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The Law of the Non-Navigational Uses of International Watercourses: Dilemma for Lower Riparians

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Abstract

Today, three factors relating to fresh water sources are universally recognized: first, fresh water is a finite and shrinking resource, essential to sustain life, development, and the environment; second, the effective development and management of fresh water resources requires the participation and cooperation of all users, planners, and policy makers; and third, fresh water has an economic value in all its compelling uses and should, therefore, be recognized as an economic good. More than two decades ago, recognizing that many nations share international watercourses, members of the international community felt that an agreement was needed to codify the rules regulating international watercourses, to minimize environmental damage, and to ensure each state an equitable share in the use of such watercourses. The international community also recognized that because any such international agreement would require the harmonization of a variety of concepts, principles, and interests, and would involve addressing a host of political, legal, economic, and geographic factors implicating vital state interests, an umbrella agreement for regulating international watercourses was needed. The international community envisaged that such an umbrella agreement would set out general rules applicable to all international watercourses and would be complimented by other, more specific, local agreements. The duty to cooperate and notify other riparian states about planned measures for shared watercourses and the obligation not to cause significant harm to other states' watercourses were among the cornerstone articles of customary law for the envisaged umbrella agreement. Bangladesh has always attached paramount importance to the evolution and elaboration of universal rules of law that regulate international watercourses through comprehensive national, regional, and global regimes. This essay traces the international community's progress over the last quarter century towards establishing an umbrella agreement and analyzes the resulting implications for countries such as Bangladesh.

ESSAYS

THE LAW OF THE NON-NAVIGATIONAL USES OF INTERNATIONAL WATERCOURSES: DILEMMA FOR LOWER RIPARIANS

*Reaz Rahman**

INTRODUCTION

Today, three factors relating to fresh water sources are universally recognized: first, fresh water is a finite and shrinking resource, essential to sustain life, development, and the environment; second, the effective development and management of fresh water resources requires the participation and cooperation of all users, planners, and policy makers; and third, fresh water has an economic value in all its compelling uses and should, therefore, be recognized as an economic good.

More than two decades ago, recognizing that many nations share international watercourses, members of the international community felt that an agreement was needed to codify the rules regulating international watercourses, to minimize environmental damage, and to ensure each state an equitable share in the use of such watercourses. The international community also recognized that because any such international agreement would require the harmonization of a variety of concepts, principles, and interests, and would involve addressing a host of political, legal, economic, and geographic factors implicating vital state interests, an umbrella agreement for regulating international watercourses was needed. The international community envisaged that such an umbrella agreement would set out general rules applicable to all international watercourses and would be complemented by other, more specific, local agreements. The duty to cooperate and notify other riparian states about planned measures for shared watercourses and the obligation not to cause significant harm to other states' watercourses were among the cor-

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nerstone articles of customary law for the envisaged umbrella agreement.

Bangladesh has always attached paramount importance to the evolution and elaboration of universal rules of law that regulate international watercourses through comprehensive national, regional, and global regimes. Bangladesh is among the most densely populated and water dependent countries in the world. It is a delta that is lower riparian to three of the worlds largest river systems: the Ganges, the Brahmaputra, and the Meghna. Fifty-seven rivers enter Bangladesh from across its borders. This essay traces the international community's progress over the last quarter century towards establishing an umbrella agreement and analyzes the resulting implications for countries such as Bangladesh.¹

I. *DEVELOPMENTS IN THE UNITED NATIONS*

In 1970, Finland proposed the inclusion of an item in the agenda of the twenty-fifth session of the United Nations ("U.N.") General Assembly entitled the "Progressive Development and Codification of the Rules of International Law Relating to International Watercourses."² After initially suggesting that the task of studying and codifying a legal regime for international watercourses should be entrusted either to an Ad Hoc Committee established for that specific purpose or to a competent organ of the United Nations, Finland later concluded that the International Law Commission³ ("ILC") was the most suitable body to carry out the task. Consequently, Finland asked the ILC to give priority to the problems of the regulation of international watercourses in its work program for the next session.

