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The completion of the preparatory work for the UN Convention on the Law of International Watercourses

Attila Tanzi

This article deals with the debate of the UN General Assembly on the establishment of a framework convention on the Law of the Non-Navigational Uses of International Watercourses. The debate took place in two sessions, held in October 1996 and March/April 1997, with the final voting and adoption of the Convention on 21 May 1997.

The present article concentrates on the second part of the negotiations and the finalization of the text. Salient aspects are analyzed, such as the normative function of the Convention, the two important principles of "equitable utilization" and the "no-harm rule", as well as peaceful settlement of disputes. The preparatory work concerning these provisions is examined, and some general consideration is given to the results achieved.

The present article is a sequel to the account by the same author, published in NRF 21:2, which deals with the first part of the debate and outlines the main legal and political issues at stake. The original text of the ILC articles is also included in the Special Issue on Transboundary Waters. *© 1997 United Nations Published by Elsevier Science Ltd*

Although the author was a member of the Italian Delegation to the Working Group, the opinions expressed in the present article are his own and do not necessarily reflect the views of the Italian Government. The author apologizes for any inaccuracies in the presentation of the views of other delegations in this article.

On 21 May 1997, the General Assembly of the United Nations adopted the Convention on the Law of the Non-Navigational Uses of International Water courses.[1] Previously, on 4 April 1997, the Sixth Committee of the General Assembly, convened for its second session as the Working Group of the Whole,[2] had completed the debate on the issues and recommended to the General Assembly the adoption of the text of the draft Convention on the subject in hand (United Nations, 1997b).[3]

In accordance with its mandate, the Working Group proceeded with its activity in a second session, meeting from 24 March to 4 April 1997, building on the results achieved during the first session, held from 7 to 25 October 1996 (Tanzi, 1997). Consequently, in the second session, the WG discussed primarily those draft articles on which agreement had not been reached during the first round. These were especially art. 3, relating to the normative function of the Convention; arts. 5, 6 and 7, containing both the basic principles of "equitable utilization" and the "no-harm rule"; and, finally, art. 33 on the peaceful settlement of disputes.

The present discussion will confine itself to the examination of the preparatory work concerning the above provisions and will provide some considerations of a general character on the results achieved at the end of the negotiations.

The relationship between the Convention and existing and future watercourse agreements

As to the normative function of the Convention, a clause was added to the text of art. 3 as submitted by the International Law Commission (ILC),[4] according to which the Convention will not supersede provisions

The author is a Senior Lecturer of Public International Law at the University of Perugia, and Adjunct Professor of Diplomatic and Consular Law at the University of Florence, Via Laura 48, 50121 Florence, Italy.

[1] The Convention was adopted on 21 May 1997 by G.A. Resolution 51/229 with 106 affirmative votes, 26 abstentions and three negative votes, i.e. Burundi, China and Turkey (United Nations, 1997a, pp. 7–8).

[2] Under G.A. Resolution 51/206 of 17 December 1996.

[3] The text of the draft Convention as a whole was adopted by the Working Group on 4 April 1997 with 42 affirmative votes, 18 abstentions and three negative votes, i.e. those of China, France and Turkey (A/C.6/51/NUW/WG/L.3 and L.3.Add.1). For the recorded vote in the Plenary of the G.A., see footnote 1.

[4] Art. 3, para. 1.

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contained in existing watercourse agreements, and will not "affect the rights or obligations" thereunder. This is to say, that the Convention may not derogate from such rights or obligations that might be inferred from the absence of certain provisions within an existing agreements. Indeed, it is often the case that negotiations of an international agreement are aimed not only at the elaboration of provisions governing certain aspects of the subject matter, but also specifically at the avoidance of explicit provisions on other aspects.

