rxMO MORAIS, J.A. A critical study of the legal philosophy... uses of international watercourses ...

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# A CRITICAL STUDY OF THE LEGAL PHILOSOPHY UNDERLYING THE LAW OF THE NON-NAVIGATIONAL USES OF INTERNATIONAL WATERCOURSES TAKING INTO ACCOUNT INTERNATIONAL LIABILITY FOR INJURIOUS CONSEQUENCES ARISING OUT OF ACTS NOT PROHIBITED BY INTERNATIONAL LAW

RESEARCH PAPER FOR INTERNATIONAL LAW

LL.M. (LAWS 517)

LAW FACULTY
VICTORIA UNIVERSITY OF WELLINGTON

WELLINGTON 1982

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INTRODUCTION

The "Law of the Non-Navigational Uses of International Watercourses"[1] and that of "International Liability for Injurious Consequences Arising out of Acts not Prohibited by International Law"[2] are two topics currently before the International Law Commission. The aim of both topics is ultimately the codification of the law covering their respective areas. Both topics are dynamic in nature. They aim to make a positive contribution towards the progressive development of international law and its codification. Indeed these were the reasons why the topics were chosen by the International Law Commission. The topics seek to provide umbrella provisions and to serve as framework instruments for States to conclude their particular agreements. The Special Rapporteur of the International Watercourses topic, Mr. S. M. Schwebel, viewed the predominant use of the product of his topic thus:[3]

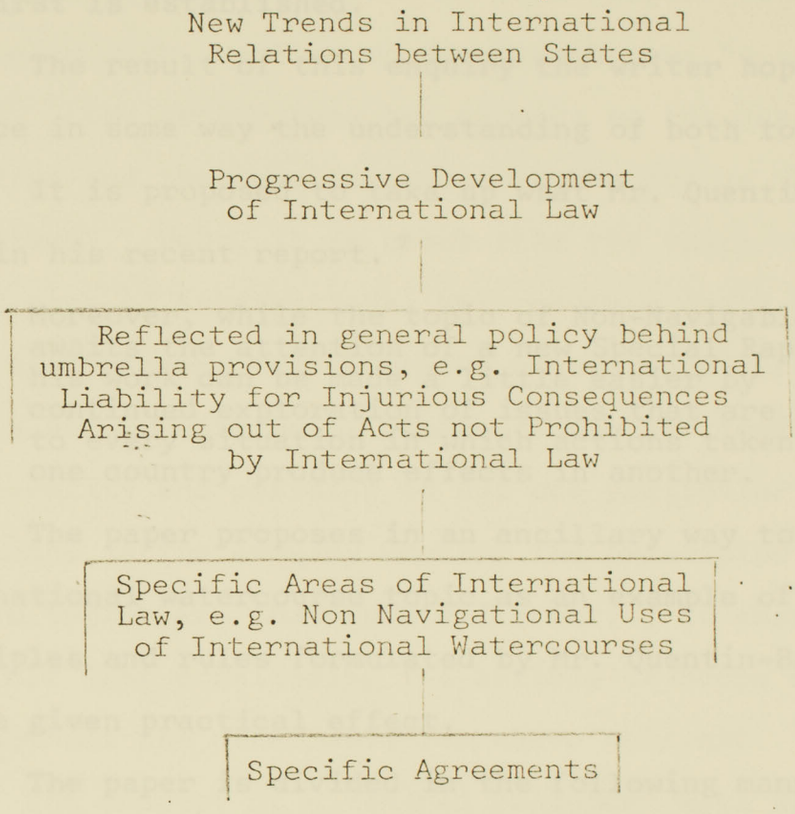
> [It] ... should serve to provide, except for navigational uses, the general principles and rules governing international watercourses absent agreement among the States concerned and to provide guidelines for the negotiation of future specific agreements.
>
> ... the Commission's articles would contain general principles plus residual rules applicable to subject matters not covered by such agreements.[4]

These observations, with relevant adjustments, it is submitted, may be applicable to the topic on international liability, of the Special Rapporteur, Mr. R. Q. Quentin-Baxter. Thus, it is true that general principles, rules and guidelines are being formulated to govern the two regimes established under

Mr. Quentin-Baxter's topic (regimes of prevention and reparation where loss or injury is prospective; regime of reparation where loss or injury is actual). Further these principles, rules or guidelines may serve for the negotiation of future specific agreements and would serve as a statement of what the law is, if no agreement exists among States.[5] However, States are free to conclude specific agreements adjusting the rules to their unique situations.[6]

The writer sees a fundamental distinction between the content of the umbrella provisions the topics seek to provide. The topic of international liability provides the umbrella provisions, the framework instrument that specific topics such as that of the international watercourses topic should consult when drawing up their particular provisions. Indeed the content of the topic on international liability is not restricted to any particular subject area. The international liability topic like the topic of State Responsibility is concerned with the wider policy question of the development of international law as a whole. What it sets down to do is to draw from current expression in international law, the pattern of the evolution of the interrelationship of States. Thus, the topic is primarily an expression of current international legal policy considerations in general. To give this policy effect certain all embracing 'umbrella' rules will be formed. These in turn will be applicable when umbrella rules and guidelines affecting specific areas of international law are formulated. The latter will in turn be applicable when specific agreements are concluded between States. The interrelationship of

the topics and their status, vis-a-vis each other and progressive developments in international law in general, might be expressed in a diagram.




Thus, it is submitted there is a direct relationship between the topics.

The writer now proposes to outline what her paper hopes to accomplish. The paper is primarily concerned, as its title suggests, with a critical and analytic approach to the underlying philosophy of the law on the non-navigational uses of international watercourses. This study is approached and conducted taking account of contemporary development of the international liability for injurious consequences arising out of acts not prohibited by international law topic. Thus, the point of inquiry, the critical analysis,

is coloured by the international liability topic. The study interrelates the two topics and by a comparative assessment of how the one is seen from the rules established by the other, an evaluation of the underlying philosophy of the first is established.

The result of this enquiry the writer hopes will help advance in some way the understanding of both topics.

It is proposed to take up what Mr. Quentin-Baxter said in his recent report.[7]

> Moreover, while the topic of Non-Navigable Watercourses awaits the attention of a new Special Rapporteur, his work can be made a little easier by continued exploration of issues that are germane to every situation in which actions taken in one country produce effects in another.

The paper proposes in an ancillary way to use the international watercourse topic as an example of how the principles and rules formulated by Mr. Quentin-Baxter's topic can be given practical effect.

The paper is divided in the following manner:

(1) Chapter I - Part A. "Scope of the Topics"
Part B. "The Duty to Negotiate"

(2) Chapter II - The Concept of Equitable Participation

(3) Chapter III - The Concept of Appreciable Harm

(4) Conclusion.

# CHAPTER I

## PART A. "SCOPE" OF THE TOPICS

### Introduction

The enquiry in Part A of this chapter is based on the preliminary question of discovering the "scope" of the topics. The writer sees two aspects to the question of scope. The first and the less important of the two is the aspect of content. Here, it is clear that the topic on non-navigational uses of international watercourses deals with a particular area whereas the injurious consequences arising out of acts not prohibited by international law topic is one of generality and pertains to not one particular area exclusively. The second is the enquiry whether the principles established by both topics are that much different. To answer this means not just considering the article on scope but taking into account the other articles where relevant.

The concept of a "shared resource" will also be examined in the same light. Here, another question to consider is what the value of the concept is and how it affects a system State.

### Scope of each topic, a critical look

### The Non-Navigational Uses of International Watercourses

The scope of the articles on the Law of the Non-Navigational Uses of International Watercourses is set out in draft article 1.

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

watercourse systems and their waters.

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

Thus, from draft article 1(1) it appears that the articles will apply to every use of an international watercourse system, and its waters, except navigational, and to conservation measures that are connected to such uses. Although navigational uses of international watercourse systems and waters are expressly excluded in article 1(1) in article 1(2) it is submitted that navigational uses of waters of an international watercourse system can be brought within the articles. This occurs in the situation where other uses of the waters are affected by navigation or when navigation affects the other uses of the waters. In such situations the regime set up by the articles will come into existence. This would bring navigational uses to the extent qualified within the scope of this topic. Can this conclusion be right when the topic is meant to deal solely with the non-navigational uses of international watercourses? [8]

The Special Rapporteur at the conclusion of his report gave special consideration to this query. He makes it clear that although the topic was on the law of the non-navigational uses of international watercourses, there was no doubt that there was an interrelationship between navigational uses and other uses. [9]

Regarding article 1(2) the Commission commented that it

> ... recognizes that the exclusion of navigational uses ... cannot be complete. As both the replies of States to the Commission's questionnaire and the facts of the uses of water indicate, the impact of navigation on other uses of water and that of other uses on navigation must be addressed in the present articles ... [The provision] has been negatively cast, however, to emphasize that navigational uses are not within the scope of the present articles except in so far as other uses of waters affect navigation or are affected by navigation.[10]

The Commission came to the conclusion that[11]

> ... it must deal with the frequent and significant interactions between navigational uses and other uses

and that this fact was "understood and generally accepted".[12]

The question that remains unanswered in the articles is the crucial one of what exactly is meant by the term "international watercourse system". Recourse is found by looking at the "Note"[13] put forward by the Commission. The Note defines a watercourse system and an international watercourse system and it is worth quoting.[14]

> A watercourse system is formed of hydrographic components such as rivers, lakes, canals, glaciers and groundwater constituting by virtue of their physical relationship a unitary whole; thus, any use affecting waters in one part of the system may affect waters in another part.
>
> An 'international watercourse system' is a watercourse system, components of which are situated in two or more States.
>
> To the extent that parts of the waters in the one State are <u>not affected by or do not affect</u>* uses of waters in another State, they shall not be treated as being included in the international watercourse system. Thus, to the extent that

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*my emphasis

> the uses of the waters of the system have an effect on one another, to that extent the system is international, but only to that extent; accordingly, there is not an absolute, but a relative, international character of the watercourse.

It is submitted that the key word to what is meant by an international watercourse system is the word "affect". If a State makes uses of its waters which do not affect the uses of the waters of another State, then the States do not qualify as being included in the international watercourse system.

In conclusion, it is submitted that for the articles to apply, an international watercourse system must exist and this only arises if and when the use of the waters in one State affects the use of the waters in another State.

However, as this definitional clause is not included in the draft articles it is important to turn to the articles and discover just when they do apply.

The enquiry here will begin with the concept of use. From article 1(1) it is noted that the use of waters is a prerequisite for the application of the articles. What then is use? Use as understood by article 1(1) excludes the using of waters for navigational purposes and includes measures of conservation.

To carry on this examination of the concept of 'use', and thus be able to define the scope of the topic articles 2 to 4 will be examined.

Article 2 defines a system State and is self-explanatory:

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

Thus, relating this article to article 1(1) it is submitted that the only time the regime set up by the articles applies to system States is when a use is made.

Does this mean that the articles apply to all system States the moment a use has been made of an international watercourse system, of which they are a system State? It is submitted that the answer to this is no. Support for this submission is found in articles 3[15] and 4[16].

The point to note about article 3 is that where certain system States wish to enter into a systems agreement, if that agreement provides for the use of the waters of an international watercourse system, the use of which is going to "an appreciable extent" affect adversely another or other non-participating system State/States, that system agreement may not be entered into. The article should further be read in conjunction with article 4(2).

Article 4(2) deals with the situation where certain system States may be in the process of negotiating or participating in a system agreement that only applies to a part of the international watercourse system. If the use is going to affect to an "appreciable extent" the use of the waters of an international watercourse system of a non-participating system State, the non-participating system State is 'entitled to participate in the agreement'. The use is here qualified and is further defined by a reference

back to article 3. It is submitted that the use must be one that to "an appreciable extent" affects "adversely" the non-participating system State.

The conclusion arrived at is that the draft articles apply in two particular situations. The first is where a system agreement is being negotiated by system States. If the whole international watercourse system is being looked at, then all the system States are entitled to participate in the negotiations and become party to any system agreement that might be concluded. If certain system States are negotiating a system agreement over part of the international watercourse system then the second situation of when the draft articles apply comes into existence: this is when use of the waters of a non-participating system State would be to an appreciable extent affected adversely.

However, the concept of what uses will make the present articles applicable is not complete without an examination of article 5. Article 5 defines when the use of waters of an international watercourse system constitutes a shared natural resource:

> 1. To the extent that the use of waters of an international watercourse system in the territory of one system State affects the use of waters of that system in the territory of another system State, the waters are, for the purposes of the present articles, a shared natural resource.
>
> 2. Waters of an international watercourse system which constitute a shared natural resource shall be used by a system State in accordance with the present articles.

An observation of a general character may be made of this article. The concept of a 'shared natural resource' here refers to a resource that is within the territorial jurisdiction

of a State; it is not a resource such as the high seas, where the resource may be viewed as being a shared resource to all nations and being part of the common heritage of mankind. Thus, the concept here is different because the resource exists within the territorial jurisdiction or control of a sovereign.[17] How does it become a shared natural resource? It so becomes when a use of waters of one system State affects the use of waters in the territory of another system State. Thus, if the use does not affect the use of the waters in another system State, then the international watercourse system is not a shared natural resource. It is submitted that full circle is arrived at with this definition. This is because in the Commission's Note an international watercourse system was regarded as a creature that only came into existence if and when or to the extent that the use of the waters of a watercourse system affected the use of the waters in another system State. Thus, it was relative whether or not a watercourse system qualified as being international.

In the draft articles 1 to 4 it was observed that the articles only applied in two circumstances.

In article 5 full circle is arrived at because it takes one back to the initial point of enquiry - whether use of the waters by a system State affects the use of waters in another system State. If the answer is in the affirmative, a shared natural resource exists and the articles apply.

This leads to the enquiry as to what "affects" means here. If one turns to the observations of use one notes

that the term affect is qualified by 'adversely' and quantified by 'appreciably'. Thus, it might be concluded that unless there is an adverse effect of an appreciable extent, use is not affected.

It is tentatively submitted, that perhaps the underlying philosophy as to when a shared natural resource, or indeed, when the articles spring into existence, is when use of waters in an international watercourse system by one or more system State or States affects adversely and to an appreciable extent the use of waters of another or other system State/s.

How does one reconcile this view with the observation that all system States have a right to participate in a systems agreement which applies to the whole international watercourse system? It is submitted that this paragraph of article 4 entitles a system State to participate. When would this entitlement be used? This question will be considered in the concluding paragraph.

It is now proposed to turn to the consideration of the scope of the liability for injurious consequences of acts not prohibited by international law topic.

## International Liability For Injurious Consequences Of Acts Not Prohibited By International Law

In Section 1(1) of the Schematic Outline[18] the scope of the topic is outlined:

> Activities within the territory or control of a State which give rise or may give rise to loss or injury to persons or things within the territory or control of another State.

Section 1(2) defines the terms.[19] As the title of the topic suggests, what one is here concerned with is 'injurious

consequences' which are caused by acts that are not prohibited by international law.

The Special Rapporteur defined the scope of his topic as such:[20]

> In principle though this is not always literally true, a transboundary element is an essential ingredient in the present topic: typically, the topic deals with activities in one country which produce adverse consequences in another country.*

It is noted that the topic deals with and establishes two different criteria,as to when the rules it establishes are applicable. These are the regimes of prevention and reparation when loss or injury is prospective and reparation when loss or injury is actual.

Thus, the Special Rapporteur explained:[21]

> In relation to the establishment of regimes of prevention and reparation all loss or injury is prospective: in relation to the establishment of an obligation to provide reparation, all loss or injury is actual.

The primary aim of the topic is to encourage States to establish regimes of prevention; the secondary consideration is to provide a regime of reparation when injurious consequences have occurred and there is no regime in existence governing the situations.[22]

Vital to understanding the scope of the topic are two fundamental points. The first is that the topic is built on the principle as expressed by Section 5(1):

> The aim and purpose of the present articles is to ensure to acting States as much freedom of choice, in relation to activities within their territory or control, as is compatible with adequate protection for the interests of affected States.

The other 'cardinal' point is that the topic is not concerned with rules of prohibition.[23] Thus, in his

*my emphasis

preliminary report the Special Rapporteur stated:[24]

> The primary aim of the draft articles must therefore be to promote the constructions of regimes to regulate, without recourse to prohibition ....

Thus, one is not dealing with the question of whether a particular act or activity is wrongful; neither is the scope of the topic confined to lawful acts.[25] Thus, in terms of definition the topic is not like the regime established by State Responsibility which arises only when a wrongful act has been committed.[26] The present topic is independent of the topic of State Responsibility and may even in appropriate cases be substituted for it.[27] The division of the topics was clear right from their starting points. Thus, the Special Rapporteur for State Responsibility (Part I), Mr. Ago, felt that in establishing the boundaries of his own topic which was to deal only with the consequences of internationally wrongful acts, there was scope for the development of a separate regime dealing with liability for injurious consequences arising out of acts not prohibited by international law.[28]

The Special Rapporteur, Mr. Quentin-Baxter, aligned his topic with that of State Responsibility in terms of definition in this manner :[29]

> State responsibility is engaged only when a wrongful act has been committed. The present topic is by definition concerned only with a situation where the conduct of the State having territorial or other controlling jurisdiction has not been shown to be wrongful.

In his preliminary report the Special Rapporteur said:[30]

> ... there can be no onus upon an injured State to prove the lawfulness of the activities of which it complains, the phrase carries implicitly the enlarged meaning 'acts, whether or not prohibited'.

The point is one is not concerned in determining whether or not

> ... a particular territorial use, involving the risk of loss or injury was unlawful and therefore prohibited.[31]

In the same manner one is not looking into the question of the wrongfulness or non-wrongfulness of the particular act or activity that might cause or that has caused loss or injury to another State. This would again be in the domain of State Responsibility for wrongfulness.