1. As a lay-man struggling to understand the intricacies of this complex topic, my best recourse for any inconsistencies in the arguments presented here is to take refuge in the following statement by John Skelton (1460-1529):

Whoever goes to the law goes into a glass house, where he understands little or nothing of what he is doing; where he seen a small matter blown up into fifty times the size of its intrinsic contents, and through which if he can perceive any other objects, he perceives them all discolored and distorted.

2. *Note Verbal Dated 24 April 1970 From the Permanent Mission of Finland to the United Nations Addressed to the Secretary-General*, U.N. GAOR, 25th Sess., U.N. Doc. A/7991 (1970).

3. G.A. Res. 174, U.N. Doc. A/RES/174(II) (1947) (establishing International Law Commission); G.A. Res. 36/39, U.N. GAOR, 36th Sess., U.N. Doc. A/RES/36/39 (1981) (expanding International Law Commission to include 34 members).

The ILC was established on November 21, 1947, by the U.N. General Assembly to initiate studies and make recommendations for the purpose of encouraging the progressive development and codification of international law.⁴ Indeed, a codification department was established in the U.N. Legal Department, which also served as a Secretariat for the ILC. No commensurate division, however, was set up for the associated obligation under Article 13⁵ "to encourage progressive development" of international law. This was no accidental omission. The development of international law is a matter for states. Thus, states participate in inter-governmental fora, whether within standing organs of the United Nations or in ad-hoc multilateral conferences set up for specific subject areas.

The ILC serves as a bridge between scholars, who receive enhanced authority and status as international consultants through their participation in the ILC's work, and the Sixth (Legal) Committee of the U.N. General Assembly, where representatives of states deliberate over proposals and choose those worthy of being progressively developed. Following the Sixth Committee's considerable deliberation of Finland's Proposal, the U.N. General Assembly adopted Resolution 2669,⁶ on December 8, 1970, which recommended that:

[T]he International Law Commission should, as a *first step*, take up *the study* of the law of non-navigational uses of international watercourses with a view to its progressive development and codification and, *in the light of its scheduled programme of work*, should consider the *practicability of taking the neces-*

4. See U.N. CHARTER art 13. Article 13 of the U.N. Charter entrusts the General Assembly with the responsibility of developing international law. *Id.* Article 13 states:

- 1) The General Assembly shall initiate studies and make recommendations for the purpose of:
 - a. promoting international cooperation in the political field and encouraging the progressive development of international law and its codification;
 - b. promoting international co-operation in the economic, social, cultural, educational, and health fields, and assisting in the realization of human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion.
- 2) The further responsibilities, functions, and powers of the General Assembly with respect to matters mentioned in paragraph 1(b) above are set forth in Chapters IX and X.

Id.

5. *Id.*

6. G.A. Res. 2669, U.N. GAOR, 25th Sess., Supp. No. 28, at 127, U.N. Doc. A/8028 (1970).

sary action as soon as the Commission deems it appropriate.⁷

The ILC did in fact include the topic in its 1971 Work Program, twenty-third session, and 23 years later, in 1994, at its forty-sixth session, adopted the final text of a set of thirty-three Articles on the law of the non-navigational uses of international watercourses ("Draft Articles") and a resolution on confined transboundary groundwater.⁸ The ILC recommended this text to the U.N. General Assembly for elaboration into a U.N. General Assembly Convention or into an International Conference of Plenipotentiaries on the basis of the Draft Articles.

On February 17, 1995, the U.N. General Assembly adopted Resolution 49/52, on the recommendation of the Sixth Committee,⁹ entitled "Draft Articles on the Law of the Non-Navigational Uses of International Watercourses."¹⁰ Key elements of the U.N. General Assembly Resolution include:

2. *Invites* states to submit, not later than 1 July 1996, written comments and observations on the draft articles adopted by the International Law Commission;
3. *Decides* that, at the beginning of its fifty-first session [1996], the Sixth Committee shall convene as a working group of the whole, open to States Members of the United Nations or members of specialized agencies, for three weeks from 7 to 25 October 1996 to elaborate a framework convention on the law of the non-navigational uses of international watercourses on the basis of the draft articles adopted by the International Law Commission in the light of the written comments and observations of States and views expressed in the debate at the forty-ninth session.¹¹

This sparse chronology covers a quarter century of specific endeavors to regulate the use of international watercourses. It barely conceals the intense controversy, legal complexity, and political sensitivity that, from the time of its inception, has pervaded almost all aspects of the international community's at-

7. *Id.* at 127, ¶ 1 (emphasis added).