The addition, the above wording was originally to be coupled with a fairly mild obligation to endeavour, when necessary, to harmonize existing agreements to the basic principles of the Convention (CRP.10).[5] Eventually, after some arm twisting on the choice between the words "should" and "may", this proposal was further diluted to the effect that States parties "may, where necessary, consider harmonizing such agreements with the basic principles of the present Convention".[6] One might ask whether this wording does not render the provision devoid of any normative effect. Certainly, this provision cannot be deemed to amount to an obligation to negotiate the revision of an existing watercourse agreement which does not conform with the basic principles of the Convention. But, in accordance with the interpretive principle of effectiveness (Jennings, 1991),[7] the provision in point may provide a sound legal basis to a watercourse State for requesting a co-riparian State for the opening of negotiations, at least, on whether such a harmonization is necessary.

As to the relationship of the present Convention with future agreements, the text proposed by the ILC has been retained. Accordingly, States parties will be free to conclude watercourse agreements which "apply and adjust" the provisions of the Convention to a specific watercourse.[8] The retention of this expression in art. 3, para. 3 represents one part of a package deal (CRP.75). The other side of the compromise consists of a statement of understanding to the effect that the "Convention will serve as a guideline for future watercourse agreements and that, once such agreements are concluded, it will not alter the rights and obligations provided therein". This compromise formula was separately approved in the Working Group with 35 affirmative votes, 22 abstentions and the negative vote of three delegations, namely, Ethiopia, France and Turkey.

It is perhaps worth comparing art. 3 of the Convention with the general law governing the succession of treaties on the same subject. This comparison is especially pertinent with regard to the general regime that applies to agreements that modify multilateral treaties between certain of the parties only, as codified in the Vienna Convention on the Law of Treaties, in art. 30 and 41, respectively.[9] One may wonder whether the qualified freedom for States parties to conclude watercourse agreements that apply and adjust the Convention to a specific watercourse—under art. 3, para. 3, of the framework Convention—falls within the scope of art. 41, para. 1 a) of the Vienna Convention. If this were the case, the limitation provided in the Vienna Convention for the possibility that two or more States parties to a multilateral treaty conclude an agreement modifying the treaty when such a modification "affect[s] the enjoyment by the other parties of their rights under the treaty or the performance of their obligations"[10] would not apply. This preoccupation may lose practical importance in the light of art. 3, para. 4 of the framework Convention, which basically reiterates the limitations set out in the Vienna Convention, to the effect that specific watercourse agreements may be concluded by the States parties "except in so far as the agreement adversely affects, to a significant extent, the use by one or more other watercourse States of the waters of the watercourse".

There still might be margins for discussion on whether the formula contained in art. 3, para. 3 amounts to a provision permitting modification that, according to art. 41 b) ii) of the Vienna Convention, would rule out the non-admissibility of a modification that "relates to a provision, derogation from which is incompatible with the effective execution of the object and purpose of the treaty as a whole". It is submitted that this should not be the case on the basis of the restrictive connotation of the expression "apply and adjust".

The above question is closely linked to the wider issue of the assessment of the nature of the substantive rules of the Convention. Namely, whether they are suitable for application only within a bilateral or multilateral dimension among co-riparians of a given watercourse; or whether at least some of its rules apply *erga omnes partes*. However theoretical this question may seem, it will deserve further study in a separate context in connection with the impact of the Convention in hand on International Environmental Law. The issue in point would bear on the concrete interest that non-watercourse States may have in becoming parties to the Convention.

Be that as it may, the solutions adopted in the framework Convention on its relation to future agreements do not alter the general *regime* of the Vienna Convention, also in the sense that the

[5]Conference Room Papers relating to the deliberations of the G.A. 6th Committee Working Group bear the UN document symbol A/C.6/51/NUW/WG/CRP.(*number*) and are abbreviated here as CRP.(*number*) (United Nations, 1996).

[6]Art. 3, para. 2.

[7]When a provision lends itself to two interpretations, the one which enables the provision to perform some prescriptive function prevails over the one that does not.

[8]Art. 3, para. 3.

