort. All things considered, therefore, it may be advisable for this issue to be left to river basin states to be resolved in specific agreements. As a practical matter, however, the states concerned may be unable to reach agreement on the question or simply may not address it. The remainder of this section therefore considers the standard that would apply under rules of general international law.

In the absence of any agreement on the standard of responsibility, the question would be governed by general rules of state responsibility or possibly, where "ultrahazardous activities" are involved, the regime being developed by the Commission in its work on International Liability.⁶³ In the ordinary case of transfrontier water pollution, a breach of paragraph 2 of draft Article 16 (or, more generally, Article 8) would engage the international responsibility of the source state. In requiring watercourse states not to cause appreciable pollution harm to other watercourse states, paragraph 2 lays down an "obligation of result" in the sense of Article 21⁶⁴

61. This technique was suggested by some members of the Commission. See text at *supra* note 54.

62. 1988 ILC Report, *supra* note 9, at 281.

63. See generally Magraw, *supra* note 5.

64. Article 21 provides as follows:

Article 21. Breach of an international obligation requiring the achievement of a specified result:

1. There is a breach by a State of an international obligation requiring it to achieve, by means of its own choice, a specified result if, by the conduct adopted, the State does not achieve the result required of it by that obligation.
2. When the conduct of the State has created a situation not in conformity

and, in particular, Article 23⁶⁶ of the ILC's articles on State Responsibility. Article 23 provides as follows:

Article 23 - Breach of an international obligation to prevent a given event —

When the result required of a State by an international obligation is the prevention, by means of its own choice, of the occurrence of a given event, there is a breach of that obligation only if, by the conduct adopted, the State does not achieve that result.⁶⁶

Both Article 8 and paragraph 2 of draft Article 16 require watercourse states to prevent a given event, namely, appreciable harm in another watercourse state. Whether there had been a breach of those provisions would therefore be determined by applying Article 23. If, by whatever means it chooses, the state fails to prevent the occurrence of appreciable (pollution) harm to another watercourse state, it will have breached the two articles. The Commission's commentary to Article 23 states that it even applies to "cases where the result aimed at by the obligation is the prevention by the State of an event caused by factors in which it plays no part [such as] ensur[ing] the result of preventing individuals or third parties from committing certain acts, or of preventing disasters, whether naturally or artificially caused (such as flooding or pollution), from taking place."⁶⁷

This sounds very much like strict responsibility. Indeed, although opinion is not uniform, the prevailing view today would seem to be that there is no general requirement of international law that a state be at "fault" — in the sense of culpable negligence (*culpa*) or malicious intent (*dolus*) — in order to be internationally responsible.⁶⁸ Under this "objec-

with the result required of it by an international obligation, but the obligation allows that this or an equivalent result may nevertheless be achieved by subsequent conduct of the State, there is a breach of the obligation only if the State also fails by its subsequent conduct to achieve the result required of it by that obligation.

[1977] 2(2) Y.B. INT'L L. COMM'N at 18-19.

65. [1978] 2(2) Y.B. Int'l L. Comm'n at 81.

66. *Id.*

67. *Id.* at 82. Article 21, on the other hand, covers obligations "requiring a result in whose achievement or non-achievement only action by the State is involved."

68. See, e.g., I. Brownlie, *Principles of Public International Law* 436-441 (3d ed. 1979), canvassing the authorities: "It is believed that the practice of states and the jurisprudence of arbitral tribunals and the International Court have followed the theory of objective responsibility as a general principle (which may be modified or excluded in certain cases). . . . A considerable number of writers support this point of view, either explicitly, or implicitly. . . ." Similarly, according to Starke, international law does not contain "a general floating requirement of malice or culpable negligence as a condition of responsibility." Starke, *Imputability in International Delinquencies*, 19 BRIT. Y.B. INT'L L. 114, 115 (1938). See also Sohn and Baxter, *Convention on the International Responsibility of States for Injuries to Aliens (Final Draft with Explanatory Notes)*, reprinted in RECENT CODIFICATION OF THE LAW OF STATE RESPONSIBILITY FOR INJURY TO ALIENS 135, 169 (Garcia-Amador, Sohn & Baxter eds. 1974). See generally the survey of "doctrine" concerning the "fault

tive theory" of responsibility, it is the content of the obligation itself (in the ILC's parlance, the "primary rule")⁶⁹ that is crucial. Where the obligation requires the state to prevent the occurrence of a given event (such as pollution harm), no amount of diligence will eliminate responsibility if the event occurs.⁷⁰ On the other hand, if the obligation merely requires the state to exercise due diligence to prevent the occurrence of the event, the occurrence of the event will not give rise to responsibility if due diligence has been exercised.