What one is here concerned with is to consider the problem with a view to accommodating the various interests without going into the question of lawfulness or wrongfulness. Inherent in the topic is the concept of the "balance of interest" test. Articles 6 and 7 are relevant here as well as the principle embodied in article 5(1). Although this concept will be looked at in greater detail subsequently, mention has to be made of it. The importance of the balance of interest test is that even under the regimes set up under this topic, a State may not be liable for any loss or injury that the affected State may suffer or has suffered. Thus, the Special Rapporteur said:[32]

> ... the underlying purpose of this topic is not merely to requite or even to avoid, losses and injuries: it is to enable States to harmonize their aims and activities, so that the benefit one State chooses to pursue does not entail the loss or injury another has to suffer. Every kind of factor may enter into the equation.

A result of the balance of interest test, it is submitted, is that States may be under no liability to stop the proposed activity or pay reparation for loss or

injury caused.

There is a point in relation to State Responsibility that has to be commented on. The present topic, though separate from that of the topic on State Responsibility for wrongful acts, is not mutually exclusive at all levels. The fact is that there does exist a point of intersection between harm and wrong. Thus, at the junction where harm becomes wrongful then the rules of State Responsibility for wrongfulness take over. However, as the Special Rapporteur stated:[33]

> ... this melancholy end-result does not represent the main thrust or focus of the topic, which is concerned with minimizing the risk of loss or injury, and of making appropriate advance provision for such risks as cannot reasonably be avoided.

Finally the question of scope in terms of the actual content that the topic covers has not been fully resolved.[34] The topic is stated in the most general terms and thus may cover any given situation. However, to the extent that the Special Rapporteur relies largely on materials in the area of the use of the physical environment, it might be concluded that this is an area in which the topic will bear influence. By so concluding, this by no way restricts the boundaries of the topic. Thus, the area encompassed within the topic can certainly include activities which may cause economic loss or injury in another State, whether by use of the physical environment or not.

Conclusion

It is interesting to note some of the comments on the Commission's work registered in the General Assembly

on the law of non-navigational uses of international watercourses. The delegation from Egypt, for example, stated that the method adopted by the Commission[35]

> ... be based on the principle of goodwill, the positive use of law, humanitarian concerns, co-operation among the user States of watercourses and their responsibilities in the context of fundamental rules.

The representative from Argentina stated that:[36]

> ... the international community 'had become aware that the world's resources were limited and that countries sharing natural resources such as water should seek to ensure their equitable and rational use'.

Finally this comment was made:[37]

> Moreover, it was stressed that a balance must be maintained between the requirements of sovereignty and the requirements of good neighbourliness and the prohibition of abuses.

These comments can find parallels in the topic of injurious consequences arising out of acts not prohibited by international law. Thus, in his preliminary report the Special Rapporteur said:[38]

> The theme of accountability for acts not prohibited comes into prominence precisely because there is need for a new and imaginative effort to reconcile the widest possible freedom of action with respect for the rights of others, and with a justified apprehension that mankind may perish through undisciplined use of industrial and technological power.

Inherent in both topics, it is submitted, is the underlying theme that States are interdependent, thus the establishment of rules that will foster co-operation and co-ordination of activities that cause a minimum amount of loss or injury suffered is imperative. Along with this underlying theme of interdependence is that as expressed by Section 5(1) of the Schematic Outline - the balancing of freedom to act within their territories and that of the interests of other States.

It is clear that expression of this underlying principle is expressed in both topics. In the topic of non-navigational uses it takes form in the concept of system agreements. What is the purpose of system agreements? It is submitted that like the regime of prevention that promotes construction of regimes to regulate without recourse to prohibition, the purpose of a system agreement is to regulate use of the international watercourse system. It does not prohibit, it is submitted, system States from carrying out activities within their territories. However, if a non-participating system State's interests might be adversely affected, it has a right to participate in the system agreement. If the use involves the whole international watercourse system then all system States are entitled to participate.

It is submitted that two points may be derived from when system agreements are made. The first is that as in the topic of international liability some element of trans-boundary loss or injury is necessary for a system agreement to be concluded. The second is merely the formulation of the principle of co-operation between system States and the encouragement of system States to work together for the maximum benefit of all. It looks at the watercourse system as a unitary whole and encourages system States to co-ordinate their efforts to attain maximum utilization. It must follow that as use is being made of the whole international watercourse system, all system States must be involved. Thus, one is no longer in the realm of acts or activities or use being made within the territory or control of a system State. The use here extends to the whole international watercourse

system. In such circumstances, there is a clear need to consult all system States as the use affects all their interests. It is submitted that this brings one to two conclusions. The first is that there is a regime established that arises when use within the control or territory of a system State of the international watercourse system affects adversely to an appreciable extent the use of another system State.

Secondly, when one considers the international watercourse system as a whole, a different regime applies and necessarily so. For how can a system State carry out a use that applies to the whole international watercourse system without consulting all the system States? By virtue of the very nature of the use it proposes, all system States have to be consulted and party to any system agreement concluded. The point is that this is a statement of the principle that States are to co-operate to attain maximum utilization of the resource. For this goal to materialize, all rights and interests of affected States must be taken into account. The proposed use thus affects all these system States. Does the question of an adverse effect of a transboundary nature become a determining factor here?

It is submitted that the regimes set up by the articles are dealing with prospective use. Thus, system agreements are concerned with regulating the system States' interests vis-a-vis the proposed activity.

The point is that it is difficult to take the discussion of both the topics in relation to each other to a further stage because the first five articles of the law of non-navigational uses of international watercourses do not consider the areas

of interest to the paper. Thus, the regimes established by Mr. Quentin-Baxter's topic cannot be considered. Even the question, are these rules of a prohibitory nature, is hard to answer. This is because it appears that these articles will serve as guidelines for States to conclude specific agreements for the particular watercourse. It appears that States are under an obligation to consider these rules when negotiating specific agreements. However, can States specifically avoid the articles without committing a wrong? Or is there an obligation to consider these articles only if States agree to do so?

It is submitted that these questions are left better answered after the consideration of the concepts of equitable participation and appreciable harm.

On the face of the articles, tentative submissions may be made. Firstly it appears that system States shall not make any use of the watercourse system that would adversely affect to an appreciable extent the use of other system States. Thus, in these terms, the approach of the Commission seems to be the setting up of prohibitory rules, breach of which will entail a right of action.

Secondly, it may be concluded from our preliminary observations that all system States have the right to participate in the system agreement. This may be the embodiment of the principle of an integrated and co-ordinated approach to the use of the international watercourse system. The object here is the maximum utilization of the watercourse system. However, when the concept as expressed was being explored, it became obvious that all States had to be included

as their various rights and interests would be affected. This then would trigger off an enquiry as to whether in effect the only time a system State may participate in a systems agreement affecting the whole international watercourse system is when it is being affected. The point then is what is "affect" here? If a system State receives only a beneficial effect by the use, does it need to participate in the agreement? Do not States only enter into negotiations when conflicting interests, or uses in this case, arise? Thus, could it not be implied from the articles that what is being sought by allowing all system States to participate in a system agreement affecting the whole watercourse is more likely to be the reconciling of conflicting uses. Does this then not take one back to the starting block of the Special Rapporteur for injurious consequences of acts not prohibited by international law - that there must be in the terms used by the Special Rapporteur, Mr. Schwebel, use that is adversely affected?

On the one hand there appears to be a coincidence of when the regimes they establish arise - when there is loss or injury or when a use is adversely affected of a transboundary nature that is of an appreciable extent.

However, the enquiry cannot be concluded here, in respect of when a system agreement embodies use of the whole watercourse system. While at first there appears to be a wide sweeping principle being stated, the next step is into the pragmatic enquiry but exactly when do all system States participate? Is this then narrowed down to the fundamental point of when a right of interest is affected? But why negotiate at all if what is being derived is a benefit?

Surely then there must be some conflict, some interest being affected in an adverse manner?

These questions lead on to the next part, where through the examination of the concept of negotiations and system agreements it is hoped that some answer may be found.

Before concluding there is one further point to be considered, that is the concept of 'a shared natural resource'. Why have such a concept? It is submitted that such a concept fosters rights and duties vis-a-vis States in their relations with one another. It is a manner through which the activities within the territory or control of a State may be regulated. As in the earlier part of this chapter, it was noted that the shared natural resource is one that has a relative character - it arises when a use is affected. The enquiry of what is 'affected' led to the conclusion that it is use that is affected to an appreciable extent.

The concept of a shared natural resource thus arises when a use made within the territory of one system State affects adversely to an appreciable extent use of another system State. It is therefore clear that the scope of this topic is very much like that established by Mr. Quentin-Baxter in his topic.

Thus it can be safely concluded that in the case of a system State making use of part of the waters of an international watercourse system and that in the case of a shared natural resource, the scope of the articles is limited to use that adversely affects to an appreciable extent. On the question of the use of the whole international watercourse system, this conclusion has not yet been

arrived at.

Are these articles establishing prohibitory rules? It is submitted that on one interpretation they are. If the articles are breached, a wrong is committed. However, is it a wrong not to take the rules, as established by the articles, into consideration when negotiating an agreement? The Special Rapporteur stated at the beginning of his report that the aim of the topic was to provide general principles and rules governing international watercourses, where there was no agreement covering the situation among the system States, and it was also to provide guidelines for the negotiation of future specific agreements.[39] He went on to say that the articles would[40]

> provide general principles plus residual rules applicable to subject matters not covered by such agreements.

What happens if one of these principles or rules is breached? Surely the answer must be a right of action. What happens if they are not at all observed? Well, if they are established principles and rules, surely again the answer must be a right of action against the offending State.

In these terms it is clear that unlike the topic of acts not prohibited by international law, one is constructing here, regimes built on the premises that it is a wrong, a breach of a principle of international law, if a particular duty as established by the articles — is not observed.

To this extent then there must be a parting of

ways between the two topics: as one is attempting to establish prohibitory principles and rules, breach of which entails wrongfulness and the other is in the realm of State liability for acts not prohibited. Having said this, it is proposed in the next chapter to examine under the concept of equitable participation whether in effect the two separate regimes (one dealing with wrongfulness and the other divorced from this concept) can co-exist at the same time.

There is another interpretation of the articles that the paper wishes to tentatively propose. Can the problems that are inherent in these articles be put in the context of the principles proposed by the topic of liability for acts not prohibited by international law? It may be worthwhile considering the articles from this interpretation. At present a consideration of the articles shows that at every point prohibitory rules are established. Thus, wrongfulness occurs every time they are breached. The proposition now advanced is to regard these articles as divorced from wrongfulness.

Both topics deal with establishing primary rules of obligation. The international liability topic, however, establishes only one obligation which if breached entails wrongfulness. The rest of the obligations do not entail a right of action. Wrongfulness is precluded up to the point when the single obligation is breached. Applying this to the international watercourses topic, can one not arrive at the conclusion that wrongfulness can be precluded until one obligation is breached?

## PART B. THE DUTY TO NEGOTIATE

The writer proposes to consider the duty to negotiate as a subtopic of this chapter because one cannot fail to notice that this duty is given some prominence in both topics.

It is hoped to take a multifaceted approach to the whole concept, as it will become obvious that this duty does not arise in a vacuum and there are interrelated concepts to be considered. To this extent the duty to negotiate will serve as an introduction to these concepts which play dominant roles in the two topics.

This part of the paper is divided first into separate sections where the duty is considered critically as it is presented in the two reports. Because the concept of 'agreement' is fundamental to the duty to negotiate a third section discussing the case of Lake Lanoux[42] will be included.

### The duty to negotiate, a critical evaluation

### Non-Navigational Uses Of International Watercourses

The duty to negotiate will be examined in the following manner. The primary question is when does it arise? To this extent it is proposed to venture into the comments made at the General Assembly and the tentative article 16. The reason for doing this is twofold. First it is a means of uncovering the underlying philosophy of this duty; secondly it is hoped that by examining the duty one will be able to arrive at a conclusion as

to the ambit of the articles. Thus by defining what one is negotiating about, it is hoped to show what in essence one is dealing with.

It is clear from article 3(3) and from article 4 that only if the circumstances require it, is there a duty to negotiate. If negotiation is the vehicle or procedural device through which system agreements are concluded, can one not state the circular argument that without system agreements the articles do not apply and without negotiations system agreements cannot be concluded. However, as negotiations only arise in certain circumstances, then it is only in those circumstances that the articles apply.

The articles state the following:

Article 3
System Agreements

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

Article 4
Parties to the negotiation and conclusion of system agreements

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

2. A system State whose use of the waters of an international watercourse system may be affected to an appreciable extent by the implementation of a proposed system agreement that applies only to a part of the system or to a particular project, programme or use is entitled to participate in the negotiation of such an agreement, to the extent that its use is thereby affected, pursuant to article 3 of the present articles.

There are two points to note: the first, it is

submitted is, that the duty to negotiate only arises if the proposed use may require the system States to do so. Secondly States that may be party to a negotiation are all system States where the use applies to the international watercourse as a whole or where use by non-participating system States may be adversely affected to an appreciable extent. The end result of negotiation here is the concluding of a system agreement or agreements. There is a duty to negotiate in good faith.

It is relevant to observe the comments made by the delegates at the General Assembly.[43] Some saw the obligation to negotiate as a means of dispute settlement akin to the principle embodied in article 33 of the Charter (which provides for negotiation as a means of peaceful settlement of international disputes). The representative of the delegation from Sweden pointed out that[44]

> ... the obligation to negotiate should not be considered in the abstract but in relation to a dispute or a situation where measures planned or undertaken by one basin State might adversely affect the interest of another basin State; negotiations would, thus, be necessary to avoid conflict.

The interesting point to note about the comments is that the delegates saw the duty to negotiate as either a means of dispute settlement or as a means of dispute avoidance. This encompassed the view that negotiations came into existence when there was a conflict of interest, where a situation might arise of one State being adversely affected. Thus, interrelated with the concept of negotiations was the fact that rights and interests might be adversely

affected. It was a unique view of one delegation that the duty to negotiate should arise in situations dealing with international freshwater resources, "rather than only where conflicting interests made negotiation necessary".[45] The norm then, it is submitted, is that for negotiations or the duty to negotiate to arise there must be a conflict of interests. The question then arises whether in the case of a system agreement, that applies to the international watercourse as a whole, is the entitlement of every system State to participate in negotiations limited to the situation where a conflict of interests arises only. Thus, to the extent that use of system States is not affected, could it not be said that there is no conflict of uses situation and therefore no need to participate in the negotiations. The very nature of negotiations implies a conflict situation. If the conflict is removed, what is the purpose of a duty to negotiate?

It is therefore submitted that the very nature of negotiations and of the duty to negotiate imply a dispute situation at one end of the scale and a conflict of interests at the other end. If this is so, then although States are entitled to participate in negotiations of system agreements that apply to the international watercourse system as a whole, in practical terms it appears that unless there is some situation of a conflict of uses or a use being adversely affecting to an appreciable extent, a duty to negotiate will not arise.

It is not out of place in this context to turn to the tentative draft article 16.[46] The principles and

procedures of this article have two objectives: firstly, dispute avoidance and secondly dispute settlement.

Inbuilt in the article is the concept 'accommodation in lieu of dispute'.[47] To promote this underlying theme negotiations are broken up into several 'echelons' to forestall the matter hardening into a formal dispute.[48] Thus, there is first a reasonable period of consultation and negotiation to reach an accommodation of the conflict;[49] if accommodation is not achieved a system State may call for the creation of an international commission of inquiry.[50] Before this commission is set up, a system State can convoke a period of intensified negotiations, not to exceed six months. This period is measured starting from the date of the call to establish the commission.[51] On receipt of the commission's report, negotiations are to be resumed.[52] If resolution of the difference is not achieved within six months after receipt of the commission's report or that the commission's formation or work is frustrated so that no report is rendered, a system State may refer the matter to conciliation.[53] If conciliation fails to resolve the difference within a reasonable time, after giving notice and waiting a minimum period of ninety days a system State may declare the matter an international dispute.[54] Dispute settlement then comes into existence.

The situations where system States are guided into negotiations are set in article 16(2)(a), 16(2)(b), 16(2)(c) and 16(2)(d):

> (a) A planned or intended use in the future of system water by one or more system States shall not be ground for denying a right of reasonable and beneficial use in the present to another system State.

> (b) Pending a determination of equitable use, a system State is not obliged to suspend an existing beneficial use, except by agreement, unless the use is causing or will cause appreciable harm to another system State or to the environment. In the event that appreciable harm is caused, failure to modify the use, to suspend the use, or otherwise to abate the cause of the appreciable harm at the request of another system State subjects the offending system State to liability for damages and denial of the right of the use.
>
> (c) Conflicting use of an international watercourse system will be made compatible, at the request of a system State affected by the conflict, by restricting one or more of the uses, or by making adjustments to the regime of the system, to the degree necessary and in a manner calculated to produce the minimum practical loss of total utilization; more valuable uses will be given preference where other considerations are determined not to be paramount.
>
> (d) Where the difference between the system States involves the development, protection or control of the international watercourse system, the above principles, mutatis mutandis, shall apply.

It is submitted that this article brings out the primary aim of negotiations under this topic and that is: 'dispute avoidance'. However, there is a fundamental principle in article 16: using the terminology of Mr. Quentin-Baxter it is only when loss or injury is prospective or actual that there is a duty to negotiate.

Thus, in a survey of the duty to negotiate, it is submitted, the writer arrives at the conclusion that even in a situation where the system agreement applies to an international watercourse system as a whole, the underlying philosophy is that it is only when loss or injury is prospective is there a duty to negotiate. Thus, this duty in itself defines when the present articles are applicable: the fundamental or underlying theme is therefore when a situation

of harm, loss or injury, or use that is adversely affected to an appreciable extent is prospective, then the duty to negotiate arises.

An ancillary point should be noted. Under article X which deals with the relationship between the present articles and other treaties in force, paragraph 3 of article 3 is held applicable even in the situation where other treaties are in force.