[9]For our purposes, art. 41, para. 1 reads as follows: "Two or more of the parties to a multilateral treaty may conclude an agreement to modify the treaty as between themselves alone if: a) the possibility of such a modification is provided for by the treaty; or b) the modification is not prohibited by the treaty and: i) does not affect the enjoyment by the other parties to the treaty of their rights under the treaty or the performance of their obligations; ii) does not relate to a provision, derogation from which is incompatible with the effective execution of the object and purpose of the treaty as a whole".

[10]Art. 41, para. 1 b) i), of the Vienna Convention on the Law of Treaties.

conclusion of a successive treaty that was not permissible would not affect the validity of such a treaty, but should be considered on the basis of the law of State responsibility.[11]

The basic principles of equitable utilization and the prohibition to cause significant harm

As to the core principles of the Convention, separate informal consultations were conducted on arts. 5 and 6, referring to the principle of equitable utilization, on the one hand, and on art. 7, concerning the no-harm rule, on the other. This two-track approach proved a useful negotiating method, but could not bring about conclusive results. This was due to the fact that some delegations would hold their approval of a given formula in one of the articles in hand hostage to the acceptance of another formula in another of the three provisions in point, and *vice versa.*

For that reason, two days before the end of the session, the Chairman of the Working Group, Ambassador Yamada, tabled a text for the three articles in question as one indivisible package (CRP.94). This package reflected to a great extent the results achieved during the informal consultations conducted separately on the provisions under consideration. Yet, it also took into consideration the widespread feeling that such results could lend themselves to interpretations more favourable to the interests of upper riparians. In fact, neither arts. 5 nor 6 made express reference to the concept of "ecosystem" as contained in proposal CRP.35, already described in the commentary to the first session of the Working Group.[12] Of the amendments contained in this proposal, only the words "and sustainable" were added in art. 5, para. 1, between the words "optimal" and "utilization".

On the other hand, the informal consultations on art. 7 had not resulted in any change to the proposal already submitted at the end of the first session by Austria, Canada, Portugal, Switzerland and Venezuela (CRP.72). According to this proposal, para. 1 or art. 7 would provide an obligation to "take all appropriate measures to prevent causing significant harm to other watercourse States", whereas, under para. 2, "[w]here significant harm is caused" the obligation is set out for the harm-causing State to "take all appropriate measures, consistent with arts. 5 and 6, in consultation with the affected State, to mitigate and eliminate such harm and, where appropriate, to discuss the question of compensation". It is to be remembered that a footnote contained in this proposal stated that the latter was submitted "on the condition that the amendments to arts. 5 and 6 contained in CRP.35 are adopted". The fact that some delegations, such as China, Ethiopia, India and Turkey, were not prepared to accept all the amendments to arts. 5 and 6 as contained in CRP.35 further complicated the search for a compromise on art. 7. Lower riparian delegations were worried that the expression "consistent with articles 5 and 6" contained in CRP.72 for art. 7 would render the no-harm principle subservient to the right to utilization. More importantly, it was feared that the above expression could be interpreted in such a way as to neutralize the obligation to take all the appropriate measures to mitigate and eliminate the harm caused. Besides, if such measures have to be consistent with arts. 5 and 6, one might assume that the obligation to take them would apply only when the harm is caused by a use which is not equitable and reasonable under arts. 5 and 6. This clearly did not correspond to the general view.

The action eventually taken by the Chairman sought to change the text of the above provisions as much and at the same time as little as possible—in a way that would not be considered too little by the lower riparians, nor too much by the upper riparians. While art. 6 was left unchanged, in art. 5 the words taking into account the interests of the watercourse States concerned were inserted in para. 1 after the words "[...] with a view to attaining optimal and sustainable utilization thereof and benefits therefrom". This addition accommodated the preoccupation of some lower riparian delegations—without threatening others[13]—that the right to use a watercourse might be interpreted as a matter for the exclusive interest of upper riparian States. For that purpose, the addition appropriately reflects in the text the conceptual linkage between the principle of equitable utilization and that of the equitable share among co-riparians in the beneficial use of the watercourse emphasizing the common interest in its protection.[14] There is, in fact, general agreement among international law scholars that the equality of rights of co-riparians is one of the key principles in this area that has consolidated into customary law through consistent international judicial and conventional practice, as well as statements of principles of intergovernmental and non-governmental bodies, such as the International Law Association and the Institut de Droit International (for all, Higgins, 1995).