8. *Report of the International Law Commission of the Work of its Forty-Sixth Session*, U.N. GAOR 6th Comm., 49th Sess., Supp. No. 10, at 326, U.N. Doc. A/49/10 (1994) [hereinafter *Report of the ILC's Forty-Sixth Session*].

9. *Report of Sixth Committee*, U.N. GAOR 6th Comm., 49th Sess., 3d plen. mtg. at 12, 15, U.N. Doc. A/49/738 (1994).

10. G.A. Res. 49/52, U.N. GAOR, 49th Sess., Agenda Item 137, U.N. Doc. A/RES/49/52 (1995).

11. *Id.* at 2, ¶ 3.

tempt to develop and codify the law of international watercourses.

Bangladesh's participation in the complex process of having a legal regime for the uses of international watercourses has been significant:

- 1) In 1970, Bangladesh, then part of erstwhile Pakistan, argued that the progressive development and codification of rules of international law pertaining to international watercourses should be entrusted to an inter-governmental committee, preferably under the U.N. Security Council or the U.N. General Assembly. The U.N. General Assembly's decision was to entrust the task to the ILC.
- 2) In 1970, Bangladesh requested that the topic be given priority in the work program of the ILC at its next session. The U.N. General Assembly recommended that the ILC should, as a first step, take up the study of the work program and consider the practicability of taking necessary action.
- 3) Twenty-three years later, in adopting the final text of a set of thirty-three Articles, the ILC recommended that the U.N. General Assembly or an International Conference of Plenipotentiaries elaborate a convention on the basis of the Draft Articles. Bangladesh fully supported the calling of an International Conference. The U.N. General Assembly decided, however, that the form for elaborating the convention would be a Working Group of the Whole of the Sixth Committee.
- 4) U.N. General Assembly Resolution 49/52 downgraded the form of the final product from a convention to a "Framework Convention."
- 5) Controversies arose over the timing of the International Conference, its working methodology, and the form of the final instrument.

The above factors are not academic, but have specific relevance and bearing on the legal status and significance of the Draft Articles, the ultimate status of the final product, and the degree of its acceptability among states.

II. *LEGAL STATUS AND SIGNIFICANCE OF THE ILC DRAFT ARTICLES*

In 1970, Bangladesh strongly advocated that the task of progressively developing and codifying the law of international wa-

tercourses should be entrusted to an inter-governmental committee rather than the ILC. Bangladesh argued, from a practical point of view, that the work load of the ILC was already heavy and the ILC would, therefore, have difficulty according priority to a matter that Bangladesh felt was of the highest urgency and importance. In addition, Bangladesh argued that the ILC, as a limited body of thirty-four Member States elected in their individual capacity as persons of recognized competence in international law, was an inappropriate forum for the progressive development of the law of international watercourses.¹² The ILC was a strictly juridical body, whereas the question of international watercourse regulation had important non-judicial aspects, including complex economic, ecological, and technological implications that would require intricate, politically nuanced decisions to avoid interstate disputes. In similarly complex political situations, the United Nations had not hesitated to establish Special Committees,¹³ independent of the ILC and within the framework of inter-governmental jurisdiction.

The legal status of the ILC and the significance of the Draft Articles assume particular importance for an additional reason. While the ILC has been mandated to codify and progressively develop international law, it is already handicapped insofar as the latter function is concerned, since this task falls essentially within the purview of states. The complexity of the law relating to international watercourses and their uses makes this aspect of the mandate particularly ambiguous and contentious. A key question thus arises, which is to what extent the Draft Articles submitted by the ILC are declaratory of existing customary international law and to what extent they define the precise limits of progressive development. This ambiguity has an important bearing on the degree of acceptance of the Draft Articles and can potentially be used by national actors to reject them.