As presently worded, Article 8 and paragraph 2 of draft Article 16 contain no due diligence requirement. Without any contrary indication in the commentary to those provisions, they would presumably be interpreted as falling under Article 23 of the State Responsibility draft, with the consequences described above. This would leave no room for a source state to claim that it had made its best efforts, or had used the best available technology, to prevent extraterritorial pollution harm. While this result might seem rather harsh (and possibly out of line with the reality of state practice),⁷¹ Article 23's strictness could be mitigated, in appropriate cases, in two ways. The first has to do with what the ILC has termed "circumstances precluding wrongfulness." In all cases governed by the law of State Responsibility under the Commission's draft, certain circumstances may operate to preclude what the ILC terms the "wrongfulness," or unlawfulness, of the conduct in question. "The circumstances usually considered to have this effect are consent, countermeasures in respect of an internationally wrongful act, *force majeure* and fortuitous event, distress, state of emergency [necessity] and self-defence."⁷² If one of these

theory" and the "objective theory" of international responsibility in "Force majeure" and "fortuitous event" as circumstances precluding wrongfulness: Survey of State practice, international judicial decisions and doctrine, study prepared by the U.N. Secretariat, U.N. Doc. A/CN.4/315, reprinted in [1978] 2(2) Y.B. INT'L L. COMM'N 61, 188 (1978).

69. The Commission decided in 1970 that, in order to enable it to make progress on the State Responsibility draft, it would not undertake to define

[t]he rules of international law which . . . impose particular obligations on States, and which may, in a certain sense, be termed 'primary,' as opposed to the other rules — precisely those covering the field of responsibility — which may be termed 'secondary,' inasmuch as they are concerned with determining the consequences of failure to fulfil obligations established by the primary rules.

[1970] 2(2) Y.B. INT'L L. COMM'N 179. Using this terminology, the "secondary rules" of international responsibility contain no "fault" requirement; fault may, however, be required by a specific "primary" rule. To this effect see, e.g., L. HENKIN, *supra* note 47, at 528-529; and B. SMITH, STATE RESPONSIBILITY AND THE MARINE ENVIRONMENT 16-17 (1988).

70. See the passage of the commentary to article 23, quoted in text at *supra* note 67.

71. See LAMMERS, *supra* note 18, at 349, noting that if source states take the best practicable measures to abate pollution, "victim States do not appear to be much inclined to hold those States internationally responsible, demanding either the *immediate* effective termination of the causing of substantial harm or compensation for the harm caused or both." (emphasis in original).

72. [1979] 2(2) Y.B. INT'L L. COMM'N 106 (commentary to Chapter V of the articles on State Responsibility).

circumstances were present, the conduct of the State of origin could not be characterized as "wrongful;" the State would thus not be in breach of the relevant obligation (e.g., draft Article 16(2)). For example, under Article 33, "*State of Necessity*," a state would not be in breach of draft Article 16 if it could show that its "sole means of safeguarding an essential interest threatened by a grave and imminent peril is to adopt conduct not in conformity with what is required of it by [Article 16]."⁷³ While this kind of situation is certainly not a common one, the availability of exculpating circumstances such as a state of necessity provide potential escape routes for polluting states; if the "primary rule" requires strict prevention, source states can be expected to look closely to see whether one of these circumstances might be present.⁷⁴

The second way in which Article 23's strictness might be mitigated has to do with the consequences that would ensue from the international responsibility of the source state. In the words of Jimenez de Arechaga, "a State discharges the responsibility incumbent upon it for breach of an international obligation by making reparation for the injury caused. . . . The forms of reparation may consist in restitution, indemnity or satisfaction,"⁷⁵ indemnity being "the most usual form."⁷⁶ It has long been recognized that the amount of indemnity, or compensation, may in appropriate cases be determined by taking into account the degree of "blameworthiness" of the state's conduct.⁷⁷ That is, even if the standard of responsibility is strict under the applicable primary rule, its effect may be softened by a reduction in the monetary extent of responsibility where the source state's conduct was not particularly "blameworthy." Thus, a source state might be found to have breached draft Article 16 but, because the harm occurred notwithstanding its proper use of the best available technology, the amount of compensation owing to the injured state might be mitigated. Such a reduction in the extent of responsibility may well be viewed as being inconsistent not only with the "Polluter Pays Principle,"⁷⁸ but

73. [1980] 2(2) Y.B. INT'L L. COMM'N 34.

74. It must be noted, however, that even if there is an applicable circumstance precluding wrongfulness, the Commission does not exclude the possibility that compensation might be payable. Article 35 of the State Responsibility draft provides that "Preclusion of the wrongfulness of an act of a State . . . does not prejudice any question that may arise in regard to compensation for damage caused by that act." [1980] 2(2) Y.B. INT'L L. COMM'N 61.

75. de Arechaga, *International Law in the Past Third of a Century*, 159 *Recueil des Cours* 285 (1978-I). See also *The Chorzow Factory Case* (Ger. v. Pol.), 1927 P.C.I.J., Ser. A, No. 9, at 21 (the leading judicial decision on the point).

76. *The Chorzow Factory Case*, 1927 P.C.I.J., Ser. A, No. 17, at 27.

77. In the 1872 *Alabama* arbitration, Great Britain took the position, which the United States did not dispute, that the amount of compensation should be in proportion "not only to the loss incurred as a consequence of a wrong (act or omission), but also to the gravity of the wrong itself." *The Alabama Claims Arbitration* (U.S. v. U.K.), Moore, 1 *Arbitrations* 495, at 623 (1898). See also SCHWARZENBERGER, *INTERNATIONAL LAW* 661 (3d ed. 1957). See generally the authorities surveyed in B. SMITH, *supra* note 69, at 58.