As to art. 7, the Chairman's proposal left the text of para. 1 as it was in CRP.72, whereas a first amendment to para. 2 consisted of the addition of the word "nevertheless" between "[w]here significant harm" and "is caused to another watercourse State". Far from being irrelevant, this amendment made clear that the obligation to take the appropriate measures for the elimination, or mitigation of the harm caused applied also when the latter arises from a use with respect to which all preventive measures have been taken under para. 1 of art. 7. That is to say, that the provision in hand pertains to the domain of primary obligations, and hence leaves any question of responsibility for wrongful activity totally unprejudiced.

[11]Art. 30, para. 5 of the Vienna Convention.

[12]See Tanzi (1997), footnote 7.

[13]With the only exception of Tanzania, whose representative in the General Assembly, when announcing that his delegation would abstain on the resolution adopting the Convention, went so far as to declare that those words introduced an element of uncertainty in the text of the Convention (UN Press Release GA/9248).

[14]Such a link had already been emphasized by the ILC in its commentary to art. 5 (United Nations, 1994).

The second proposed amendment to para. 2 of art. 7 consisted in the replacement of the expression "consistent with the provisions of articles 5 and 6" with the words "taking into account the provisions of articles 5 and 6". Even though one could possibly consider such a change as one of a merely cosmetic nature, this was certainly not the perception of most upper riparian delegations. It is true that the proposed expression could permit interpretations rendering more burdensome for upstream countries the obligation to take the appropriate measures for the elimination or mitigation of the harm caused. Namely, that additional and heavier elements with respect to those deriving from art. 5 and 6 could apply for the determination of the appropriate measures in point. In any case, the list in art. 6 containing the relevant factors for determining the equitable utilization was never meant to be exhaustive. Nonetheless, on account of the firm resistance by the large majority of upper riparian delegations, the Chairman thought it appropriate to resume the efforts to find a formula that would attain wider support. Such a formula was eventually found in the words "having regard for" as a terminological, rather than conceptual, compromise between "taking into account" and "consistent with". This amendment was to be coupled with the replacement of the words "to mitigate and eliminate" with the words "to eliminate or mitigate". The latter modification, in addition to being a change in favour of the position of upper riparian delegations, should be considered as an improvement in the logical consistency of the provision in hand.

The final package for arts. 5 to 7 tabled by the Chairman was adopted separately by the Working Group with 38 affirmative votes, 22 abstentions and four negative votes, namely, those of China, France, Tanzania and Turkey.

Apart from the drafting niceties of which the Working Group was capable, one has the impression that the text finally produced for art. 7 changes the structure of the ILC text, although less radically than it may seem at first. As already noted (Tanzi, 1997), para. 1 confirms the preventive approach of the ILC, even though the obligation of due diligence (Pisillo Mazzeschi, 1992) is expressed in the most stringent way, notably, as an obligation to take "all appropriate measures to prevent the causing of significant harm". The language brings the provision under consideration in line with the pertinent provisions of other basic international instruments for the use and protection of natural resources, such as art. 194 of the 1982 UN Convention of the Law of the Sea and art. 2 of the 1992 ECE Convention on the Protection and Use of Transboundary Watercourses and International Lakes.

The case has been appropriately made that breach of the obligation of due diligence in relation to activities, that may include the utilization of international watercourses, is generally too difficult for the claimant State to prove (Jiménez de Aréchaga, 1978). Nonetheless, under the Convention at hand, this preoccupation should be dispelled since, once the claimant State is proven to have suffered significant harm, the burden will shift on the State whose use has caused the harm to prove that it has abided by the most stringent standards of due diligence.[15] In fact, according to a contextual interpretation of art. 7, para. 1, the expression "all the appropriate measures to prevent significant harm" must be deemed to include the adoption of the standards of conduct set out in art. 5 and 6 for the utilization to be equitable and reasonable.