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

Thus, the duty to negotiate in good faith is being established as a principle that must be complied with in every situation governing the law of non-navigational uses of watercourses, where it is required.[55]

Finally as it has been observed, the end-result of the duty to negotiate is a system agreement.

What happens if a system agreement is not concluded? Article 16 suggests that a dispute then arises. Since it was noted that system agreements seem to deal with the area of prospective use, what are the obligations of the system States? Can a system State carry out the proposed activity or is it prohibited from so doing until an agreement is negotiated? What about the view raised by the German delegate that[56]

> the very concept of a duty to negotiate seemed likely to conflict with the sovereign rights of every State over its territory and its national resources.

These questions are better left unanswered at this stage. They will be considered in the concluding section.

As it has been noted, the articles apply to prospective use, where the situations require that there is a duty to negotiate.

However, under the proposed article 10 of the sub-topic on environmental protection and pollution, the duty to negotiate arises when a particular harm is prospective as well as actual. Further, it is questionable whether a system agreement is the end result sought or whether it is various regimes to be applied according to the given state of affairs. The focus here is the harm and not use. Thus article 10(11) states:

> In the event that abatement or mitigation of specific pollution, or a particular programme for the protection of the environment, is required by one or more system States in order to achieve compliance with the provisions of this article, the system States concerned shall negotiate with a view to arriving at an agreed timetable and efficacious measures for the accomplishment of the abatement, mitigation or programme, or at alternative arrangements sufficient for the purpose, as appropriate.

In the area of 'hazards' the term used is consult rather than negotiate. It is submitted here the emphasis is on co-operation towards prevention of harm. In strict terms the duty to negotiate here does not exist because there does not exist the element of reconciling conflicting interests, neither is a regime of reparation envisaged if harm does occur.

Article 11 deals with the prevention and mitigation of hazards. There is under article 11(3)(b) a duty to consult

> concerning joint measures, structural and non-structural, where such measures might be more effective than measures undertaken by the system

States individually.

Thus, an article on the duty to negotiate a regime of reparation when loss or injury is suffered along the lines provided by the Special Rapporteur, Mr. Quentin-Baxter, might indeed be invaluable. It is questionable whether loss or injury should be limited to that caused by a 'human' activity or by accident but not by 'natural phenomena'. The International Law Association in 1972 approved articles on flood control.[57] Under article 7:[58]

> A basin State is not liable to pay compensation for damage caused to another basin State by floods originating in that basin State unless it has acted contrary to what could be reasonably expected under the circumstances, and unless the damage caused is substantial.

Article 11 of the report on the law of non-navigational uses of international watercourses states:

> 1. System States shall co-operate on an equitable basis with a view to the prevention or mitigation of water-related hazardous conditions and occurrences such as flood, ice accumulation, erosion, sediment transport, avulsion, saltwater intrusion, obstruction, deficient drainage and drought, as the circumstances of the particular international watercourse system warrant.

As no provision is made when harm or loss or injury is actually suffered, the provision as set down by Section 4 of the international liability topic is valuable.

Thus, the Special Rapporteur, Mr. Schwebel, noted before considering the International Law Association's articles:[59]

> Detailed, uniform rules applicable to all international watercourses would be chimerical. 'Besides, nearly all hydraulic works, whether carried out for flood-control purposes alone or combined with other purposes, produce multiple secondary effects ...' But the development even of general principles had been

> neglected by the international legal community. The Committee's articles were therefore, 'an effort to fill an obvious gap in international water law and thereby to contribute to mitigation of human suffering caused by human omission to control nature'.*

It is submitted that, divorced from the concept of wrongfulness working from the basis that 'all harm is not wrongful', an article should be established that in case of transboundary harm that is caused, by 'hazards', a duty to negotiate a regime of reparation will arise. The point is that in such situations 'wrongfulness' and strict liability will be absent. Instead, negotiations will establish whether a reparation should be made to the affected State taking all factors into consideration.

Article 13 is titled "Water resources and installation safety". Again the article aims at preventing harm. Here[60]

> ... destructive or contaminating actions taken during armed conflict, the acts of sabotage by terrorists are more than ever before of prime concern.
>
> Thus, prohibition of use of water resources and hydraulic installations and other facilities, associated with an international watercourse system and capable of releasing dangerous forces or substances

in offensive military operations and terrorist acts of sabotage is the basic goal of the article. The article is limited to shared water resource. There is no duty to consult or enter into negotiations but a system State may request consultations with a view to reaching agreement. The article does not provide for the situation where loss or injury does occur. However, the Special Rapporteur did foresee States having three sorts of liability, one[61]

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*my emphasis

> ... for failure to fulfil a special duty to use due diligence and foresight to ward off the person or persons, even including in some cases insurgents or foreign military.

The other[62]

> ... a separate duty; absolute unless excused, would of course apply to the system State's own actions of this kind of wilful nature.

Finally:[63]

> There might also be absolute liability attaching to certain types of installations, notably atomic installations.

In the second situation one is concerned with a State being engaged in an illegal activity. To that extent one is not within the scope of the topic of Mr. Quentin-Baxter.

However, in the case of the atomic installation without determining the question of wrongfulness or illegality, is it not possible to provide for reparation, in every situation where loss or injury is suffered by a system State due to the atomic installations. Should a treaty akin to the Space Objects Convention not govern this situation?

<u>The 'duty to negotiate' international liability for consequences arising out of acts not prohibited by international law</u>

One is first introduced to the concept of negotiation, by the Special Rapporteur in Chapter 3 of his Preliminary Report.[64] Here, while discussing 'legitimate interests and multiple factors', he said:[65]

> The first emphasis, however, is on the duty to negotiate: the applicable rule of law itself requires the parties to enter into negotiations with a view to arriving at an agreement, and not merely to go through a formal process of negotiation as a sort

> of prior condition for the automatic application of a certain method of delimitation in the absence of agreement ....

Later on, he stated that the above rule, that is the duty to negotiate with a view to arriving at an agreement, is itself

> an expression of a binding rule of customary law - even though the rule is of great generality.[66]

In his Second Report[67] when considering 'Elements in striking a balance of interests' he quoted from the Fisheries Jurisdiction Case the following passage:[68]

> The most appropriate method for the solution of the dispute is clearly that of negotiation ... It is implicit in the concept of preferential rights that negotiations are required in order to define or delimit the extent of those rights ... The obligation to negotiate ... flows from the very nature of the respective rights of the Parties; to direct them to negotiate is therefore a proper exercise of the judicial function in this case.

What one derives from these statements is that there is something established in customary international law that is known as the duty to negotiate. When does this duty arise? It arises when parties find themselves in a situation where they have conflicting interests. But does this duty arise prior to a 'dispute' or is it a means of avoiding a dispute? Thus, is the duty to negotiate primarily a first step towards resolving and reconciling a conflict of interests? Is it therefore a means of dispute avoidance? There is also the factor of arriving at an agreement. This appears to be the end result of the duty to negotiate. What happens if parties do not arrive or cannot arrive at an agreement? Is this when a dispute arises? Connected with this is the question

of whether the duty to negotiate is merely a method of fact finding, of defining and delimiting the parties' rights or whether it is something more: that as rights are established, along the proces of negotiations, various regimes are set up which allow the parties to act in accordance with them; the final aspect of negotiations is the conclusion of an agreement, breach of which will provide a right of action. This last conclusion leads to a more fundamental point if there is a duty to negotiate, then breach of that duty must entail a right of action.

The last question to be asked is: why was this duty considered under the rubric of what can generally be termed the 'balancing of interests'? The answer to this is apparent; multiple factor, or the factors that constitute how one is to arrive at evaluating the activity in question, provide the guidelines and set the standards that are to be met while negotiating. Thus, they dictate the course of the negotiations.

These preliminary questions serve as a basis towards how the duty to negotiate will be considered under the Special Rapporteur's topic.

Before considering the Sections, an important point to recall is the underlying theme of the rules as established by Section 5 of the Schematic Outline.

> 1. The aim and purpose of the present articles is to ensure to acting States as much freedom of choice, in relation to activities within their territory or control, as is compatible with adequate protection for the interests of affected States.

There are three Sections in the Schematic Outline that will be considered in relation to this duty (Sections 3,

4 and 2 ). The first Section to be considered is Section 3.

The first observation that may be advanced on Section 3 is that it deals with the situation where the loss or injury has not yet occurred. Thus, one is here concerned with the regime of prevention. Reparation is not excluded from this regime, indeed if on a balance of interests the proposed activity is to be carried out, then reparation (together with all measures of prevention) may be the solution to loss or injury. Section 3(1) establishes when the duty to negotiate arises.

Under Section 3(1)(a), it is submitted that the duty to negotiate is regarded as a means of expediently resolving a conflict of interests.

> If (a) it does not prove possible within a reasonable time either to agree upon the establishment and terms of reference of fact-finding machinery of for the fact-finding machinery to complete its terms of reference.

Section 3(1)(b), it is submitted, sets down two criteria when the duty will arise. The first arises when any State concerned "is not satisfied with the findings" presumably of the fact-finding machinery set-up; the second is when any State concerned "believes that other matters should be taken into consideration". Thus, it is submitted under this subsection as opposed to subsection 3(1)(a) a course of consultations has already begun; negotiations come as a second stage.

Finally under subsection 3(1)(b), it is submitted, the duty to negotiate arises if the fact-finding machinery recommends it. As this is advice only, the States are under no obligation to enter into negotiations.

However, the subsection expressly states that if the fact-finding machinery recommends it, the duty to negotiate will arise if any one of the States concerned requests it.

> (c) the report of the fact-finding machinery so recommends, the States concerned have a duty to enter into negotiations ...

Thus, in the case of a prospective activity the above sets down when the duty arises. The next point to consider is what is the end result of negotiations here?

The end result of negotiations here is not exactly arriving at an agreement, it is submitted. Negotiations as Section 3(1)(c) states are to be entered "with a view to determining whether a regime is necessary what form it should take". While agreement is not precluded from this phrase and Section 3(3) clearly envisages this, what exactly is the outcome sought by negotiations here? Is it a process by which one evaluates the proposed activity according to the principles set down in Section 5, the relevant factors set down in Section 6 and further relevant matters established in Section 7, only to conclude that no regime need be established and that the proposing State may carry out its activity? This end result, in itself, it is submitted, is the conclusion of an agreement.

Negotiations culminate in agreement if they are seen as a means of allowing the proposing State to carry out the activity and should loss or injury arise then to negotiate a regime to deal with the situation. The problem here is what exactly does 'regime' mean? Is it a setting down in exact terms of what would happen if loss or injury should occur? Is a regime in this section only to come into existence if the acting State, after all relevant factors are taken into account, is held liable in case of loss or injury? Thus, the setting up of

a regime to deal with the situation will only be considered necessary if loss or injury is attributable to the acting State after due consideration to all principles and factors.

It is submitted that the aim of the duty to negotiate is twofold. It is first concerned with evaluating the proposed activity with reference to the relevant sections.

In the case of an activity which has to be carried out urgently and of loss or injury that might occur to the affected State, a regime might be needed to be established at once. However, if liability cannot be imputed to the acting State is there a necessity for a regime?

Thus, if alternative methods may be found of carrying out the same activity, so that loss or injury will not be suffered then a regime need not be set up.

The second aim of negotiation is, then, it is submitted, to decide if a regime is necessary and this need only be decided if loss or injury may still arise and if liability may still be imputed to the acting State.

The underlying theme of the duty to negotiate, here, it is submitted, is dispute avoidance. Before a situation of 'dispute' arises, States are urged to reconcile their differences.

Section 4 deals with the situation where loss or injury does occur and there is no agreement between the States that covers the situation. Here, the States concerned have a duty to negotiate in good faith and to come to an agreement. Again these negotiations are to be carried out in accordance with Section 5 and Sections 6 and 7 where relevant.

The main factor here is reparation for loss or injury

suffered. However, the point to note is that under Section 4, it is submitted, reparation may in fact never be made.

There are two situations, it is submitted, where reparation may not be made:

1 if "loss or injury of that kind or character is not in accordance with the shared expectations of those States"; or

2 if according to the principles set in Section 5 and on a balance of interests States are held not liable for the activity that caused loss or injury.

Thus, even under the regime set up in this topic, States may not be liable for injurious consequences for acts not prohibited. Does the innocent victim then have to bear loss? It is submitted that he has to. The only difference in this situation is that he is more like the sacrificial lamb - being slaughtered for a greater good.

The danger, it is submitted, of these provisions is that one is in the realm of acts not prohibited. Thus, while a regime of strict liability may not be desired, these provisions could prove to be a loophole for States to use and thus deny liability.

What then is the purpose of negotiation here? Is it to establish that no wrong has been committed and thus no reparation should be tendered? Is it to prove that every adequate measure had been taken and that therefore one is not liable to compensate for loss or injury suffered? Why negotiate? To find that shared expectations are different and therefore there is no need to pay for loss or injury? These observations do not do justice to what the Special Rapporteur is seeking to establish.

Of prime importance is the fact that loss or injury has been suffered. The moment this is established there is an obligation to reach a negotiated settlement. Reparation for loss or injury suffered is the prime concern in negotiations. Mitigating factors that would decrease reparation due or factors that would indeed cancel it out all together would be weighed up in the negotiation process. The result if negotiations are successful is agreement.

Thus, what appropriate reparation (if reparation is to be made) in a given situation would be is arrived at by both parties negotiating. In negotiations the relevant factors such as prior negotiations, failure of prior co-operation, exchange of information and the all important principles set down in Section 5 and the factors in Sections 6 and 7 will be considered as establishing the relevant standards to be observed when negotiating.

Before concluding, Section 2 should be considered because it is relevant to the question: at what point of time can negotiations be said to have commenced? It is submitted that the various steps that States may take under Section 2(5) can be interpreted as negotiations at its preliminary stages. Thus, it is submitted, negotiations commence the moment States enter into dialogue on what their various rights and obligations are vis-a-vis each other and how these may be reconciled.

The Special Rapporteur saw this when he said: [69]

> There is a preliminary phase of consultation and fact-finding without substantive commitment by the States concerned. There is a second phase of negotiation among those States to establish a regime reconciling their conflicting interests ...

Thus negotiations, it is submitted, may be divided into stages;

consultations for example are negotiations at the preliminary stages.

It could be asked whether these preliminary negotiations or consultations could not end in agreement at this initial stage itself. Thus, if remedial measures proposed by the acting State are accepted by the affected State or if the States decide to accept solutions of the fact-finding machinery could it not be then said that negotiations have been successfully concluded?

In conclusion, it is submitted that the duty to negotiate here is primarily seen as a means of dispute avoidance. It occurs in both regimes set up by the Special Rapporteur - regime of prevention and reparation, regime of reparation. By establishing principles and factors that are to be taken into consideration, negotiations are directed in a certain course and certain standards have to be complied with.

Who initiates negotiations? Either acting or affected States may. How are negotiations to be carried out? Either States may negotiate among themselves or they may turn to a third party (either an institution or person) to help them reconcile their conflict.

In negotiations concerning prospective acts, the Special Rapporteur states that parties should enter negotiations with a view to 'determining whether a regime is necessary'. What is a regime, where does 'agreement' fit into this concept? Is coming to a decision whether a regime exists or not in itself an agreement? It is submitted that it is. Can a regime exist if liability

cannot be imputed to a State?

Finally there is one rather disturbing point of a preliminary nature. Under Section 3, in particular, is it indeed correct to speak of a 'duty to negotiate'? The Section ends thus: "Failure to take any step required by the rules contained in this Section shall not in itself give rise to any right of action." If this is so, States are not under an obligation to negotiate, there is no duty to do so. Thus, can there exist a 'duty' if breach of not carrying it out does not entail a right to seek redress? It is here that one must recall the nature of the topic. What one is concerned with is to try to establish regimes to regulate activities that States are perfectly entitled to carry out. The main focus of the topic is on the loss or injury that may occur or occurs. One is working from the premise that 'all harm is not wrongful'. Therefore, imposing a duty to negotiate in a situation where the activity has not yet been undertaken may be an unwanted fetter on the State's sovereign right to carry out activities within its territory or control.

The duty to negotiate - Lake Lanoux

Lake Lanoux deals with a prospective activity. The case is reported at the arbitration stage.

The facts briefly were that the French government proposed to utilize the waters of Lake Lanoux in connection with a hydroelectricity scheme. Spain felt its rights and interests as established by the Treaty of Bayonne of May 26, 1866 and the Additional Act of the same date would be adversely affected. The Spanish claim was that under the Treaty the proposed

activities could not be undertaken without prior agreement. It is from this aspect of prior agreement that the duty to negotiate is considered in Lake Lanoux.

The Lake Lanoux arbitration of 1957 brought to an end negotiations that had started in 1917. It represented some twenty-one years spent in negotiations (World Wars between 1930 and 1949 represent some nineteen years of stopped negotiations).

The case itself is not directly on the duty to negotiate; it is partly on the question of prior agreement of a proposed activity. The question of prior agreement, it is submitted, is of vital importance to the duty to negotiate. This is because if one sees the object of negotiation as the arriving at an agreement between the parties, when in the case of prospective works, proposed schemes or activities must an agreement be reached? Must agreement between the parties be reached before the works are commenced?

It is on this last query that the Tribunal began considering the second question.

The Tribunal's opinion will be examined in the following manner:

1 relevant general observations;

2 relevant specific conclusions.

It is then proposed to look at the ancillary point of what might be termed 'rights and interests'.

The Tribunal reduced the dispute between the States to

two fundamental questions. The first was whether or not Spanish rights as established by the Treaty of Bayonne of May 26, 1866 and the Additional Act of the same date had been infringed by the French hydroelectric scheme. The Tribunal held that[70]

> ... the diversion with restitution as envisaged in the French scheme and proposals is not contrary to the Treaty and to the Additional Act of 1866.

The second question was considered in detail by the Tribunal:[71]

> If the reply to the preceding question be negative, does the execution of the said works constitute an infringement of the provisions of the Treaty of Bayonne of May 26, 1866, and of the Additional Act of the same date, because those provisions would in any event make such execution subject to a prior agreement between the two Governments or because other rules of Article 11 of the Additional Act concerning dealings between the two Governments have not been observed.