Provisions that are declaratory of customary international

12. See U.N. GAOR, 21st Sess., Supp. 16, at xiii, U.N. Doc. A/6316 (1966) (listing 25 members of ILC when Resolution 2669(XXV) was passed). Bangladesh was not a member of the ILC. *Id.*

13. Special Committees, independent of the ILC, that were established by the General Assembly include:

- i. Special Committee on question of defining aggression;
- ii. Committee on Peaceful uses of Outer Space;
- iii. Special Committee against Apartheid;
- iv. Special Committee on Decolonization.

law are clearly binding on states and create real legal rights and obligations. States may rely on these provisions against other states, irrespective of whether the latter states ratify or accede to any future convention elaborated by the U.N. General Assembly. For this reason, it is important to identify whether the ILC's present Draft Articles amend customary international law thereby negatively affecting or altering the legal rights and obligations of states. If the ILC's Draft Articles, or provisions of any future convention based on these Articles, are not declaratory of international law and have not amended that law, then states can take the obverse position and claim that these cannot be binding without their ratification or accession.

The ambiguity surrounding the mandate of the ILC to "progressively develop" the law on non-navigational uses of international watercourses has been further compounded by the use of the "Framework Agreement" concept by successive Rapporteurs.¹⁴ Discussions in the Sixth Committee and the ILC did not settle questions regarding the form of the final product. Several alternative options were voiced, including: (i) the elaboration of a convention; (ii) a "Framework Agreement;" (iii) the adoption of a resolution accepting the ILC Draft Articles without reopening discussion; and (iv) adopting model rules, general principles, or guidelines as statements of law.

The latest Rapporteur, Robert Rosenstock, referred to this matter in the commentary of his Second Report, in which he stated that:

During the course of its work on the present topic, the Commission has developed a promising solution to the problem of the diversity of international watercourses and the human needs they serve: that of a *framework agreement*, which will provide for the States parties the general principles and rules governing the non-navigational uses of international watercourses, in the absence of specific agreement among the States concerned, and provide guidelines for the negotiations of future agreements. This approach recognizes that the optimal utilization, protection and development of a specific international watercourse is best achieved through an agree-

14. See *Report of ILC's Forty-Sixth Session*, *supra* note 8, at 207 (outlining and explaining "Framework Agreement" concept); see also *Report of the International Law Commission on the Work of its Forty-Fifth Session*, U.N. GAOR 6th Comm., Supp. No. 10, at 218, U.N. Doc. A/48/10 (1993) (discussing Framework Agreement).

ment tailored to the characteristics of that watercourse and to the needs of the States concerned. It also takes into account the difficulty, as revealed by historical record, of reaching such agreements relating to individual watercourses without the benefit of general legal principles concerning the use of such watercourses. It contemplates that these principles will be set forth in the framework agreement. This approach has been broadly endorsed both in the Commission and in the Sixth Committee of the General Assembly.¹⁵

The key factor motivating the form of the final document adopted by the ILC was the extent of its acceptability to states. The utility of the Framework Agreement was to be measured by the extent of its ratification. Some nations argued in favor of model rules or an authoritative statements of law, whose strength would be determined by the depth of endorsement of a U.N. General Assembly resolution. Indeed, it was argued that increased flexibility in the final document would permit more states to adapt their general rules to the specific watercourse regime, and hence, would lead to a wider acceptance and recognition.

Many countries expressed preference for a Framework Agreement approach because, even though model rules make it possible to circumvent the problem of ratification, they do not permit the legal advantages of a binding instrument. In addition, the ILC was a codification body, not a think tank called upon to produce studies. Furthermore, many Draft Articles dealt with procedural mechanisms that would become fully effective only within the framework of a treaty and would realize their full potential only if embodied in an instrument of binding force. Given the growing international awareness with environmental issues, the importance of the matter warranted conclusion of more than a Framework Agreement: a multilateral treaty.