78. This Principle is contained in the Annex to Recommendation C(72)128, adopted by

more fundamentally with the concept that one conducting an activity should be responsible for any harm it causes.⁷⁹ Yet the fact remains that relative culpability has been considered by international tribunals in assessing damages⁸⁰ and, in the specific context of water pollution, injured states have shown a willingness to allow source states some flexibility where the latter are taking all reasonable steps to terminate the harmful water pollution.⁸¹

While these considerations could introduce a small measure of flexibility into what would otherwise appear to be a rather strict regime, they are not likely to provide much comfort to source states inasmuch as they go only to the extent, not the existence of responsibility. Thus, there is all the more reason for states sharing international watercourses to enter into specific agreements that take into account the characteristics of the watercourse, the types and extent of its uses by the respective states, and any special circumstances such as the levels of development of the states concerned.

V. CONCLUSION

The recent strides made by the International Law Commission in its work on International Watercourses pave the way for completion of the draft in the near future. Important issues remain to be addressed, however. The Commission will resolve some of these when it adopts articles on environmental protection and pollution. It is uncertain at this stage of the work on Watercourses whether that draft will deal with the issue of standard of responsibility. The Commission may wish to revisit this issue prior to completing the provisional adoption of the draft as a whole or when giving the articles a "second reading."⁸² A model that the Commission might consider is provided by the 1982 United Nations Convention

the Council of the Organization for Economic Cooperation and Development (OECD) on 26 May 1972, reprinted in OECD, *OECD and the Environment* at 23, 24 (1986).

79. This idea is implicit in the maxim, *sic utere tuo ut alienum non laedas*, which was in turn stated by the Commission to be the basis of the rule expressed in Article 8 of the Watercourses draft. 1988 ILC Report, *supra* note 9, at 83. It is also expressed in Principle 21 of the Stockholm Declaration on the Human Environment, which provides in pertinent part that "States have . . . the responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other States or of areas beyond the limits of national jurisdiction." *Report of the United Nations Conference on the Human Environment*, U.N. Pub., Sales No. E.73.II.A.14, at 325. *See supra* note 15.

80. *See* the decisions collected in B. SMITH, *supra* note 69, at 58.

81. *See, e.g.*, the finding of Professor Lammers quoted in *supra* note 18.

82. When the Commission completes work on a draft, it is provisionally adopted and sent to the General Assembly and to governments for their comments. The Commission then gives the articles a "second reading" on the basis of governmental observations and the special rapporteur's recommendations in response thereto. When the Commission has adopted a final draft, it is submitted to the General Assembly with a recommendation concerning further action (e.g., that a conference be convoked to conclude a convention on the basis of the Commission's draft). *See* ILC Statute, *supra* note 1, Art. 16, paras. (g)-(j); and THE WORK OF THE INTERNATIONAL LAW COMMISSION, *supra* note 1, at 14.

on the Law of the Sea. Article 94 of the Convention measures the performance of a flag state by whether it conforms to "generally accepted international regulations procedures and practices."⁸³ The recently revised Restatement of U.S. Foreign Relations Law generalizes this standard and applies it to a source state's obligation to take measures to prevent extraterritorial environmental harm. Thus, under section 601 of the Restatement:

(1) A state is obligated to take such measures as may be necessary, to the extent practicable under the circumstances, to ensure that activities within its jurisdiction or control

(a) conform to generally accepted international rules and standards for the prevention, reduction, and control of injury to the environment of another state or of areas beyond the limits of national jurisdiction⁸⁴

In the parlance of the Commission's articles on State Responsibility, this section expresses the obligation of the source state as one of conduct,⁸⁵ rather than one of result. This may be the course that would prove most broadly acceptable to states since "[i]n general, the applicable international rules and standards do not hold a state responsible when it has taken the necessary and practicable measures."⁸⁶

Even if the Commission does not ultimately address the standard of responsibility for water pollution harm to other states, the draft will still have made a significant contribution to the development of international environmental law. As is true of any general codification effort, however, the real test of its effectiveness will be whether states apply it in concrete cases.

83. 1982 U.N. Convention on the Law of the Sea, *supra* note 31, at 32 (art. 94, para. 5).

84. 2 RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 601, at 103 (1987) [hereinafter RESTATEMENT].

85. Obligations of conduct are governed by Article 20 of the State Responsibility draft. That article provides: "There is a breach by a State of an international obligation requiring it to adopt a particular course of conduct when the conduct of that State is not in conformity with that required of it by that obligation." [1980] 2(2) Y.B. INT'L L. COMM'N 32.

86. RESTATEMENT, *supra* note 84, at 105. While the Restatement provides an interesting model, it is to be hoped that the Commission's final product will avoid language such as "to the extent practicable under the circumstances," in the interest of establishing an obligation whose content is clear to both the obligor and the obligee state. Such language could be considered necessary in relation to an obligation of result, but it does not seem justified when a mere obligation of conduct is involved.