The Tribunal felt that the Spanish government saw two obligations on the State desiring to undertake works; the first and more important was the obligation to reach a prior agreement with the other interested State; the second was "... merely accessory thereto, being in respect to other rules laid down by Article 11 of the Additional Act.[72]

The Tribunal first made several general observations on this 'obligation' of prior agreement.[73]

> To admit that jurisdiction in a certain field can no longer be exercised except on the condition of, or by way of, an agreement between two States, is to place an essential restriction on the sovereignty of a State, and such restriction could only be admitted if there were clear and convincing evidence.

The Tribunal felt that judicial recognition of the

restriction would be slow even in the light of evidence, as the underlying fear would be whether the territorial sovereignty of a State was being impaired.[74]

Prior agreement is conceptualized by the Tribunal as something that infringes on a State's sovereignty. Beginning from the premise that States may not be able to reach agreement, if prior agreement was essential, a 'veto' exercised by an interested State could paralyse the right of the proposing State to exercise its own territorial jurisdiction:[75]

> In effect, in order to appreciate in its essence the necessity for prior agreement, one must envisage the hypothesis in which the interested States cannot reach agreement. In such a case, it must be admitted that the State which is normally competent has lost its right to act alone as a result of the unconditional and arbitrary opposition of another State. This amounts to admitting a 'right of assent', a 'right of veto', which at the discretion of one State paralyses the exercise of the territorial jurisdiction of another.

However, it is submitted that while this might be true as a general observation, one must consider the question in the context of an activity that has the potential of causing harm or injurious consequences in another State's territory. Is reaching prior agreement an infringement of sovereignty or merely an application of the various principles as expressed in the maxim sic utere tuo ut alienam non laedas, or in the abuse of right principle and the goodneighbourship principle, all of which limit the complete freedom of action of a State?

The Tribunal continues:[76]

> That is why international practice prefers to resort to less extreme solutions by confining itself to obliging the States to seek, by preliminary negotiations, terms for an agreement, without subordinating

> the exercise of their competences to the conclusion of such an agreement. Thus, one speaks, although often inaccurately, of the 'obligation of negotiating an agreement'. In reality, the engagements thus undertaken by States take very diverse forms and have a scope which varies according to the manner in which they are defined and according to the procedures intended for their execution; but the reality of the obligations thus undertaken is incontestable and sanctions can be applied in the event, for example, of an unjustified breaking off of the discussions, abnormal delays, disregard of the agreed procedures, systematic refusals to take into consideration adverse proposals or interests, and, more generally, in cases of violation of the rules of good faith.

Thus, arriving at an agreement is not confined to preliminary negotiations. The role of negotiations, it is submitted, appears more to be the crystallization of the conflicting interests at any given point in time. Negotiations, thus, keep the dialogue or communications between States moving. It is an ongoing, dynamic concept and well before an agreement is concluded it establishes at any given point in time the particular status of the parties and the corresponding regimes that particular status brings with it. Thus, breach of an agreed procedure entails a right of action. Further, negotiations must be carried on in good faith etc., again breach of the rules of good faith will entail sanctions. Thus, here, there is a right of action if any of the obligations set down by negotiations are broken.

Turning to the specific problem before it, the Tribunal considered the necessity of a prior agreement. It picks up the themes established in its general observations.

Thus, it observed and concluded that it was more than

desirable that States should conclude comprehensive agreements that took into consideration all conflicting interests. However, customary international law and indeed as a general principle of international law, there did not exist an obligation of prior agreement before industrial use was made of the international watercourse.[77]

Considering Article 11 which sets down an "obligation to furnish information" it stated that there was a vast difference between the obligation to give notice and that of prior agreement. It made the observation that giving notice would allow the affected State to safeguard the rights of its riparian owners to be compensated and safeguard its general interests as far as possible.[78]

Obtaining agreement was far more extensive and would allow the affected State to exercise its power of veto.[79]

On a consideration of Articles 15 and 16 of the Additional Act, the Tribunal concluded that these articles established that there[80]

> does exist a duty of consultation and bringing into harmony the respective actions of the two States when general interests are involved in matters concerning waters.

This, however, did not establish an obligation to enter into prior agreement.

Finally the diplomatic correspondence used in the negotiations was considered. The Tribunal felt that when considering such negotiations which had taken place over a long period of time and had at various stages been suspended and resumed, certain principles should be taken into account. Citing the North Atlantic Fisheries (1910) Case,

the Anglo-Norwegian Fisheries (1951) Case and the Case concerning the [Rights of] United States Nationals in Morocco (1952), the Tribunal stated:[81]

> ... one must not seize upon isolated expressions or ambiguous attitudes which do not alter the legal positions taken by States. All negotiations tend to take on a global character; they bear at once upon rights - some recognized and some contested - and upon interests; it is normal that when considering adverse interests a Party does not show intransigence with respect to all of its rights. Only thus can it have some of its own interests taken into consideration.
>
> Further, in order for negotiations to proceed in a favourable climate, the Parties must consent to suspend the full exercise of their rights during the negotiations. It is normal that they should enter into engagements to this effect. If these engagements were to bind them unconditionally until the conclusion of an agreement, they would, by signing them, lose the very right to negotiate; this cannot be presumed.

Thus, it is submitted, inherent in negotiations is the aspect of considering all factors relevant to the dispute; the 'global character' of negotiations is another manner of expressing the balance of interests concept.

However, it is queried if by 'suspend the full exercise of their rights' the Tribunal could have meant that each time negotiations were carried out the acting State had to suspend execution of the proposed works. Thus, in a preceding observation, the Tribunal said that a party to a dispute[82]

> ... is never obliged to suspend the exercise of its jurisdiction because of the dispute except when it assumes an obligation to do so; by exercising its jurisdiction it takes the risk of seeing its international responsibility called into question, if it is established that it did not act within the limits of its rights.

This last observation is of importance because, it is submitted, it establishes the concept that once the Parties

recognize certain obligations vis-a-vis each other (irrespective of the fact that previously no obligation existed between them), they are bound to observe those obligations. Breach of the obligation will entail a right of action. Thus, voluntary acceptance of an obligation brings with it a right of action, if the obligation is breached.

A final point to be derived from Lake Lanoux, for the purposes of this paper, is a facet of the concept of rights and interests. The important question here is who decides when a right or interest is affected? The Tribunal said:[83]

> A State which is liable to suffer repercussions from work undertaken by a neighbouring State is the sole judge of its interests; and if the neighbouring State has not taken the initiative, the other State cannot be denied the right to insist on notification of works or concessions which are the object of a scheme.

It is submitted that in a situation where rights and interests are not defined the affected State has a right to have its interests taken into account and compensation paid if its interests are prejudiced.

## Conclusion

In drawing the threads together of the three sections, it is on the question of agreement that focus must be placed.

It is indisputable that both Special Rapporteurs use the duty to negotiate as a device through which system State or States may reconcile their conflicting interests or at the very least have their various rights and interests defined so that in a dispute situation negotiations will serve as material for the adjudicating body to base its opinion on. This last purpose was illustrated in Lake Lanoux.

In the non-navigational uses of watercourses topic the end result of negotiationsis the conclusion of a system agreement or agreements. The articles it was observed were dealing with prospective situations. Thus, it is submitted, what is here advocated is prior agreement between system States before an activity is carried out. But is not prior agreement an infringement on a State's sovereignty? Was this not the conclusion of Lake Lanoux?

Lake Lanoux is pertinent to this topic because it was dealing specifically with the situation of a non-navigational use of a watercourse that had transborder effects. At the beginning of the negotiations these effects were of gravity. France proposed plans then which could have caused injurious consequences or affected Spain's use adversely and to an appreciable extent. Through negotiations, France changed her plans and in the end Spain's interests not rights were affected. If anything, Spain was deriving a benefit from the proposed activity. However, agreement could not be reached and it was a hardened dispute that the Tribunal had to deal with. Prior agreement, as the Tribunal saw it, could allow another State at its discretion to paralyse the exercise of the territorial jurisdiction of another. The Tribunal found that neither in customary international law nor in international law in general was there an obligation to reach prior agreement where industrial use was being made of waters. More generally the underlying theme of the Tribunal's decision was that prior agreement would place a restriction on a State's sovereignty and that to recognize its existence (unless there was clear and convincing evidence) would amount to admitting a right of veto which at the

discretion of one State paralyses the exercise of territorial jurisdiction of another. The Tribunal said that even in the light of evidence judicial recognition would be slow. The fact is, under the non-navigational uses topic, there is clear evidence that prior agreement is required before the proposed activity may take place.

In Mr. Quentin-Baxter's topic, the underlying principle of the sections was expressed in Section 5(1). There was recognition of State sovereignty as well as the affected State's rights. Prior agreement was not seen as necessary before a proposed activity could be carried out. However, if injurious consequences were to occur, agreement for the establishing of a regime if necessary was desirable.

The question that will have to be asked at this stage is again one of a preliminary nature. Is the Special Rapporteur, Mr. Schwebel, saying that all prospective activities that have adverse effect of an appreciable extent to another system State are illegal and therefore cannot be carried out without prior agreement? Who is to decide that the proposed use is of this nature? Will this not effectively introduce what the Tribunal feared would happen, allowing one State a power of veto over another's jurisdiction? Moreover is it not using the simplistic equation that "all harm is wrongful"?

The fact is that the articles as they stand point to the conclusion that they are establishing prohibitory rules, breach of which will entail wrongfulness. What is more, system agreements certainly can be equated to the concept of prior agreement. If this is so, one is left with the enquiry - but what about a system State's sovereign rights? The articles

as they are framed seem to do away with them. This is a dangerous conclusion because in effect it gives rise to the worst fears raised in Lake Lanoux.

CHAPTER II

Introduction

This chapter proposes to consider the concept of equitable participation and the interrelated concept of equitable use. The first part of the chapter follows the path taken by the Special Rapporteur, Mr. Schwebel, to arrive at the formulation of the equitable participation principle. The reason for doing this is again to discover the underlying philosophy of the concept. The article will then be critically examined. And so will the article on equitable use. The purpose of doing this is to answer a question posed in the first chapter: can the concepts of wrongfulness and that of liability for acts not prohibited co-exist? To be able to answer this, however, it will be first considered whether article 6 as it is framed is a prohibitory rule or whether it is framed in terms divorced from wrongfulness.

Part A. The underlying philosophy of the concept of 'equitable participation'

To arrive at draft article 6, the Special Rapporteur considered the concept of equitable participation by: (1) tracing the development of the general principle (2) reviewing international agreement and the positions of States and (3) reviewing the current state of the doctrine. The writer proposes to follow this same path asking the question: what is the underlying philosophy, the raison d'être, behind this concept?

The Special Rapporteur began by considering the concept

of equitable participation.[84] He stated that[85]

> There may be, aside from the rule that no State may cause appreciable harm to another State, no more widely accepted principle in the law of the non-navigational uses of international watercourses than that each system State 'is entitled, within its territory, to a reasonable and equitable share of the beneficial uses of the waters ...'.

The concept finds its origins in other concepts such as[86]

> territorial integrity, absolute sovereignty, limited territorial sovereignty, and community in waters - and can be seen to have evolved gradually into its contemporary expression, equitable utilization.

National practice, particularly in the area of adjudications within federal States gives early indications of the formulating of the principle.[87] The important point to note, as the Special Rapporteur indicated, was that the principle was linked with a finding of injury.[88]

However, this was further developed to give rise to the concept of "equality of rights". This concept took into account the rights of the State deriving the benefit as against those of the State deprived of some use by virtue of the first State's use.

To illustrate this stage of development, the Special Rapporteur quoted from a judgement from the United States Supreme Court:[89]

> [there must be adjustment] upon the basis of equality of rights as to secure as far as possible to the Colorado the benefits of irrigation without depriving Kansas of the like beneficial effects of a flowing stream.

It is submitted that a balancing of interest concept thus found expression and grew to be an integral part of the concept of equitable participation. While taking

into account the rights of each State, the Court was simultaneously weighing up the beneficial aspects and the detrimental aspects that a particular use by a system State may have on another system State's use. Thus the balancing of interests became a determining factor of equitable participation.

The Special Rapporteur observed:[90]

> In short, disputes over the right to use waters flowing across sovereign lines must be adjusted on the basis of 'equality of rights'. But such equality does not necessarily mean equal division.

The writer agrees that the American cases[91] and the example of the Report of the Indus (Rau) Commission[92] which the Special Rapporteur uses supports the point that 'equality of right' does not necessarily mean equal division. However, it is submitted that another point is being made by the Lake Lanoux arbitration.[93] It confirms the obligation to reconcile the various interests by applying a balancing of interest type test.

However, another point is being made: States have an equality of rights in relation to their respective status as system States. As system States, they stand on an equal footing. However, in relation to the matter they were disputing, it is clear from the case that France by the proposed use of the waters was exercising her rights. However, it was not Spanish rights that were affected but something that was less than a right, an interest. The Tribunal expressed this point when it said:[94]

> France may use its rights; it may not disregard Spanish interests. Spain may demand respect for its rights and consideration of its interests.

It is submitted that the American cases as well as the opinion of the Italian Court of Cassation establish the above point - that equality of rights relates to the fact that each system State stands on an equal basis. Their various rights must be considered and inherent in this is the concept of weighing the various rights that may be affected. The Italian Court of Cassation gave this opinion:[95]

> International law recognizes the right on the part of every riparian State to enjoy, as a participant in a kind of partnership created by the river, all the advantages deriving from it for the purpose of securing the welfare and the economic and civil progress of the nation ... However, although a State, in the exercise of its right of sovereignty, may subject public rivers to whatever regime it deems best, it cannot disregard the international duty, derived from that principle, not to impede or to destroy, as a result of this regime, the opportunity of the other States to avail themselves of the flow of water for their own national needs.

The fundamental point that is addressed here is that while States have a sovereign right to undertake activities within their territories they must also respect other States' rights. What is here advanced is a State's right to be protected from injurious consequences of another State's use. However, the Italian Court expressed this right more as a point of consideration that the acting State had to bear in mind when undertaking the activity.

The equality of right principle is further examined under the heading of International Agreement and the positions of States. The Special Rapporteur traced

the early expression of this principle in the form of dividing the quantity of water to its present-day 'management' formulation.[96]

Apart from the division by volume approach, States concluded treaties that restricted the use or flow of water. Thus, the Special Rapporteur states that long lists have been compiled of agreements embodying both aspects. He then goes on to give examples where "express recognition of the principles of equality of right and of equitable utilization" [97] come up in agreements.

The concept of equitable utilization is not a new one. The treaty signed at Bayonne between Spain and France in 1866 gives recognition to the concept of equitable and reasonable use.[98]

From the Austria/Bavaria dispute,[99] the countries came to an agreement which recognized that division by volume, and each State exploiting its volume, was not enough. Other factors would be of relevance when considering the particular use. Thus, the agreement envisaged the concluding of separate agreements for the particular uses. What is discernable from this agreement is a move towards the concept that various factors are to be taken into account when considering the use of waters. Thus, economic interests and rights of private individuals were considered relevant factors. It is also clear that by allowing a volume of water belonging to one State to be used by another, and by weighing the relevant factors, the concept of optimum use of waters while having regard to factors affecting another's rights was evolving.

Another step towards the concept of equitable participation was being formulated: that of equitable apportionment. Under this concept although the waters were divided among States, this division did not apply when the parties consented to a particular use. Thus, by obtaining consent[100] or arriving at particular agreements concerning the use of the waters, system States did away with the volume divisions of their waters. The Special Rapporteur uses the term equitable apportionment interchangeably with equitable utilization.

There is an observation to be made concerning the quote in paragraph 59. The Special Rapporteur quotes from authors who conducted an extensive study some twenty years ago on State practice. They made the following finding:[101]

> While practice indicates that a State may unilaterally develop a section of an international river that is within its territory, it seems safe to conclude that the nature and extent of such unilateral development is limited by the equitable doctrine that one [may] not use his property in a manner to interfere inequitably with the use by another of his property. This conclusion is supported by both the domestic jurisprudence of a large number of States and international agreements. Frequently, when a State contemplates a use which is expected to cause serious and lasting injury to the interests of another State in the river, development has not been undertaken until there has been agreement between the States. Such agreements do not follow any particular pattern but resolve immediate problems on an equitable basis.

This quote embodies the previous points raised. However, it is thought provoking for a special reason. Whereas the material used shows a progressive movement towards the concept of equitable participation, the finding appears to take a retrogressive step to the very first

reason of why the concept of equitable participation arose at all - proposed use entailing loss or injury of a substantial nature to the use of other system States.

Thus, it is submitted while one is considering the evolution of the concept of equitable participation one should bear in mind this basic formulation. At the end one must ask the question but what really is the underlying principle of equitable participation, when does equitable participation come into existence?

The Special Rapporteur then approached agreements of recent vintage. He noted that the concepts of equal division, equitable apportionment or utilization were included in these agreements. However, also included was a more comprehensive approach to the multiple uses of waters. This last approach was noted even in non-system wide agreements and those that were not oriented towards joint management.[102]

He made two observations worth quoting:[103]

> Many modern treaties apparently take the principle of shared rights or common use as a presumed point of departure and proceed, without articulating any general rule, to spell out the specifics of their sharing of responsibilities, of the arrangements for various kinds of improvement and maintenance works, of co-ordination of activities (including information and data collection and exchange) and settlement of differences, usually through the creation of a joint commission or similar institution; the notion of equal division of water by volume is now ordinarily absent.
>
> There also exists a series of quite recent agreements among developing countries in which the system States have felt it not only unnecessary to iterate their respective rights or shares, but have instead taken thoroughgoing steps to bring about integrated management of their international watercourse systems.[104]

There are several observations that may be drawn. First the concept that all system States have rights in a shared international watercourse appears to have become an established principle. Secondly the concept of equal division by volume of water appears obsolete. Instead what is of importance is the watercourse system viewed as a whole and not piecemeal. There is no longer the need to expressly recognize the rights of system States nor carry out a division of the waters as a sign of recognition of these rights. What is now important is the integrated management of the international watercourse system which will seek to make optimum utilization of the waters while being fully conscious of the rights of all system States. Thus, it is submitted that equitable utilization has given way to optimum utilization. Support for this submission is found in the Special Rapporteur's finding:[105]

> Similarly comprehensive approaches, designed to achieve not just 'equitable' but optimum utilization by fully international, system-wide organizations have been taken by some or all of the system States of several other international watercourses.