In Bangladesh's view the Framework Agreement on non-navigational uses of international watercourses falls short of the aims and purposes of codification and the progressive development of international law. Bangladesh would have preferred a general convention specifying in detail the rights and duties of watercourse states. In Bangladesh's view the Framework Agree-

15. *Report of the ILC's Forty-Sixth Session, supra* note 8, at 207.

ment calls into question existing rules of customary international law that are universally recognized, peremptory, and binding. At various points in his commentary Rapporteur Rosenstock refers to the provisions of the Framework Agreement Articles as being "residual in character" and states that there is no obligation to enter into specific "watercourse agreements."¹⁶

Bangladesh maintains that the rules embodied in the Framework Agreement are well-established rules of customary law. Rules such as the equitable utilization and the peremptory obligation not to cause significant harm to other riparian states have evolved over a long period of time and probably exist as general principles of law under the meaning of Article 38 of the Statute of the International Court of Justice.¹⁷ To treat these rules as mere "guidelines" in the negotiations and conclusion of specific watercourse agreement is misleading. Far from being "residual," these rules are universally applicable principles of customary law. Any elaboration of the Framework Agreement must further existing watercourse agreements, and not be accepted as a mere guideline.

III. IMPORTANT ASPECTS SURROUNDING THE DRAFT ARTICLES OF THE INTERNATIONAL LAW COMMISSION

While all countries will be examining the thirty-three Draft Articles of the ILC with a view toward maximizing their own national interest, there are certain broad based features that need

16. *Id.* at 208.

17. Statute of International Court of Justice, June 26, 1945, art. 38, 59 Stat. 1055, 1060. Article 38 states:

1. The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply:
 - a. international conventions, whether general or particular, establishing rules expressly recognized by the contesting states;
 - b. international custom, as evidenced of a general practice accepted as law;
 - c. the general principles of law recognized by civilized nations;
 - d. subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.
2. This provision shall not prejudice the power of the Court to decide a case *ex aequo et bono*, if the parties agree thereto.

Id.

to be taken into account by all. In informal discussions¹⁸ with Rapporteur Rosenstock, the following salient points have emerged:

- i) The Draft Articles reflect the law as it is and not as it should be. The present ILC text represents the best possible compromise between extremely polarized views;
- ii) Some law is sometimes better than no law at all. The most important feature of the thirty-three Draft Articles is that they represent a balancing process, a package deal. The essence of the package is that radical amendments may put the whole understanding at risk. Going the treaty route and insisting on specific amendments may illicit counter-reactions from states that would make the entire convention a dead letter. For states such as Bangladesh, a failure to settle the text of a convention on the basis of the Draft Articles could create a situation of considerable legal uncertainty, leading to the worst of both worlds. Bangladesh would have no convention to rely on and the Draft Articles, without broad support, would lose status as an authoritative statement of law. In other words, a failure to elaborate an international convention would represent a major set back for countries such as Bangladesh.
- iii) Political realities also have to be taken into account. A lack of parity in negotiating power existed among the various states involved and an uneven distribution of interest and varying degrees of concern on certain issues such as the environment were present. Thus, many states had no direct concern with regard to the legal status of international watercourses; many other upper or lower riparians had already concluded bilateral agreements and the evolving law had no direct impact on them. For a few countries alone, the impact of water scarcity had a direct and dire consequence. The views of these countries tend to represent the extremes between upper and lower riparians.
- iv) The Draft Articles bridge a palpable gap in the international legal order. The Law of the Sea Convention of 1982 dealt with ocean space.¹⁹ The Stockholm Declara-