Para. 2 of art. 7 provides for the obligation to take "all appropriate measures [...] to eliminate or mitigate" the harm caused, even if the obligation of due diligence set out in para. 1 has been abided by. Furthermore, in keeping with the emphasis on the obligation of co-operation among co-riparians which runs through virtually the whole Convention, the said obligation of restoration or mitigation of the harm is to be performed in consultation with the affected co-riparian. It is in this respect that the final text represents quite a change from para. 2 of the ILC text, which, conversely, merely provided for an obligation of consultation.

The question of compensation

The final text of art. 7, para. 2 does not depart from the ILC version with regard to the question of compensation.[16] In both cases, compensation is not the direct object of an obligation which arises automatically from the occurrence of the harm, but is rather the object of an obligation of consultation as a means of balancing the interests of the concerned States.[17] In line with this rationale, the question of compensation could well be discussed before the actual occurrence of the damage, or even before the utilization susceptible of causing damage has been carried forward. Here one refers to situations envisaged by Part III of the Convention on "Planned measures", notably, to art. 17, which, in case of indication by one party that the implementation of the planned measures might lead to a use that would not be equitable and reasonable, provides the obligation to enter "into consultations and, if necessary, negotiations with a view to arriving at an equitable resolution of the situation".

The case can be made that if the State whose use has caused significant harm does not agree on any measures—including forms of distribution of benefits—that would balance the equities between the States concerned, one of the requirements for the legitimacy of the use of the watercourse has not been met. Under similar circumstances reparation—including monetary compensation—comes into play as a form of responsibility for wrongful activity.[18] The fact is that,

[15]This indication made by the ILC with regard to art. 7, as it was submitted to the Working Group (United Nations, 1994, pp. 241 ff.), applies also to the final text, for nothing in the changes adopted suggests otherwise.

[16]For an articulate consideration of the question of compensation with regard to the utilization of international watercourses, see Bush (1981).

[17]This consideration was made by the ILC in its commentary to art. 7 (United Nations, 1994, pp. 243 ff.).

[18]For a thorough, though not recent, study of the preconditions for State responsibility to arise out of the pollution of an international watercourse, see Handl (1975). For a succinct and lucid picture of the application of the principles of state responsibility to the use of international watercourses, see also Lammers (1984).

while responsibility for wrongful activity requires reparation of the damage caused, in the case of a diligent, reasonable and equitable utilization that causes significant harm, compensation would be only partly remedial and may be lower than the economic equivalent of the damage caused (Barboza, 1994).

The distinguishing feature of compensation for damage caused by an equitable and reasonable utilization of a watercourse does not necessarily lie in the fact that it would be lower than reparation for wrongful act but in the fact that it would be calculated by reference to the damage a well as to the benefits deriving from the new use. It could well be that the latter would be greater than the former. In this sense, compensation would operate in terms of distributive justice. On this score, the Convention under consideration provides a specific example of the operation of the law of "international liability for injurious consequences arising out of acts not prohibited by international law" as distinguished from the law of State responsibility. In fact, on account of the results achieved in the negotiations for the Convention, the above representation of the concept of compensation seems also in line with the ongoing work of the ILC on "international liability", with special regard to draft art. 5, on "liability", 21, on "nature and extent of compensation or other relief", and 22, on "factors for negotiations" on the question of compensation.

Dispute settlement

Art. 33 on settlement of disputes over the interpretation and application of the Convention triggered an impassioned debate, which took up a considerable portion of the time allotted to the Working Group. The text submitted by the ILC basically reflected the general principle of peaceful settlement of disputes together with the principle of free choice of means for dispute settlement, enshrined in art. 2, para. 3, and 33 of the UN Charter. The only exception to this, basically non-compulsory, approach was the provision that a fact-finding procedure could unilaterally be set in motion by one of the disputing parties after six months, should negotiations fail to produce a positive result. Although this procedure was not designed to produce a binding outcome, it nonetheless authorized the Fact-finding Commission to make recommendations in a report to be submitted to the parties. This is unusual, since powers of this nature are normally vested only in a conciliation commission.