The point then is modern State practice, as evidenced in agreements, approaches international watercourse systems as an integrated whole bearing in mind the rights of all system States and seeks to make optimum utilization of the waters.

Where does the concept of equitable utilization come in?

Under sub-heading 3 which reviewed the current state

of doctrine, the Special Rapporteur stated:[106]

> Basing themselves on the practice of States, ..., virtually all the commentators writing in the field sustain the existence of equitable utilization as a rule of general international law where the system States have conflicting uses or plans for the further development of their shared water resources.

It is submitted that, therefore, the underlying principle that brings into existence the whole concept of equitable utilization or participation as it is being developed into is a conflict of uses. How does this conflict manifest itself? One need only go through the material referred to by the Special Rapporteur under this subheading. It manifests itself when some form of "appreciable injury"[107] is threatened or caused or when "substantial damage"[108] would be caused, or when the use may "affect adversely"[109] the right of States. All this serves to manifest one fundamental point: that without some form of prospective or actual injurious consequence, the whole concept of equitable utilization does not arise.

The Special Rapporteur produces material that supports the co-operation among system States for an integrated approach to the use, development, management of the international watercourse system. He demonstrates how the equitable utilization principle has been embraced in the integrated approach. It is submitted that this is an obvious fact, if in seeking optimum utilization and the approach used is that a watercourse system should be looked at as an integrated whole. In such situations there might arise conflicting uses and solution must be worked out. However, the point is that one has arrived full circle.

It is submitted that the fundamental philosophy underlying the concept of equitable utilizational or the progressive concept of equitable participation is that while system States may be entitled to take unilateral action within their territory or control, the moment there is a threat of some injurious consequence of not an insubstantial nature to the rights of another system State, there is a duty to reconcile the conflicting rights. It is submitted that on an observation of the material, the concept is more concerned with prevention of the loss or injury thus imposing the duty to consider the conflicting rights before any use has been undertaken. However, it is interesting to note that by obtaining consent but providing full compensation,[110] arriving at an agreement,[111] having an international court or arbitral commission decide,[112] by reconciling the respective interests to the greatest possible extent[113] or by simply providing for damage a proposed use that might cause injurious consequences may still be carried out.

What qualifies as an injurious consequence? If one turns to Lake Lanoux, one might conclude that so long as even an 'interest' might be affected this would bring into play the whole regime. However, it must be noted that when negotiations began in Lake Lanoux Spain's rights as opposed to interests were being affected. It was only through attempts to reconcile the conflicting rights that France changed its plans. This resulted in Spain's interests being affected. It is submitted that interests per se cannot stop a system State from

undertaking an activity. However, this does not preclude the fact that system States may have to pay compensation or seek some method for satisfying the affected interest.

What then would qualify as loss or injury or harm under this principle? Although this question will be considered under the chapter of 'appreciable harm' it is submitted, as it has been noted above, that injury must be "appreciable", something more than a minor detriment that may be fully compensated for and adequate security measures taken,[114] it must be 'substantial'.[115]

What does the proposed article set out to do? It sets out not only to articulate the settled principle of equitable utilization but also the progressive concept of 'equitable participation'.[116] The Special Rapporteur went on to explain:[117]

> States sharing an international watercourse system not only may stand on their rights to reasonable and equitable sharing of the uses of the waters but, arguably, also have a right to the co-operation of their co-system States in, for example, flood control measures, pollution abatement programmes, drought mitigation planning, erosion control, disease vector control, river regulation (training), the safeguarding of hydraulic works or environmental protection - or some combination of these - as appropriate for the particular time and circumstances. The details of such joint co-operative efforts on the part of system States should be reflected in one or more system agreements. Nonetheless, it may be maintained that there now exists a duty under general international law to participate affirmatively to effectuate more rational development, use and protection of shared water resources. To the extent that State practice does not establish that duty, it is believed that the progressive development of international law should establish it.*

In conclusion, several submissions may be made.

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*my emphasis

First there is a definite coincidence of the underlying themes of the two topics. Equitable participation grew from the concept that States should not undertake activities within their territory or control if injurious consequences were to be suffered by another system State. Thus, recognition was given to the fact that system States had vis-a-vis each other equal status. Therefore conflicting interests had to be reconciled. A balancing of interests type test was inherent in reconciling the various interests. Importance, to the fact that it was the injurious consequences that brought system States to work out their rights, cannot be underplayed. Also injurious consequences had to be of an 'appreciable', 'substantial', 'serious and lasting' level; anything less would not give system States a right to oppose the proposed activity. However, if any 'interest' as opposed to right was affected, this did not preclude the system State from carrying out the activity. However, adequate compensation or measures taken to protect the affected State's interest had to be taken.

The fact is that although there did not exist a principle in international law that prohibited system States from undertaking activities that could cause injurious consequences to other system States, the many treaties and agreements the Special Rapporteur used has demonstrated that system States have recognized vis-a-vis each other certain obligations. Thus, although the various agreements are expressed in prohibitory terms, the point is there did not exist a prohibitory principle per se

that forbade system States from carrying out whatever activity they wished to. What then can safely be concluded is that system States because of the very nature of the matter concerned (non-navigable watercourses) recognized irrespective of the fact that the activity was not prohibited that they still had obligations vis-a-vis other system States. The fact is that State practice and the numerous treaties and agreements all began to demonstrate and to accept that there are obligations entailed even when an act is not prohibited if the consequences are injurious to other system States. In the case of watercourses, this could readily be seen. One was dealing with "tangible" subject matter and thus effects of proposed activities could be worked out in "tangible" terms.

By arriving at the formulation of equitable participation other obligations that system States are seen to have vis-a-vis each other are also imposed. To what extent these obligations are regarded as duties can be seen on an examination of article 6.

Although terms such as optimum utilization might be used, it still embodies the fundamental concept of reconciling the various rights: of a State's freedom to carry out an activity against the rights and interests of other system States.

What the Special Rapporteur has done is to codify into a prohibitory rule that which has been established through practice.

By so doing system States are prohibited from taking any unilateral action within their territories, if transboundary consequences will be felt by other system States.

From the material these transboundary consequences have to be of a certain degree such as to cause, for example, appreciable or substantial harm.

It is now proposed to study the draft article on equitable participation.

Part B. Section I - Equitable participation

Article 6

It is submitted that the underlying philosophy of this article is the concept of maximizing use of a shared resource. What is maximizing use? It is the concept of trying to achieve the maximum beneficial use of the resource for all system States. Thus, the proposed use has to be evaluated from the standpoint of all system States concerned - without their consent the use cannot be undertaken. The underlying philosophy is really then equitable user of a shared resource.

The underlying philosophy which Mr. Quentin-Baxter's topic is built on is well expressed by Section 5(1) of his Outline. Section 5(1) establishes that States are ensured

> as much freedom of choice in relation to activities within their territory or control as is compatible with adequate protection for the interests of affected States.

This guiding principle does not consider the aspect of maximizing the proposed use for the benefit of all as a duty and a prerequisite (as established by the watercourses topic), before an activity may be undertaken.

In the case of maximizing use, the focus is on the integrated approach of how the use may be made beneficial

to the whole system. To use an analogy from Land Law, what one is concerned with is the concept of joint ownership of the resource. Viewed from this angle, it is then natural to understand why a system State cannot undertake a use without consent of the other owners. Sovereignty of choice to carry out an activity within one's own territory is not paramount. It is making the most of the resource that is.

Thus, there is a tremendous difference in strategy in what the fundamental principles of the two topics are based on. In Mr. Quentin-Baxter's topic there is no modification of the rule of State sovereignty. The right of a State to act is preserved even though it may be accountable to another State. However, in the international watercourses topic there has been a modification of the rule of State sovereignty. Through the concept of a shared resource, no system State may use the resource without consent of other system States. Thus, by using the concept of a 'shared' resource, the frontier or the boundary, within which a State has sovereignty, is moved. What replaces it is the concept of joint ownership of a resource.

Maximizing use then triggers the application of the article.

Does maximizing use have a significance in relation to Mr. Quentin-Baxter's topic? It certainly does. However, here, maximizing use comes as a consequence in the situation where there is a possibility of harm and a regime is needed. Maximizing use will then become a

factor to be taken into account. Lake Lanoux may be used as an example to illustrate this submission. In Lake Lanoux it could be said that what the French did was to maximize use. How was this done? Through negotiations that were of a global character, the French scheme caused gain to both sides. The scheme took into account Spanish interests to the extent that not only was there no displacement of water but Spain derived a benefit - a regulated flow of water all year round, preventing flooding and lack of water during dry seasons. In terms of Mr. Quentin-Baxter's topic, this is maximizing use.

However, what about the proposals Spain wanted the French to realize so that particular agricultural needs were cared for? What Mr. Quentin-Baxter's rules would say is that what Spain wanted was pure gain without expense. If Spain was to provide for the expense, this was a different matter, a different situation.

Turning to the Tribunal's advice in Lake Lanoux it is submitted that there is direct support for the submission of Mr. Quentin-Baxter's topic's approach to the concept of maximizing use:[118]

> France is entitled to exercise her rights; she cannot ignore Spanish interests.
>
> Spain is entitled to demand that her rights be respected and that her interests be taken into consideration.
>
> As a matter of form, the upstream State has procedurally, a right of initiative, it is not obliged to associate the downstream State in the elaboration of its schemes. If, in the course of its discussions, the downstream State submits schemes to it, the upstream State must examine them, but it has the right to give preference to the solution contained in its own scheme provided that it takes into consideration in a reasonable manner the interests of the downstream State.

However, in terms of the watercourse topic maximizing use comes together with the concept of a shared resource. As sovereign rights are varied, it becomes paramount to maximize use in the sense that the proposed activity must make maximum beneficial use of the resource. Thus, in the Lake Lanoux situation it would mean that France has a duty to give consideration to Spain's proposals for the scheme to serve its agricultural needs.

Is there then any manner in which Mr. Quentin-Baxter's topic may be used in the concept of equitable participation? It is submitted that an attempt can be made in interpreting the concept of equitable participation from the standpoint of the topic of international liability.

Part B. Section II - Equitable participation viewed from the perspective of the topic of liability for injurious consequences of acts not prohibited by international law

Article 6

In Part A of the chapter the writer came to the conclusion that what was being established was a duty of equitable participation imposed on system States, breach of which would entail wrongfulness. Equitable participation was seen as composed of two aspects: (1) equitable utilization and (2) the obligation of system States to co-operate in the protection and control of the international watercourse system. In terms of underlying principles, it was clear that the concept of equitable utilization was based on the fact that States were responsible for transboundary harm caused. There was the concept of equality of rights that

was embodied: States had the right to carry on activities within their territories but other system States had also the right to ensure that they did not suffer transboundary harm or injurious consequences emanating from the system State's use. Harm, here, or injurious consequences was qualified as having ot be of a certain degree such as appreciable, substantial or serious. As to the duty to co-operate in protection and control, this is what the progressive concept of equitable participation wishes to promote. Again it is submitted the underlying principle is working together to prevent transboundary harm that might be caused by nature (floods, erosion etc.) or by man (pollution, river regulation).

Arguably this latter aspect of harm caused by man could be included in the earlier concept of equitable utilization.

Therefore, if transboundary harm occurs because the duty of equitable participation is breached, the acting State has acted wrongfully and is responsible.

The question that follows is how are proposed activities conceptualized? Is every prospective activity wrongful if there is the prospect of harm being caused? The difficulty one immediatley runs into is what is harm. Who determines and how is an activity determined as causing harm? Are system States not then being given the right of 'veto' or the right to paralyse the activities of other system States? Again while it is admirable to promote the positive duty of co-operation and the duty of protection and control of the waters of an international watercourse system, what happens in situations where for example system

States cannot meet this duty because they are at various levels of development, because shared expectations are different, because urgent needs in a State may require measures to be taken to deal with an immediate problem? Is a system State responsible if it cannot afford to contribute towards the development of a programme or meet the required standards that other system States wish to maintain? In a situation such as Lake Lanoux for example, was France wrong in carrying out the project that had substantial benefits only for the French? Should it not have carried out the project in such a way that Spain's agricultural requirements could also be met irrespective of the fact that Spain while putting forward its plans was not simultaneously making moves to contribute to the costs? What if a proposed use may not be making optimum utilization of the watercourse system simply because the co-system State cannot afford to make a contribution towards the costs? Is the proposing State acting wrongfully by not making optimum use of the waters and thus causing harm to the other system State? Has the other system State's rights been harmfully affected so that it has a right of action against the proposing system State?

These questions lead to a basic enquiry about the article. Accepting that it is framed in prohibitory terms: (1) Is all transboundary harm wrongful - is its wrongfulness always dependent upon the breach of a rule which leaves no margin for appreciation or which entailed no comparison between the value of the activity and the extent of its harmful transboundary consequences? or (2) Is the wrongfulness

of transboundary harm commonly dependent upon a balance of interests that would determine wrongfulness?[119]

Article 6 states:

> 1. The waters of an international watercourse system shall be developed and used by system States on an equitable basis with a view to attaining optimum utilization of those waters, consistent with adequate protection and control of the components of the system.
>
> 2. Without its consent, a State may not be denied its equitable participation in the utilization of the waters of an international watercourse system of which it is a system State.
>
> 3. An equitable participation includes the right to use water resources of the system on an equitable basis and the duty to contribute on an equitable basis to the protection and control of the system as particular conditions warrant or require.

The Special Rapporteur's view of the emphasis of the article is[120]

> ... on the sharing reasonably and equitably of uses (para.1 of the article), the regional, or community oriented goal of maximizing the resource is expressly stated. Moreover, the States' right to use the waters, in the technical sense of the term, is qualified by protection and control of the system ...

The Special Rapporteur appreciated the point that "measures of protection" and "measures of control" would ultimately require precise definition. However, he pointed out that the terms employed "... do have precedents and are generally understood and widely employed by water sources specialists".[121]

The Special Rapporteur's comments on the second and third paragraphs will be considered. The Special Rapporteur sees the paragraphs as establishing positive rights for system States. However, the perspective from which these rights will be examined in this paper is as they are set in prohibitory terms. What one is here concerned with

is the question, is all harm wrongful or is there a point at which harm is not wrongful.

In article 6(1) there is first the concept of use and development on an equitable basis. This is qualified by the fact that optimum utilization should be aimed at and that adequate protection and control must be considered when use and development is proposed. Thus, the first factor to note is that while optimum utilization should be aimed at, it is only a factor to be taken into consideration. Thus, if for some reason optimum utilization cannot be attained the proposing State is not in breach of a duty. In our list of questions it might then be concluded in our example of Lake Lanoux Spain's plans may not have been feasible, for although accommodation of them might have made optimum utilization of the waters, other factors prevented attaining optimum utilization.

Equitable development and use however have to be consistent with adequate protection and control. What is adequate in a given situation may vary. It is submitted, this would depend on the system. Further in article 6(3), the protection and control of the system is regarded as a duty, the standards of which are fixed "as particular conditions warrant or require".

Thus it is submitted this appears to be a duty which is relative and subjective to the particular conditions of the system. However, there is a basic level that has to be observed. The Special Rapporteur in this connection said:[122]

> ... the system State's affirmative involvement is considered as much of a 'right' as it is a 'duty',

> since the welfare and other vital interests of the system State are so often intimately linked to the wise husbanding of the system's water resources and the careful avoidance of water's so-called 'harmful effects'.

One is again taken back to the basic premise: the duty of the acting State to prevent injurious consequences of a transboundary nature and the right of the other State to demand protection from harmful effects, due to lack of adequate measures of protection or control. However, as it was first observed, what is adequate in a given situation is relative to that system. This submission is readily endorsed by the Special Rapporteur who states that the final phrase "as particular conditions warrant or require" "has been used to qualify the expectation (or, conversely, the duty) in relation to need and to justification".[123] Thus, adequate measures of protection and control refer to a duty not a factor to be taken into consideration such as 'optimum utilization'. However, the duty is qualified in that it is relative to the given system. Thus, inherent in fixing a point at when a system State may be held in breach of the duty is the fact that a weighing up process must first be conducted. However, the fact to note is that what is being emphasized is that every system State has a duty and correspondingly every system State has a right to demand that adequate protection and control for that system is undertaken.

Article 6(2), according to the Special Rapporteur,[124]

> ... simply restates the rule that a system State is entitled to its equitable 'share', yet broadened to embrace the full scope of a system State's involvement in matters affecting the international watercourse system - its 'equitable participation'.

However, the writer sees real problems with this paragraph.

The article is drawn up in terms that if consent is not obtained and a system State is denied its equitable participation, the State that has carried out the use has acted wrongfully. Prior consent is thus required. However, how is the acting State to know if another system State's equitable participation in the utilization of the waters has been denied? Who decides this? Can a State unilaterally decide that another's equitable participation has not been denied? Is it up to the other (affected) State to decide if its equitable participation is being denied? What is consent? Is it mere notice, the providing of information that a particular activity is being undertaken? Or is it something more, something akin to a prior agreement between system States before the activity is undertaken? At this point it is pertinent to recall our discourse of Lake Lanoux. It suffices to say that if consent is equated with prior consent in the sense of prior agreement, does this not open the floodgates of system States having the arbitary right of veto over the activities of other system States? But what is 'equitable participation'?