18. Informal Bilateral Discussions with Robert Rosenstock, Rapporteur (Oct. 15, 1994).

19. *Official Records of the Third United Nations Convention on the Law of the Sea*, Vol. XVII, at 151, U.N. Doc. A/CONF.62/122 (1982). The Third U.N. Conference on the

tion,²⁰ the Montreal Protocol,²¹ the Rio Declaration and Conventions on Biodiversity and Climate change,²² and a variety of regional conventions have made significant advances in the field of environmental law. Only the law pertaining to non-navigational uses of international watercourses has lacked systematic expression in a solemn legal instrument. The linkages between these conventions are of enormous significance, especially for Bangladesh situated as it is in the flood planes of the world's largest delta and on the divide between two major ecosystems. The interface between the Law of the Sea provisions and the thirty-three Draft Articles have special relevance to the problems faced by Bangladesh. These linkages also tend to make the law more sensitive to problems and possibilities created by the rapid advance of technology and scientific knowledge. They tend to alter the balance between upper and lower riparians, probably in favor of the latter through universal recognition of the norms of law.

A. *Positive Features of the Draft Articles*

To have some objectivity in determining the merit of the Draft Articles it is important to tabulate all the positive features of the ILC's Draft Articles, both general and specific, which are cited by member states in the Sixth Committee. Among the general features the following could be listed:

- a) The world community took a leap forward by simply elaborating the thirty-three Draft Articles that recognize, in essence, that a state is no longer free to make decisions re-

Law of the Sea (1973-82) adopted the comprehensive 1982 U.N. Convention on the Law of the Sea. *Id.* It entered into force in November, 1994.

20. *Report of the United Nations Conference on the Human Environment*, U.N. Doc. A/CONF.48/14/Rev.1, at 3 (1973).

21. Montreal Protocol on Substances that Deplete the Ozone Layer, Sept. 16, 1987, 26 I.L.M. 1541 (entered into force Jan. 1, 1989). The Montreal Protocol, signed in 1987 and ratified by 132 countries, identified certain ozone-depleting substances and set schedules for phasing out their use. *Id.*

22. *Report of the United Nations Conference on Environment and Development*, Vol 1, at 6-7, U.N. Doc. A/CONF.151/26/Rev.1 (1992). The U.N. Conference on Environment and Development ("UNCED" or "Earth Summit"), held in Rio de Janeiro in 1992, adopted a Declaration and Agend 21, a Comprehensive Programme of Action. *Id.* The Rio Summit also adopted a Convention on Biological Diversity, signed by more than 150 countries and ratified by a sufficient number to enter into force on 29 December 1993. *Id.* Rio also adopted a Framework Convention on climate change which entered into force on 21 March 1994. *Id.*

- garding new uses of an international watercourse on its own. Such use is subject to consultation and negotiation.
- b) The Draft Articles take adequate account of existing, proven regulations under international law, in line with the objective of creating a comprehensive system of mutually complementary global and regional regimes for international watercourses.
 - c) The Draft Articles provide states with a normative framework for the use of international watercourses by setting a general minimum standard that could, henceforth, apply to all international watercourses for which there are no binding agreements to date. In addition, the broader definition of the term "watercourse" allows not only the optimal use of a watercourse as a common resource, but also, its comprehensive and effective protection.
 - d) The prior approach did not, however, prevent states from taking account of specific agreements of the particular characteristics of each international watercourse and its specific use. In this connection, the Draft Articles make it clear that such agreements must, in all circumstances, take account of uses by all watercourse states, even if they had not themselves participated in the negotiations.
 - e) The Draft Articles establish a basic level of protection allowing the use of watercourses to be fairly assessed in accordance with the principles of equitable and reasonable utilization and participation, and make it possible to reconcile conflicting interests.
 - f) The inherent character of disputes over uses of international watercourses calls for special procedures, especially in connection with the evaluation of the degree to which uses of international watercourses should be regarded as reasonable and equitable.