Be that as it may, the ILC draft art. 33 found itself under cross-fire. On the one hand, some delegations—particularly China, India and Turkey—objected to any compulsory third party formula for dispute settlement, even in the mildest terms, such as the one provided in the ILC draft.[19] On the other hand, a number of delegations, including Finland, Greece, Italy, the Netherlands, Portugal, Syria and Switzerland, advocated the need for a set of mechanisms for third party dispute settlement that included compulsory and binding procedures, with special regard to arbitration and/or adjudication. At a later stage of the negotiations, while China and India, on the one hand, and Switzerland and Syria,[20] on the other, maintained their original positions, other delegations were prepared to accept intermediate formulas in a spirit of compromise. To that effect, a proposal jointly submitted by Finland, Greece and Italy (CRP.71), set aside compulsory arbitration or adjudication, confirmed the compulsory fact-finding procedure put forward by the ILC, and added to the draft a unilaterally triggered conciliation procedure, that would yield "a final and recommendatory award, which the parties shall consider in good faith". This proposal also provided for an "opt in" formula for arbitral or judicial settlement before the International Court of Justice, to be selected by States when ratifying, accepting or acceding to the Convention, "[...] or at any other time thereafter". If this formula has been opted for by two or more disputing parties, each of them can unilaterally submit to arbitration—or to the International Court of Justice—a dispute between each of them that could not be solved through negotiation.

The formula that eventually commanded general—though not unanimous—support was submitted by the Chairman of the Drafting Committee at an advanced stage of the discussion (CRP.83). Basically, this proposal envisaged the above fact-finding procedure as the only compulsory third party mechanism, as in the ILC text. For the rest, it provided an "opt in" formula for the submission of the dispute to arbitration—or to the International Court of Justice—along the lines of the proposal described above. It may be worth emphasizing that para. 2 of the text submitted by the Chairman, in setting out the full list of traditional third party dispute settlement procedures that may consensually be resorted to by the disputing parties—from good offices to adjudication—makes express reference to "any watercourse institutions that may have been established by such parties". Such a reference, even though of a purely hortatory character, is important in that it encourages States parties to enhance co-operation, avoid watercourse disputes and settle such disputes through the establishment of joint bodies, valuing the successful experience of existing institutions of this kind (Appelgren and Klohn, 1997; Duda and La Roche, 1997). Hence, the above reference also has the merit of bringing the provision in line with art. 8, para. 2, on "cooperation" and with art. 24 on "management".

As certain delegations were opposed to any compulsory means for dispute settlement, the Working Group adopted the text of art. 33 separately, by a vote.[21] It is worth recalling that, while Syria and

[19] Consequently, China tabled a proposal according to which the resort to any third party means of dispute settlement, from good offices to adjudication, would be based on consensus (CRP.82).

[20] See their joint proposal, UN document A/C.6/51/NUW/DC/CRP.10.

[21] Art. 33 was adopted in the Working Group with 33 affirmative votes, 25 abstentions and five negative votes, i.e. those of China, Colombia, France, India and Turkey (A/C.6/51/SR.62).

Switzerland voted in favour of the whole text, both in the Working Group and in the plenary, India, China and Turkey, respectively, abstained from the vote on art. 33, and voted against the adoption of the Convention as a whole, adducing, among other reasons, their disagreement on the text of art. 33.[22]