Article 6(3) partly defines equitable participation. It includes both the right to use and the duty to contribute. This is thus explained by the Special Rapporteur who sees this article as an attempt at:[125]

> ... a straightforward delineation of the two 'aspects' of the compound principle of equitable participation: the right to use and the duty to contribute in an equitable manner. The equities are couched in the larger perspective so widely sought: the integrated approach to the development, use and protection of shared international water resources.

However, while 'protection and control' have been examined, there is the concept of 'equitable use' that has still to be defined, for equitable use together with protection and control makes up equitable participation.

To determine equitable use, one has to turn to a consideration of article 7. The first thing one notices about article 7 is that it sets down a list of factors that together or in various combinations determine what equitable use is in any given situation. Thus it is through a balancing of interests that one arrives at what equitable use is for a particular system. Before considering equitable use determinants, a tentative conclusion may be submitted: equitable participation is based on the concept of a balance of interests. Thus the point of wrongfulness, the point when the duty of equitable participation is breached and when wrongfulness occurs is not based on a rule which leaves no margin for appreciation of the activity. Does it then mean, that before fixing the point of wrongfulness, attention to use the words of Mr. Quentin-Baxter, will first be focused on the conditions subject to which the activity can be continued without entailing wrongfulness?[126] It is submitted that this is the very principle that is embodied in the article. Thus, Mr. Quentin-Baxter stated:[127]

> the determination of wrongfulness entailing State responsibility, and the adjustment of the rights and interests of the parties pursuant to ... [liability for acts not prohibited by international law] are simply two sides of the same coin.

Thus can one say that there exists this 'bonding' between the two systems of obligation in these articles? It is submitted that the answer is 'yes'. It is clear from the

article that a certain level of obligation exists but this level is relative to the particular system, thus it is not an absolute standard. What is more to determine whether the obligation is breached, there is a set of factors that must first be considered. The problem here is whether one is dealing with the concept of the freedom of States to act being limited by their obligation to respect the equal rights of other States or is one really more concerned with maximizing the use of the system? What if no 'adverse effect' is suffered but it is determined that equitable participation is being denied because full potential of the system is not being made? Can this in itself qualify as an adverse effect or something that adversely affects to an appreciable extent? The point here is whether one is really dealing with loss or injury suffered? The Special Rapporteur, Mr. Quentin-Baxter, said that loss or injury could be material or non material.[128] Further, it was a pure question of fact. In his preliminary report he quoted the following from McDougal and Schlei:[129]

> It is a continuous process of interaction, of continuous demand and response, in which the decision-makers of individual nation-States unilaterally put forward claims of the most diverse and conflicting character ... and in which other decision-makers, external to the demanding nation-State and including both national and international officials, weigh and appraise these competing claims in terms of the interest of the world community and the rival claimants, and ultimately accept or reject them.

The point is: is one dealing with conflicting uses of a State interest being adversely affected, or is the concept of maximizing the resource simply divorced from the concept of injurious consequences or being adversely

affected to an appreciable extent? It is worth turning to article 7 before a conclusion is reached on this point. Article 7 states:

> 1. The right of a system State to a particular use of the water resources of the international watercourse system depends, when questioned by another system State, upon objective evaluation of:
>
> a. that system State's
>
> (1) contribution of water to the system, in comparison with that of other system States,
>
> (2) development and conservation of the water resources of the system,
>
> (3) degree of interference, by such use, with uses or protection and control measures of other system States,
>
> (4) other uses of system water, in comparison with uses by other system States,
>
> (5) social and economic need for the particular use, taking into account available alternative water supplies (in terms of quantity and quality), alternative modes of transport or alternative energy sources, and their cost and reliability, as pertinent,
>
> (6) efficiency of use of water resources of the system,
>
> (7) pollution of system water resources generally and as a consequence of the particular use, if any,
>
> (8) co-operation with other system States in projects or programmes to attain more optimum utilization and protection and control of the system, and
>
> (9) stage of economic development;
>
> b. the total adverse affect, if any, of such use on the economy and population of other system States, including the economic value of and dependence upon existing uses of the waters of the system, and the impact upon the protection and control measures of the system States;
>
> c. the efficiency of use by other system States;
>
> d. availability to other system States of alternative sources of water supply, energy or means of transport, and their cost and reliability, as pertinent;
>
> e. co-operation of other system States with the system State whose use if questioned in projects or programmes

to attain optimum utilization and protection and control of the system;

2. The determination, in accordance with paragraph 1 of this article, of the equitableness of a use as part of a system State's equitable participation shall be undertaken through good faith consultations among the system States concerned at the request of any system State.

3. Failure to reach agreement on such a requested determination within a reasonable time entitles any system State participating in the consultations to invoke the means provided in these articles for the pacific settlement of disputes.

The point to note is that adverse effect is regarded as a factor in determining equitable use. It is not the underlying principle. However, maximizing use must embody an element of conflict of interests, an element of transboundary consequences, an element of a system State's rights being affected whether in a material or non material way. The point is if there is going to be no adverse effect to system States, there is no denial of equitable participation. Co-operation is needed to reconcile the various interests. Maximum utilization encompasses co-operation to make the most of a resource. However, why system States have to do this is because embedded in the concept is that by not maximizing use an injurious consequence occurs, harm is caused, all system States' interests are being affected to an appreciable extent. To this extent then, if the positive duty to maximize use has not been complied with, a wrong occurs because harm occurs. However, to prevent this effect all consideration must be given to the proposed activity. To arrive at what maximization of use is, one uses the same methods to evaluate the proposed activity as that established by Mr. Quentin-Baxter's topic. Both by a process of the

balancing of interests attempt in the end to achieve a result, the beneficial effects being such that even if an adverse effect occurs this is overridden by the beneficial effects. In the maximization of use, presumably if adverse effects are to occur they will be adjusted. It is clear that in the balancing of interest in the maximization of use, the concept of wrongfulness is precluded. One is not concerned with the evaluating of the proposed activity from a point of view of wrongfulness. What one is concerned with is regulating the use so that maximum benefit is sought from the activity. To this extent then one is at the very heart of Mr. Quentin-Baxter's topic. Where the parting of ways occurs is the fact that there is a duty of equitable participation and this duty embodies certain other duties breach of which would entail State responsibility for wrongfulness. To this extent then every system State is under a duty to observe the duty of equitable participation when considering a prospective use of the system.

The other differentiating aspect lies in the subject matter one is dealing with. A watercourse system can be conceptualized as having no boundaries. It intimately connects one system State with another. Transboundary effects are readily felt of any use made within a system State's territory. As the resource is precious, it is important and imperative to forge co-operation and co-ordination of work done in a system. Maximizing use is a positive approach towards looking at the system in an integrated manner - having all the 'joint owners' working together to get maximum beneficial use.

In Mr. Quentin-Baxter's topic the emphasis is not on maximizing the use of a proposed activity. In the area of a prospective activity it is concerned with the prime obligation - that of preventing or repairing any prospective loss or injury. States are viewed as sovereigns and their sovereign rights held important. They are not conceptualized as joint owners of a resource although interdependence and co-existence are recognized in this area. In the end, it is obvious that the concept of maximizing use is indeed ahead of the rules that Mr. Quentin-Baxter is formulating - this is because maximization of use establishes that irrespective of boundaries, irrespective of the sovereign right of choice to act within a territory, when an activity is proposed using the watercourse system, it has to be considered in the global sense of how the whole system will be able to beneficially take from the particular use.

CHAPTER III

Introduction

This chapter proposes to consider draft article 8 of the law on non-navigational uses of international watercourses. The article is on responsibility for appreciable harm. It is, thus, with particular interest that it is studied. The chapter is divided into two parts. Part A sets out primarily Mr. Quentin-Baxter's study of the Trail Smelter[130] arbitration. Part B considers the concept of appreciable harm.

Part A

Mr. Quentin-Baxter explained the underlying philosophy on which his concept of harm was based as follows:[131]

> Not all transboundary harm is wrongful; but substantial transboundary harm is never legally negligible. Conversely, it is the policy of the law to allow each sovereign State as much freedom, in matters arising within its territory or jurisdiction, as is compatible with the freedom of other States; but no activity which generates or threatens substantial transboundary harm may be pursued in disregard of obligations that arise, ipso facto, in customary international law.

To reiterate - Mr. Quentin-Baxter's topic does not modify the doctrine of State sovereignty; it is prospective or actual 'harm' that triggers off the regimes his topic establishes if States consider them necessary. These regimes have already been dealt with by the paper.

It is his development of the Tribunal's reasoning in the Trail Smelter[132] awards, involving Canada and the United States, that will now be considered. The facts

of the case as expressed by the Special Rapporteur were:[133]

> Industrial pollution from the privately owned smelter [in Canada] affected wooded and arable land across an international boundary, causing damage (that is, loss in value of crops and trees) that was economically significant, though small in proportion to the value of the product of the smelter industry.

The Special Rapporteur uses the case as a locus classicus for the formulation of certain rules. The first step the case took was to put into effect the general rule which in the watercourses context is readily accepted: the liberty of a sovereign State was limited by its obligation to respect the equal liberties of others. Mr. Quentin-Baxter derived from the Tribunal's decision in its second and last award the following. First that:[134]

> ... if the transboundary harm which was still being caused by the Trail smelter was shown to be wrongful in character, Canada, as the territorial sovereign, would have an obligation to ensure that such harm did not occur in future.
>
> Secondly, the question whether the transboundary harm was wrongful in character would - subject to any special factors - depend on a balance of interest test ...
>
> Thirdly, the scientific tests carried out under the tribunal's direction had established that a regime which satisfied the balance of interest test, [when applied], would indeed provide reasonably adequate guarantees that harm would cease; and there was therefore no reason to include provision for compensation in the regime that Canada was under obligation to promote and sustain.
>
> Finally, if Canada were to fulfil its obligations in relation to that regime, and harm should nevertheless occur, that would not in itself entail wrongfulness, but would attract an obligation to ensure that compensation was provided.

The conclusions one arrives at from these findings are that a 'dual regime' may be established and that irrespective of wrongfulness States may establish liability to compensate on the basis of harm caused. What is this 'dual regime'?

It is a means of expressing the fact that both the concepts proposed by the topic and wrongfulness may co-exist. There will be a point of intersection between harm and wrong. However, to arrive at this point a balancing of interests test will be applied. Thus, applying the balancing of interests test, all harm may not be wrongful. However, at the determined point of intersection, harm might become wrongful. Wrongfulness of transboundary harm depends upon a balance of interests.

The Trail Smelter dispute also proved the important point that:[135]

> ... States are not required, against their wishes, to suffer substantial harm if compensation is tendered.

However, this statement cannot be left without comment. The Special Rapporteur, in considering both the Canadian and American arguments, saw that while harm had to be assessed within a particular context, one did not want to arrive at a situation where a State's freedom of action would be little less than paralysed.[136]

Bearing these concepts in mind, it is now proposed to consider article 8.

Several observations of a general nature will be made on the nature of the concept of appreciable harm.

Part B: Appreciable Harm

It is of importance to note that article 8 and the principles established by Mr. Quentin-Baxter are based on the same underlying philosophies. Thus, the maxim sic utere tuo ut alienan non laedas is used by both Special Rapporteurs as the basis of their rules. Again the abuse of rights

principle and the principle of goodneighbourship ('voisinage'; which as Mr. Schwebel points out emphasizes the neighbour's duty to tolerate inconsequential or minor interference as opposed to the former doctrines that stress the restrictive aspect of the property owner's use rights)[137] play roles in establishing the foundation of the topics.

In arriving at the concept of 'appreciable' harm the Special Rapporteur, Mr. Schwebel, observed from material researched: [138]

> Harm of some significance is required before the legal interests of the affected State would be infringed.
>
> The qualifying terms obviously vary, although it is not as readily ascertainable whether the same or essentially the same degree of harm is intended to be imparted. 'Substantial', 'significant', 'sensible' (in French and Spanish) and 'appreciable' (especially in French) are the adjectives most frequently employed to modify 'harm'.

He notes that the sic utere tuo ... maxim has thus been almost always limited by the use of such terms.[139] The Special Rapporteur concluded:[140]

> In its use of 'appreciable', the Commission desires to convey as clearly as possible that the effect or harm must have at least an impact of some consequence, for example, for the public health, industry, agriculture or environment in the affected system State, but not necessarily a momentous or grave effect, in order to constitute transgression of an interest protected by international law.

The aspect of harm being of a certain level is essential to the topic of Mr. Quentin-Baxter. Loss or injury is a pure question of fact here, and "its legal significance has to be estimated with regard to any available criteria that help to establish the shared expectations of the States concerned."[141] It is remarked that in the first and second reports, the term 'substantial' was used to qualify 'loss or injury'

but has not been used in the Third Report.

Under the heading 'Making the rule more definite and certain' the Special Rapporteur, Mr. Schwebel, said:[142]

> ... the time has come to cast the sic utere principle, appropriately qualified, as a clear rule with respect to international watercourse systems. The classical case, ..., is the Canada-United States Trail Smelter arbitration.

Lake Lanoux was also used to give support to this proposal.[143]

The Special Rapporteur, Mr. Quentin-Baxter, was equally conscious of casting the sic utere into a working rule of law[144] for his topic.

The Special Rapporteur, Mr. Schwebel, did not make any other comment of what the Trail Smelter case established. However, he went on to survey natural and man-made hazards[145] and concluded that States may be held responsible for harm caused in such situations. Thus, for example, he observed:[146]

> Dams in rare instances give way; spills of highly toxic chemicals may amount to more than a 'pollution problem to be studied'. Damage may be catastrophic and involve, among other irreversible effects, the loss of thousands of lives.

He also noted:[147]

> Thus a highly beneficial use or a combin[a]tion of uses downstream - ... - may result in appreciable harm to one or more upstream system States.
>
> Moreover, the refusal of a lower riparian, for example, to pay compensation, make contribution, or share power (as indicated or appropriate under the circumstances) may be adjudged to deprive an upper riparian of its equitable participation.

Thus, it is clear that the Special Rapporteur, Mr. Schwebel, has by not going into the question of wrongfulness recognized that appreciable harm may occur from a beneficial use and that there was an obligation to pay compensation or make appropriate reparation. If a State refused to do so it

could be held as liable for depriving another State of its equitable participation.

Finally, it is submitted that the following represents the underlying philosophy of the concept appreciable harm:[148]

> Just as important as the text of 'appreciable' is the construction of the just balance in the procedural aspects of determining, and then quashing the charge or imposing, or excusing, a finding of appreciable harm.* Every effort has been made to heed the clear insistence that no system State be entitled to brandish a 'veto' over the head of a State proposing a modification of the regime of the international watercourse system, consistent with affording each possibly adversely affected State access to the facts and respectable opportunities to evaluate the situation and to propose or to consider adjustments to resolve the question, and even to have its findings challenged.

*(A footnote states:[149]

> Of course, there may be some damage without compensation being justified in some cases.)

It is submitted that this is precisely what the Special Rapporteur, Mr. Quentin-Baxter, seeks to establish in his topic.

The Special Rapporteur, Mr. Schwebel, concluded his view on the proposed article by noting that:[150]

> The duty to inform and to consult and then to work out a solution that obviates the expected appreciable harm is now cardinal in the field of shared water resources. To proceed unmindful of the sovereign interest of other system States often may constitute culpable behaviour, contrary to existing international law.
>
> Finally, not so much 'right' is given the system State claiming that it may be affected that it is permitted to convert its legitimate interest and that of the international community into harassment of the proposing State.

The above then are the salient features that the Special Rapporteur saw as the factors that will go towards

composing the article on responsibility for appreciable harm.

It is clear from the approach taken by the Special Rapporteur that his observations on the fundamental concepts that go towards the proposed article are in accordance with those principles elucidated by Mr. Quentin-Baxter. (Thus, one noted that: 'harm' must be of a certain degree; that injurious consequences may occur from a highly beneficial activity; that irrespective of the activity loss or injury will have to be compensated for: that it is on a balance of interests that a State will be held liable for appreciable harm; that negotiations are of prime importance; that the fundamental principle of a State's freedom of choice to act within its territory is compatible with adequate protection for interests of affected States.)

However, the concept of appreciable harm as clearly demonstrated by the article is based on a rule of prohibition.

It is equally obvious that operating simultaneously is a balance of interest test that may preclude wrongfulness if all given factors are weighed.

Articles 3(1) and 8(2) establish the general prohibitory rule, breach of which entails wrongfulness.

> 1. The right of a system State to use the water resources of an international watercourse system is limited by the duty not to cause appreciable harm to the interests of another system State, except as may be allowable under a determination for equitable participation for the international watercourse system involved.

> 2. Each system State is under a duty to refrain from, and to restrain all persons under its jurisdiction or control from engaging in, any activity that may cause appreciable harm to the interests of another system State, except as may be allowable under paragraph 1 of this article.

However, it is clear that not all harm is wrongful. Thus, as it has been observed in the context of equitable participation, it is through a balancing of interests that one arrives at the conclusion that appreciable harm is not wrongful. If one says this then it is clear that two systems of obligation exist. One establishes that causing appreciable harm is wrongful. The other establishes that if means of achieving certain aims of system States pay reasonable regard to the separate interests of other States, injurious consequences that are incidental to their activities do not in themselves entail State responsibility for a wrongful act. In this case, some form of reparation will need to be worked out unless a system State consents to foregoing its equitable participation.[151]

Article 8(3) establishes that the proposing system State has to give prior notice of a proposed use if the use may cause appreciable harm to the interests of another State. The point to note is that the proposing State gives prior notice. It decides if appreciable harm might be caused to the other State's interest before it gives notice. Thus, the initial decision is left in the hands of the proposing State. Under the equitable participation (article 6(2)), the acting or proposing State must seek consent of another

State to make sure the other State is not deprived of its equitable participation. However, the other State also has a right under article 7(1) to question the proposing system State about its proposed use.

Article 8(3) states:

> Before a system State undertakes, authorizes or permits a project of programme that may cuase appreciable harm to the interests of another system State, as determined on the basis of objective scientific data, notice accompanied by technical information and data shall be made available by the former State (the proposing State) to the system State that may be affected. The technical data and information provided must be sufficient to enable the other system State to determine accurately and to evaluate the potential for harm of the intended project or programme.

Article 8(4) sets down a period during which the affected system State is allowed to evaluate the potential for harm. It is noted that until the other State has evaluated the proposed use, the proposing State may not initiate the proposed use unless it obtains the other system State's consent.

> The proposing State under paragraph 3 of this article shall allow the other system State, unless otherwise agreed, a period of not less than six months to study and evaluate the potential for harm of the project or programme and to communicate its determination to the proposing State. The proposing State shall co-operate with the other system State should additional data or information be deemed to be needed for a proper evaluation. During the said or agreed upon evaluation period, the project or programme may not be initiated without the consent of the other system State.

Article 8(5) is the most interesting paragraph of article 8.

> 5. If the other system State under paragraphs 3

> and 4 of this article determines that the intended project or programme would, or is likely to, cause appreciable harm to its interests and such harm is deemed by the other system State not allowable under the proposing State's equitable participation, and makes timely communication thereof to the proposing State, the proposing State and the other system State are under a duty, promptly after communication of such determinations to the proposing State, to consult with the objective of verifying or adjusting the other system State's determinations, and of arriving at such modifications of the intended project or programme by negotiation as will eliminate any remaining cause of appreciable harm not allowable under the proposing State's equitable participation, except that compensation acceptable to the other system State may be substituted for project or programme modification.

Under this article the other system State, after its evaluation, finds that the proposed use has the potential of causing harm to its interests. However, this is not all the other system State has to allege. It also has to state that such harm is deemed to be not allowable under the proposing State's equitable participation. Thus, there are two links to the evaluation process. The first is on the technical data and information and such other data and information as may be requested under paragraphs 3 and 4. The other is an evaluation from the aspect of equitable participation. Equitable participation, will encompass equitable use determinations. Thus, good faith consultations may be entered into at the request of either system State. Also equitable use determinations have to be done upon an objective evaluation[152] of the various factors.

Once the other system State determines there is a potential for appreciable harm, the next step is for the

system States to enter into consultation. Here, two results may be achieved:

(1) that modifications will take place so that there will be an elimination of the cause of appreciable harm not allowable under the proposing State's equitable participation; or

(2) compensation may be substituted for modification.

As one is dealing with a proposed activity, it is possible to have an either/or situation - either the source of harm is removed or compensation paid.

However, it is clear that harm of a level that is not appreciable may be allowable. Also allowable is harm of an appreciable level if it falls within the equitable participation of a State.[153] Appreciable harm is allowable if it is compensated for. Thus, one may conclude all harm is not wrong. Also the other State is given the choice of either negotiating towards modification of plans or, if it accepts, compensation. One may also conclude that the other State is not obliged to accept compensation in lieu of a modification of proposed use.

Article 8(6) deals with the situation of the other system State failing to communicate to the proposing State its determination of the proposed use. So long as the proposing State has complied with paragraphs 3 and 4, it may go ahead with its plans. The proposing State is not responsible for any subsequent harm. Thus, this paragraph operates as a form of estoppel against the other State. Article 8(6) states:

> If the other system State under paragraph 4 of this article fails to communicate to the proposing State

> its determination that a project or programme would, or is likely to, cause appreciable harm within the period provided under paragraph 4 of this article, the proposing State may proceed to execute the project or programme in the form and to the specifications communicated to the other system State without responsibility for subsequent harm to the other system State from that project or programme, provided that the proposing State is in full compliance with paragraphs 3 and 4 of this article.

Article 8(7) considers the situation when a system State feels there is an urgent need to carry out the proposed use but that there is a probability of appreciable harm being caused. In this situation, again, the proposing State is obliged to go through the procedure set out in paragraphs 3, 4 and 5. It must 'formally declare and demonstrate' that the proposed use is of utmost urgency. If it has complied with the articles 3, 4, 5 then it may carry out the project. However, this again is qualified by the fact that the proposing State must demonstrate

> ... willingness and financial capability to compensate the other system State in full measure, by way of guaranty or otherwise, for all appreciable harm caused.

The paragraph does not relieve the proposing State of its duty to consult and negotiate in this case. The point, though, is would this paragraph allow a proposing State to carry out a proposed use while consultations are going on? It presumably does. Here, the factor of utmost urgency takes precedence over appreciable harm. Again, harm here is not wrongful. Thus on the grounds of utmost urgency for a proposed use, appreciable harm caused to another system State is not wrongful. In this case it is only a regime of reparation that the other State must look to if harm

is suffered.

Article 8(7) states:

> In the event that the other system State under paragraphs 3, 4 and 5 of this article communicates its determination that the intended project or programme would, or is likely to, cause appreciable harm to its interests and the proposing State formally declares and demonstrates to the other system State that the project or programme in question is of the utmost urgency, the proposing State may proceed without further delay with the project or programme, provided that the proposing State is in full compliance with paragraphs 3, 4 and 5, of this article and provided that the proposing State demonstrates willingness and financial capability to compensate the other system State in full measure, by way of guaranty or otherwise, for all appreciable harm caused thereby. In such event, the proposing State shall be liable for all appreciable harm caused by the project or programme to the other system State. No provision of this paragraph shall relieve the proposing State from its duty to consult and to negotiate in accordance with paragraph 5 of this article.

In the case of irreconcilable differences, resort should be made to the 'most expeditious procedures of pacific settlement available' and binding the parties.

> 8. Irreconcilable differences between the proposing State and the other system State, with respect to the adequacy of compliance with this article or concerning the evaluation of the potential for harm of the intended project or programme or regarding modifications of the project or programme in question or with respect to either system States equitable participation, shall be resolved by the most expeditious procedures of pacific settlement available to and binding upon the parties, or in accordance with the dispute settlement provisions of these articles.

Finally article 8(9) states:

> If a proposing State fails to comply with the provisions of this article, it shall incur liability for the harm caused to the interests of the other system States as a result of the project or programme in question.

The point here is that all <u>harm</u>, irrespective of whether it is appreciable, has to be paid for when system States do not observe the provisions of the article.

It is submitted that this paragraph raises several problems. The first is: how does one decide if there has been failure to comply with the provisions of the article? From the third paragraph, it was established that the proposing State evaluates whether appreciable harm would be caused by the proposed activity. Thus, if on its objective evaluation it holds that no appreciable harm will be caused, it need not submit its plans to the other State. However, what if harm does occur? Does the proposing State have to pay? On the authority of this paragraph, it does. Is this not similar to one of the findings in the Trail Smelter case? That irrespective of no wrong being committed, by virtue of harm done, compensation must be paid.

What if the other State maintains that it suffers appreciable harm? Again under the paragraph the proposing State will have to pay. However, is not compensation the cheaper way out of a situation? Would this not in turn provide the proposing State with a licence to undertake any activity it feels will not cause appreciable harm?

The problem of a proposing State evaluating the proposed activity in relation to the effect it will have on another State runs contrary to Lake Lanoux. The Tribunal stated that it was up to the affected State to decide if its rights were prejudiced. Thus, if the affected State holds that its rights are prejudiced under the paragraph, the proposing State has to pay.

The fact is that this paragraph is akin to an all-embracing strict liability type provision. Every time

harm occurs the proposing State has to pay. On one end of the scale this might encourage States to carry out activities without taking due consideration of the rights of other States. Compensation will always be paid for damage done. On the other end of the scale every time the other State alleges harm, the proposing State has to pay. It is wrongful not to pay. However, it is not wrongful to carry out the activity.

The overriding emphasis is on harm caused. Reparation has to be provided whenever harm is caused. This is not akin to Mr. Quentin-Baxter's treatment of harm. To arrive at whether reparation has to be paid under his regime, one has to, by a balance of interest test, decide whether the acting State is liable. Thus, under Mr. Quentin-Baxter's regime, on a balance of interests, an acting State may not be liable to pay reparation for harm done.

How does a State get over the fact that it has to pay for harm caused if it does not observe the article? It would have to give notice to the other State every time a use is to be made where harm might occur. However, there is no provision in the articles that says this. The only problem then would be where does one draw the line at what harm should be tolerated as an incidence of the goodneighbourliness principle and what should be paid for.

It is submitted that article 8 as it now stands does not adequately deal with the concept of appreciable harm. It does not do justice either to all the issues

the Special Rapporteur raised in his consideration of the material, leading to the article.

It is submitted that the incorporation of Mr. Quentin-Baxter's principles will provide for a complete appraisal of the concept and will realize Mr. Schwebel's vision of the article.

Thus, a preliminary stage should be incorporated in the determination of appreciable harm. The method of approaching the proposed activity should be as outlined by Mr. Quentin-Baxter. Thus, if there is the prospect of harm the acting State should notify the affected State. Either State may initiate negotiations. The activity will be evaluated and agreement as to whether a regime need be established decided. These negotiations will reveal whether there is a question of prospective harm. If prospective harm is likely, it will help determine the seriousness of such harm. If harm is determined to be of an appreciable extent then the rules as established by the article should apply. These preliminary negotiations will also serve to regulate the consequences of harm that might not be of an appreciable extent. The result might well be a State modifying its plans to control the harm, the affected State agreeing to tolerate the harm or some form of compensation if at all necessary. Thus, the introduction of these rules will evaluate the proposed activity in an efficacious manner; without curtailing the system State's sovereignty. Further, such a procedure may exempt the proposing State from paying

for harm caused if it is not appreciable.

Secondly the article makes no reference to those activities already in existence that need to be regulated in case of prospective or actual harm being caused by the existing activity. A separate article on appreciable harm should govern such situations.

The passages quoted earlier in Part B demonstrated the Special Rapporteur, Mr. Schwebel's concern over a beneficial use having harmful effects. He raised in his context the question of either appropriate measures being taken to prevent harm or providing for reparation. There was also his concern over a system State's sovereignty and the other State's interests. He observed the need to evaluate the activity by balancing the various interests. By applying to just future situations where appreciable harm might occur, the article is taking an unduly restricted approach. There are activities in existence to which probably no regulation exists as to what a State's liability would be if appreciable harm occurred. Mr. Quentin-Baxter's rules can readily cover such situations.

Thus, an article should be formulated incorporating Mr. Quentin-Baxter's rules; this article will cover the situation of activities already in existence.

An ancillary point may be added. Instead of indirectly bringing in a balance of interests test, through the aspect of equitable participation, a general formulation of this test should be incorporated into the article, so that while technical data and information may help evaluate the potential of harm other factors, such as

those drawn up under article 7 will help evaluate the activity. Thus, the beneficial use of the activity, for example, to a system State will be considered when evaluating its injurious consequences. What is being promoted, here, is the 'global' evaluation of the activity. Thus, a highly beneficial activity which may cause appreciable harm to another State may be allowed, with adequate measures of protection taken and reparation provided if harm occurs.

CONCLUSION

Our preliminary enquiry in Chapter I discovered that for the purposes of non-navigational uses, an international watercourse system was relative in character. It was in certain situations that the watercourse was treated as an international watercourse system. Only to those particular situations did the articles proposed by the non-navigational uses of international watercourses report apply. Thus, the fundamental and preliminary enquiry was to isolate the circumstances to which the proposed articles were applicable. Three situations were discovered when a watercourse system was an international watercourse system, thus making the proposed articles applicable. These were: (1) when a proposed use by certain system States would affect adversely and to an appreciable extent another system State's use; (2) when a proposed use was to be made of the whole international watercourse system; and (3) when the watercourse was said to be a shared natural resource.

Several problems were encountered when the writer tried to determine just when a system State would participate in a system agreement affecting the whole international watercourse system. It was considered that article 4(1) may be read as an expression of the policy that system States should take an integrated and co-ordinated approach to the use of the international watercourse system. The object of this approach was the maximum utilization of the international watercourse system. Internationalizing

the system was a means of allowing this integrated and co-ordinated approach to be put into effect. However, as the writer's perspective was coloured by the concepts used by Mr. Quentin-Baxter, the enquiry was pursued to determine when all system States would participate in such agreements. It was proposed that the article basically gave in general terms an entitlement to participate to system States. It was then proposed that this entitlement was used in the situations when some conflict of uses, some interest being adversely affected to an appreciable extent arose. This proposition was substantiated in the study in Chapter I, Part B, on the duty to negotiate.

The concept of a shared natural resource was noted to be of a relative character. It came into existence when use was affected. This led the writer to the enquiry of what affected meant. From the articles it was proposed that affected was qualified by adverse and quantified by appreciable extent. The proposition then forwarded was that a shared resource came into existence when use by a system State adversely affected to an appreciable extent another system State's use. The concept of a shared resource at this stage of the enquiry was seen as not adding anything new to the articles. It was questionable whether there was a need for such a concept. In retrospect, it appears to support the principle of integration and co-ordination of use of a watercourse system. However, article 4(1) sets this out. It is questioned whether in effect this article on shared natural resource puts into practical terms the wider policy oriented

article 4(1), by limiting a system State's right to participate in a system agreement only when its interests are affected.

The duty to negotiate was considered of prime importance to the international watercourses topic. It was examined in Part B of Chapter I in this paper. Thus it was noted that in article 3 the duty only arose if necessary. This was taken as a clue to the question as to when the proposed articles were applicable. The reasoning used here was that as system agreements where the object of the proposed articles and negotiations the means of arriving at this object it followed that in determining the underlying philosophy of negotiations one could deduce when the proposed articles were applicable. Thus, it was concluded that the underlying philosophy of the duty, was that it could not exist without at the very least a conflict of interests situation. This finding in turn was used to arrive at the conclusion of when system States would participate in system agreements involving the whole watercourse system.

The all important object of the duty to negotiate is the system agreement in the watercourses topic. It is the prime purpose of the articles. Through a comparative study using Mr. Quentin-Baxter's concept of negotiations and 'agreements' and Lake Lanoux, the duty to negotiate and system agreements were critically analysed. It was submitted that the 'system agreement' was the equivalent of 'prior agreement' in the Lake Lanoux context. This conclusion brought to the surface the problem of allowing

one State the right of 'veto' of another's activities. The writer at this stage wishes to propose that better suited for the purposes of the topic would be the incorporation into the articles of the concepts in relation to this area put forward by Mr. Quentin-Baxter's topic. These concepts are critically examined in Part B of Chapter I. For our purposes, it suffices to say that States should be first encouraged to determine if a system agreement is necessary. It is necessary they should then decide when a system agreement should be concluded.

An ancillary point that was made in the paper was the promotion of the negotiations as a means of dispute avoidance as opposed to just being a means of dispute settlement.

In Chapter II the concept of equitable participation was studied. It is noted that the writer came to a conclusion that the material used by the Special Rapporteur pointed to the conclusion that an underlying philosophy of the concept was based on the same underlying philosophy of the concept of appreciable harm. This underlying philosophy also was used by Special Rapporteur, Mr. Quentin-Baxter. Thus, the concept sometimes expressed by the Latin maxim sic utere tuo ..., the goodneighbourship (voisinage) principle, the abuse of rights, or simply the fact that a State's freedom to act is limited by the obligation to respect the equal freedom of others, is an underlying philosophy for the concept of equitable participation, appreciable harm and Mr. Quentin-Baxter's topic. However, in the equitable participation context, although this is proved to be an underlying philosophy, another

dimension is added to the concept - that of maximizing use. It is with some discomfit that the two concepts are made to fit together, and one is led to an almost impossible task of reconciling these two concepts - one triggered off by 'harm' the other by 'equitable user of a shared resource'.

This brings one to the conclusion that right from the beginning of the paper was seen emerging - the fact that there are two competing doctrines that form the underlying philosophy of the articles on the topic of non-navigational uses of international watercourses. The root cause of why these philosophies are competing and incompatible is by virtue of the fact that they are promoting two fundamentally different concepts. With the concepts of equitable participation, shared natural resource, system agreements, prior consent (as in article 6(2)), all system States being entitled to participate in system agreements affecting the whole watercourse system, there is a definite move towards the modification of the rules of State sovereignty. Thus, what is being established is the concept that the system States are 'joint-owners' of a shared resource. Thus, this concept of joint-ownership of a shared resource, in fact, internationalizes the watercourse system and makes the articles applicable every time use has to be made of the system. The point is, in this particular context of a watercourse system, the worst fears of the Lake Lanoux Tribunal in terms of giving a State a power of 'veto' over another State's activities is interpreted differently. The rules, here

established would be read as representing a regime constructed for 'joint-owners'.

However, there is the equally important concept of 'appreciable harm' that was analysed in Chapter III. The Special Rapporteur in advancing this concept was adamant that State sovereignty should be preserved. Thus, under the appreciable harm context, no State may have the power of 'veto' over another State's activities. The Special Rapporteur, Mr. Schwebel, endorses fully the Tribunal's decision and emphatically stands up for the rights of all system States to have the freedom to carry out activities within their territorial jurisdiction conditional upon not causing appreciable harm to another system State's interests.

It is important , first, for the Special Rapporteur of the non-navigational uses of watercourses topic to decide which doctrine he wishes to promote. What is suggested is that the importance of State sovereignty be retained and a regime built on the concept of equitable harm be established. To this end, the concepts used by Mr. Quentin-Baxter will prove invaluable. How they will be used is outlined in Chapter III.

The concept of equitable participation should be retained as a factor that helps determine whether appreciable harm would be caused. Thus, the equitable use determinants of article 7 will prove valuable in the balancing of interests when evaluating the activity.

It is suggested that the attaining of the concept of equitable participation should be aimed at.

Thus, a general article that embodies the concept of equitable participation should be promoted as a 'policy oriented' ultimate goal in the area of international watercourse systems. However, for present purposes, it is more important to draft articles using a pragmatic approach towards establishing shared values for all system States, incorporated in rules that may be followed by all.

FOOTNOTES

[1]Third Report A/CN.4/348; the topic will at times be referred to as the "international watercourses topic".