It has been pointed out that the law on international watercourses serves more usefully as a framework for negotiations than for adjudication (Tanzi, 1997). Indeed, it is very seldom that watercourse disputes are resolved by the mere ascertainment of a breach of a primary obligation and of the regime of responsibility deriving therefrom. However, on the assumption that international arbitration and adjudication are not necessarily confined to the function just described, it would be wrong to rule out, in absolute terms, the usefulness of arbitral or judicial procedures for the settlement of watercourse disputes. On the contrary, if one may draw a lesson from the recent case-law of international arbitral tribunals and of the International Court of Justice, especially in the area of maritime boundary disputes, awards and decisions have been rendered with a view to enhancing a negotiated settlement, rather than as an alternative to negotiation. The fact that most, if not all, disputes over maritime boundary delimitations under arbitration or before the International Court of Justice have been submitted by special agreement, leads one to question whether unilaterally triggered arbitration or adjudication will not be counterproductive in view of a negotiated solution of the dispute. Compulsory arbitration or adjudication certainly cannot make up for the lack of political will to pursue a negotiated solution. On the other hand, the mere prospect of a unilaterally triggered and binding procedure might induce the recalcitrant party to take a more flexible attitude towards negotiations with a view to avoiding resort to such a procedure by the other party. At most, an arbitral or judicial decision, even if rendered *in absentia* or met with inobservance, could be used at a later stage as a bargaining tool, or as a term of reference for a negotiated settlement of the dispute.

Concluding remarks

The adoption of the Convention on the Law of the Non-Navigational Uses of International Watercourses by the United Nations General Assembly undoubtedly marks a significant step in the process of consolidation and creation of international customary water law.

In the 1969 Vienna Convention on the Law of Treaties, the relationship between treaties and custom is, inevitably, dealt with in general and unqualified terms, to the effect that "[n]othing in articles 34 to 37 precludes a rule set forth in a treaty from becoming binding upon a third State as a customary rule of international law, recognized as such". This question might seem premature with regard to this Convention, for a treaty is a treaty after its entry into force. Nonetheless, even at this stage, the evidentiary function of the text adopted by the G.A. with respect to general custom is of the utmost interest, as is also the assessment of the actual and prospective impact on international customary law of the whole UN process of negotiations, from the preparatory work of the ILC to the debate of the Sixth Committee of the General Assembly convened as the Working Group of the Whole, which led to the adoption of the present Convention.

Indeed, as the International Court of Justice has repeatedly stated, codification conventions may perform an evidentiary or generating effect well before their entry into force.[23] The entry into force of the present Convention will certainly enhance its authority. Conversely, paucity of ratifications or accessions could weaken the impact of the Convention on custom, even if there may be a degree of ambiguity as to the reasons why a State may decide not to become a party to a codification convention. For this reason, it may be questioned whether the conventional format is appropriate for the codification exercise (Tanzi, 1997). In any case, as Baxter (1965–1966) has put it, the reason why a State does not ratify a treaty may be either a "consequence of the fact that States disagree with the treaty or because the treaty has been so warmly received into customary international law that ratifications of the treaty or accession to it would be supererogatory".

In assessing the evidentiary and creative functions of the Convention with respect to general customary law, the fact that a majority of States supported the General Assembly resolution adopting the Convention, is certainly of importance, particularly in consideration of the relatively limited number of States that are riparians to international watercourses. Further study is required to pierce the authority of the G.A. through an analysis of the positions expressed by individual delegations on specific provisions and, eventually, by comparing such provisions with the solutions adopted by other authoritative fora, such as international arbitral tribunals and the International Court of Justice, diplomatic and treaty practice, and last, but not least, the work of scholars, particularly when carried out within private international law bodies, such as the Institut de Droit International and the International Law Association.

In evaluating the link between the present Convention to the practical world where international law is intepreted and applied *in concreto*, one has the impression that diplomats and lawyers, judges and arbitrators negotiating a specific watercourse agreement or handling a watercourse dispute, will from now on keep the text of the New York Convention of 1997 in their hand together with other authoritative texts, for reference with a view to corroborating their interpretation of the body of international law on the non-navigational uses of international watercourses. If it is true that "resolutions and treaties matter" (Higgins, 1995, p. 38), then there is no doubt that the adoption of the present Convention "does and will

[22]Press Release GA/9248 99th Meeting (AM) 21 May 1997.

[23]Fisheries Jurisdiction Case (ICJ, 1974); case concerning Delimitation of the Maritime Boundary in the Gulf of Maine Area (ICJ, 1984).

matter". How much and in what ways will be for future research to assess.

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