[2]Third Report A/CN.4/360; the topic will at times be referred to as the "international liability topic".

[3]Supra, Note 1, p.7, para.2.

[4]Supra, Note 1, p.8, para.2.

[5]Supra, Note 1, p.7, para.2.

[6]Ibid.; supra, Note 2.

[7]Supra, Note 1, p.2, para.3.

[8]It is interesting to note the comments of the representatives of Italy, the United Kingdom and Jamaica, as reported in the Third Report, on this point.

The representative from Italy

> "noted that the situation of non-navigational uses affecting navigational uses, and vice versa, might often occur."

The representative from the United Kingdom

> "... declared that his delegation wanted to give further study to the provision, since it had the indirect effect of bringing navigational uses within the scope of these articles."

> "The third comment, by the representative of Jamaica, was to the effect that the final phrase 'or are affected by navigation' was not relevant since such situations came under the law of State responsibility."

Supra, Note 1, p.17, f.n.47.

[9]Supra, Note 1, see pp.294-295 generally.

[10]Supra, Note 1, p.295, para.430.

[11]Supra, Note 1, p.295, para.431.

[12]Ibid.

[13]Yearbook ... 1980 Vol.II (Part Two), pp.108-136, document A/35/10.

[14]Supra, Note 1, p.10, para.8.

[15]Article 3:

"System agreements

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

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

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

[16]Article 4:

"Parties to the negotiation and conclusion of system agreements

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

"2. A system State whose use of the waters of an international watercourse system may be affected to an appreciable extent by the implementation of a proposed system agreement that applies only to a part of the system or to a particular project, programme or use is entitled to participate in the negotiation of such an agreement, to the extent that its use is thereby affected, pursuant to article 3 of the present articles."

[17]See generally: Studies on International Liability for Injurious Consequences arising out of Acts not Prohibited by International Law, Part One, Review of Multilateral Treaties, Codification Division, Dec. 1981.

[18]Supra, Note 2, p.24.

[19] "Definitions

"'Acting State' and 'Affected State' have meanings corresponding to the terms of the provision describing the scope.

"'Activity': includes any human activity.

"'Loss or injury' means any loss or injury, whether to the property of a State, or to any person or thing within the territory or control of a State.

"'Territory or control' includes, in relation to places not within the territory of the Acting State -

"any activity which takes place within the substantial control of that State; and

"any activity conducted on ships or aircraft of the Acting State, or by nationals of the Acting State, and not within the territory or control of any other State, otherwise than by reason of the presence within that territory of a ship in course of innocent passage, or an aircraft in authorized overflight."

[20]Supra, Note 2, p.19, para.43.

[21]Supra, Note 2, p.17, para.35.

[22]Preliminary report, A/CN.4/334 and Add 1 and 2.

"The primary aim of the draft articles must therefore be to promote the construction of regimes to regulate, without recourse to prohibition, the conduct of any particular activity which is perceived to entail actual or potential dangers of a substantial nature and to have transnational effects. It is a secondary consideration, though still an important one, that the draft articles should help to establish the incidence of liability in cases in which there is no applicable special regime, and injurious consequences have occurred."

Preliminary Report, supra, p.5, para.9.

[23]Supra, Note 2, p.4, para.9.

[24]Supra, Note 22.

[25] "... the phrase 'acts not prohibited by international law' in the title of the present topic was chosen for one important reason only; and that was to make it clear that the scope of this topic was not confined to lawful acts.

Supra, Note 2, p.17, para.36.

[26]Supra, Note 2, p.2, para.6.

[27]Ibid.

[28]Supra, Note 22.

[29]Supra, Note 2, p.2, para.6.

[30]Supra, Note 22, p.8, para.14.

[31]Supra, Note 22, p.17, para.37.

[32]Supra, Note 2, p.13, para.24.

[33]Supra, Note 2, p.5, para.10.

[34]Supra, Note 2, see pp.20-21, para.46-48.

[35]Supra, Note 1, p.13, para.10.

[36]Supra, Note 1, p.14, para.10.

[37]Ibid.

[38]Supra, Note 22, p.5, para.9.

[39]Supra, Note 1, p.7, para.2.

[40]Supra, Note 1, p.8, para.2.

[41]See Second Report on International Liability for Injurious Consequences Arising Out of Acts NotProhibited by International Law, A/CN.4/346, p.10, para.18.

[42]International Law Reports, 1957, p.101.

[43]Supra, Note 1, p.19, para.21-26.

[44]Supra, Note 1, p.19, para.21.

[45]Ibid.

[46] "Article 16

"Principles and procedures for the avoidance and settlement of disputes

"1. System States are under a duty to settle disputes concerning the development, use, protection or control of their shared water resources by peaceful means that do not endanger international peace and security, and justice.

"2. Absent applicable agreement between the system States concerned for the resolution of differences and the settlement of disputes concerning an international watercourse system, such differences and disputes are governed by the rules and principles of these articles and by the following:

"(a) A planned or intended use in the future of system water by one or more system States shall not be ground for denying a right of

reasonable and beneficial use in the present to another system State.

"(b) Pending a determination of equitable use, a system State is not obliged to suspend an existing beneficial use, except by agreement, unless the use is causing or will cause appreciable harm to another system State or to the environment. In the event that appreciable harm is caused, failure to modify the use, to suspend the use, or otherwise to abate the cause of the appreciable harm at the request of another system State subjects the offending system State to liability for damages and denial of the use right.

"(c) Conflicting use of an international watercourse system will be made compatible, at the request of a system State affected by the conflict, by restricting one or more of the uses, or by making adjustments to the regime of the system, to the degree necessary and in a manner calculated to produce the minimum practical loss of total utilization; more valuable uses will be given preference where other considerations are determined not to be paramount.

"(d) Where the difference between the system States involves the development, protection or control of the international watercourse system, the above principles, mutatis mutandis, shall apply.

"3. System States shall use their best efforts to adjust their differences regarding the development, use, protection or control of their shared water resources with the view to avoiding the emergence of disputes.

"4. Unless the system States concerned otherwise agree,

"(a) failure after a reasonable period of consultation and negotiations to reach an accommodation of a difference between system States regarding the development, use, protection or control of an international watercourse system entitles any of the system States concerned to call for the creation of an international commission of inquiry to investigate and report upon the facts relevant to the unresolved difference;

"(b) any system State concerned is, after the call for creation of an international commission of inquiry, entitled to convoke a special period of intensified negotiations not to exceed six months measured from the date of the call for the said commission, during which time the formation of the said commission

shall be held in abeyance;

"(c) international commissions of inquiry shall be constituted in accordance with this article and the procedures annexed to these articles at the instance of any system State concerned;

"(d) upon receipt of the report of an international commission of inquiry, the system States concerned shall renew their negotiations and, with the said report as a basis, endeavour to arrive at a just and equitable resolution of the difference;

"(e) in the event that resolution of the difference by negotiation is not attained within six months after receipt by the system States concerned of the report of the international commission of inquiry, or the formation or work of said commission has been frustrated so that its report is not rendered, any system State concerned may thereafter refer the matter to conciliation in accordance with the procedure annexed to these articles;

"(f) in the event that, with the assistance of conciliation, the system States concerned fail to resolve the difference within a reasonable time, any system State concerned may, after notice to all system States concerned and thereafter waiting a minimum of ninety days, declare the matter to be an international dispute and call for arbitration or adjudication of the dispute in accordance with the optional procedures annexed to these articles. This subparagraph shall not be operative where the system States concerned have an applicable mutually binding agreement to arbitrate or adjudicate disputes."

[47]Supra, Note 1, pp.322-323, para.470-473.

[48]Supra, Note 1, p.324, para.474, para.475.

[49]Supra, Note 46, Article 16(4)(a).

[50]Supra, Note 46, Article 16(4)(b).

[51]Ibid.

[52]Supra, Note 46, Article 16(4)(d).

[53]Supra, Note 46, Article 16(4)(e).

[54]Supra, Note 46, Article 16(4)(f).

[55]In the General Assembly, some representatives felt that this article gave rise to new problems.

"One delegation urged the Commission to be careful

not to reopen situations that had been settled for the time being by practice or by treaty and, thus, wondered whether article X was broad enough."

Supra, Note 1, p.23, para.5.

[56] Supra, Note 1, p.20, para.22.

[57] Supra, Note 1, pp.238-242.

[58] Supra, Note 1, p.242, para.339.

[59] Supra, Note 1, p.240, para.339.

[60] Supra, Note 1, p.286, para.408.

[61] Supra, Note 1, p.286, para.409.

[62] Ibid.

[63] Ibid.

[64] Supra, Note 22, Add.1, p.7.

[65] Ibid.

[66] Supra, Note 22, Add.1, p.8, para.42.

[67] Supra, Note 41.

[68] Supra, Note 22, Add.1, p.8, para.53.

[69] Supra, Note 2, p.16, para.32.

[70] Supra, Note 42, at p.125.

[71] Ibid. at p.121.

[72] Ibid. at p.127.

[73] Ibid.

[74] Ibid. at p.128.

[75] Ibid.

[76] Ibid.

[77] Ibid. at p.130.

[78] Ibid. at p.132.

[79] Ibid.

[80] Ibid. at p.133.

[81] Ibid. at p.134.

[82]Supra, Note 78.

[83]Ibid. at p.138.

[84]It is useful to quote the Special Rapporteur's introduction as it brings out the issues involved so admirably:

> "Within its own territory, a State is indubitably entitled to make use of the waters of an international watercourse system with respect to which it is a system State. This entitlement is not only an attribute of sovereignty, but, in the case of shared resources, may be grounded in the fundamental principle of 'equality of right'. Each system State enjoys this right, of course, but, where the quantity or quality of the water is such that all of the reasonable and beneficial uses of all the system States cannot be realized to their full extent, what is termed a 'conflict of uses' results. International practice then recognizes that some adjustments or accommodations are required in order to preserve each system State's equality of right. Such adjustments or accommodations are to be calculated on the basis of equity, absent specific agreement with respect to each system State's 'share' in the uses of the waters. Indeed, a number of international agreements expressly or impliedly apply this 'equitable share' concept, which may be seen as evidence of the force of the principle in customary international law.

Supra, Note 1, p.27, para.41.

[85]Supra, Note 1, p.28, para.42.

[86]Supra, Note 1, p.28, para.43.

[87]Supra, Note 1, p.28, para.44.

[88]Ibid.

[89]Supra, Note 1, p.29, para.45. See also para.44, 46, 47 for further examples. In para.47, the Supreme Court stated in the case of New Jersey v. New York the same point as follows:

> "... New York has the physical power to cut off all the water within its jurisdiction. But clearly the exercise of such power to the destruction of the interest of lower States could not be tolerated. And on the other hand equally little could New Jersey be permitted to require New York to give up its power altogether in order that the River might come down to it undiminished. Both States have real and substantial interests in the River that must be reconciled as best they may be."

[90]Supra, Note 1, p.30, para.47.

[91]Ibid.; also see f.n. 98-99.

[92]Supra, Note 1, p.31, para.47.

> "If there is no ... agreement, the rights of the several Provinces and States must be determined by applying the rule of 'equitable apportionment' each unit getting a fair share of the common river ..."

Ibid.

[93] "... the tribunal was of the opinion that the upper riparian State, under the rules of good faith, has an obligation to take into consideration the various interests concerned, to seek to give them every satisfaction compatible with the pursuit of its own interests and to show that it is, in this matter, a real desire to reconcile the interests of the other riparian State with its own."

Supra, Note 1, p.31, para.48.

[94]Ibid.

[95]Supra, Note 1, p.29, para.46.

[96]Supra, Note 1, p.32, para.49-51.

[97]Supra, Note 1, p.36, para.57.

[98]Ibid., para.58.

[99]Supra, Note 1, p.37, para.58.

[100]Supra, Note 1, see pp.41-42.

[101]Supra, Note 1, p.38, para.59.

[102]Supra, Note 1, p.42, para.66.

[103]Supra, Note 1, p.44, para.69.

[104]Ibid., para.70.

[105]Supra, Note 1, p.45, para.70.

[106]Supra, Note 1, p.48, para.73.

[107]Supra, Note 1, p.49, para.74.

[108]Ibid.

[109]Supra, Note 1, p.50, para.76.

[110]Supra, Note 1, p.49.

[111]Supra, Note 1, p.51.

[112]Ibid.

[113]Supra, Note 1, p.53, para.79.

[114]Supra, Note 1, p.49, para.74.

[115]Supra, Note 1, p.50, para.75.

[116]Supra, Note 1, p.57, para.85.

[117]Ibid., para.86.

[118]Supra, Note 42, p.140.

[119]See supra, Note 41, p.11, para.55-56.

[120]Supra, Note 1, p.58, para.87.

[121]Ibid.

[122]Supra, Note 1, p.59, para.90.

[123]Supra, Note 1, p.60, para.90.

[124]Supra, Note 1, p.58, para.88.

[125]Supra, Note 1, pp.58-59, para.89.

[126]Supra, Note 1, p.7, para.15.

[127]Ibid.

[128]Supra, Note 1, p.17, para.34.

[129]Supra, Note 22, Add.1, p.6.

[130]United Nations Reports of International Arbitral Awards, Vol.III, pp.1911 and 1938.

[131]Supra, Note 41, Add.1, p.12.

[132]Supra, Note 131.

[133]Supra, Note 41, p.12, para.23.

[134]Supra, Note 41, p.15, para.27-28.

[135]Supra, Note 41, p.19, para.36.

[136]Supra, Note 41, p.20, para.36.

[137]Supra, Note 1, p.83, para.118.

[138]Supra, Note 1, p.93, para.130.

[139]Supra, Note 1, p.94, para.134.

[140]Supra, Note 1, p.99, para.141. However, see also para.139-140, for general conceptualization of term.

[141] Supra, Note 2, p.17, para.34.

[142] Supra, Note 1, p.99, para.142.

[143] Ibid.:

> "Moreover, in the Lake Lanoux arbitration ..., the tribunal inferred that if the waters returned to the Lake by France after use had had a harmful chemical composition, temperature or other condition, the claim of Spain would have been sustained."

Ibid.

[144] Supra, Note 22, p.13, para.23; also see generally Preliminary Report, supra, Note 22.

[145] See generally, supra, Note 1, pp.100-103.

[146] Supra, Note 1, p.153, para.144.

[147] Supra, Note 1, p.102, para.152.

[148] Supra, Note 1, p.103, para.153.

[149] Ibid., f.n. 312.

[150] Supra, Note 1, p.104, para.154.

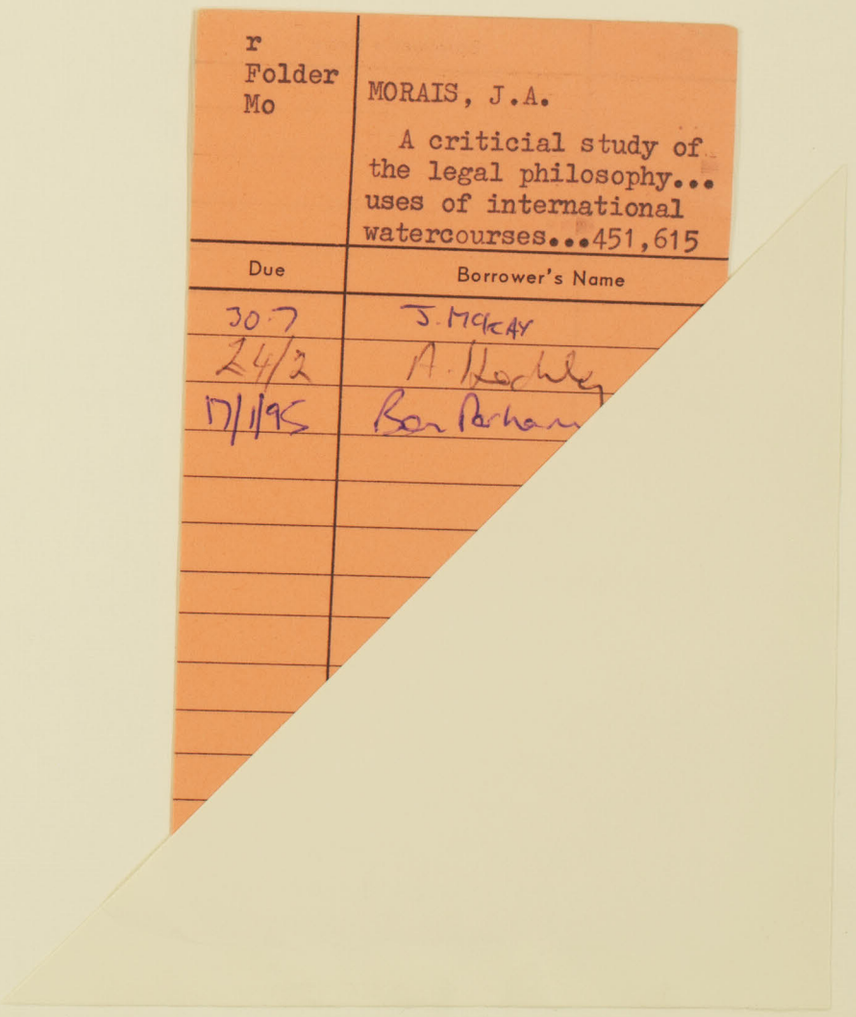
> "The procedural steps and safeguards here proposed are not regarded as stringent, except with respect to the duty to comply in good faith with them. The Special Rapporteur believes that, just as proposing States in practice do not tolerate paralyzation of their enterprises, potentially affected States in practice do not countenance a State's complete freedom of action, at least with respect to activities affecting shared water resources, where objectively the activity will or may set into motion significantly detrimental, perhaps irreversible, changes."

Ibid.

[151] Support for this may be found in articles 6(2) and 7(9)(b).

[152] See supra, Note 1, pp.72-73, para.108 for discussion of objective evaluation.

[153] See supra, Note 1, p.109, para.162.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