More specifically, the key Draft Articles, Articles 5, 6, 7, 8, and 33 provide additional benefits:

1. Article 5, 6, 7, and 8 provide guidelines for the settlement of disputes based on reason, equity, cooperation, consultation, and participation. These guidelines are underscored by the provisions relating to "planned measures" in Part I(II), "protection, preservation and management" in Part IV, and the dispute settlement provisions articulated in Article 33.
2. The ILC did not simply restate fundamental principles of

- international coexistence, but has established specific mechanisms for translating those obligations into action.
3. Article 33, on the settlement of disputes, and in particular on the obligations and mechanisms of fact-finding, offers a simple and flexible approach.
 4. Obligations such as due diligence, equitable and reasonable use, and the obligation not to cause significant harm to other watercourse states are supplemented by provisions in Articles 8, 9, 11, 12, 14 and 27. These Articles touch on the general obligation to cooperate, the obligation to regularly exchange data and information, the obligation to provide timely notification, and the obligation to hold consultations and negotiations on planned measures.²³

B. *Negative Aspects of the Draft Articles*

These positive aspects of the Draft Articles must be assessed against their negative factors, especially in the context of Bangladesh's critical dependence on fresh water resources and vulnerability to unfair uses of international watercourses. The immense importance that the Government and people of Bangladesh attach to this issue is best reflected in the statement of Prime Minister Khaleda Zia of Bangladesh to the U.N. General Assembly on October 1, 1993, in the context of water sharing issues with India.²⁴

23. See *Report of the ILC's Forty-Sixth Session*, *supra* note 8, at 195-326 (setting forth, with commentary, each of thirty-three Draft Articles).

24. Begum Khaleda Zia, Prime Minister of Bangladesh, statement in the general debate of the forty-eighth session of the U.N. General Assembly (Oct. 1, 1993).

[S]ome issues remain unresolved with our neighbor India, the most important one being the question of water sharing. We have not as yet succeeded in effectively convincing India about our fair share of the water resources of the common rivers flowing through the two countries. . . . [I]ndia has been unilaterally withdrawing the Ganges water in the upstream since the completion of the Farakka Barrage. Withdrawal of water during the dry season causes serious drought while release of excess water during the rainy season creates severe floods in Bangladesh. This has created unimaginable adverse effects on the economy and environment of Bangladesh. . . . This unilateral withdrawal of water, in complete disregard of the interests of the people of Bangladesh, has brought over 40 million people in the Ganges [and] the Padma basin face to face with a catastrophic disaster.

Th[e] Farakka Barrage has become an issue of life and death for [Bangladesh]. Due to obstruction of the natural flow at Farakka Barrage, a process of desertification is evident throughout the northern and western parts of Bangladesh. As a result vegetation is dwindling. Salinity is spreading [and is] threatening industries and agriculture with ruin. Increased siltation is reduc-

The last recourse for smaller or weaker states is to resort to the rule of law. Thus, Bangladesh's support for binding rules of law rather than to general principles, model rules, or guidelines is hardly surprising.

A crucial overall aim of any future convention is to ensure respect for the principle of common responsibility. A primary goal of the ILC Draft Articles is to establish a synthesis and find a balance between the widely differing legal positions and political interests among riparian states. Whether this balance has been achieved will determine the acceptability of the Draft Articles.

The key to attaining this balance is the content and close interdependence of several principles that are central, controlling, and long-standing in customary international law, namely: equitable and reasonable utilization and participation (Article 5); the obligation not to cause significant harm (Article 7); and the general obligation to cooperate (Article 8).

On its face, the current Draft Articles appear to take a step backward on all these fundamental issues. Thus, the long-standing customary rule of "reasonable and equitable apportionment" has now, under the present Article 5, been diluted and couched in terms of "utilizing the watercourse in an equitable and reasonable manner,"²⁵ a phrase that gives rise to the impression that the rule was procedural rather than substantive. References to the language of "right," "entitlement," and "an equitable share or solution" have been omitted.²⁶ Moreover, a new concept of "optimum utilization" has been introduced whose net effect is to

ing the navigability of the rivers. Fish and animal resources are fast moving towards extinction. Innumerable people of various occupations, who depended on the river Padma for their living, are becoming unemployed. Many are being uprooted from their homes and hearths. As the whole world voices concern for the protection of the environment, at that very moment a big part of Bangladesh's population is being pushed over to the threshold of poverty and destruction. . . . To put it simply, our economic structure is faced with a disaster as a consequence of the Farakka Barrage. . . . Bangladesh wishes, therefore, to draw the attention of the world community to this issue in the interest of establishing human rights, protecting the right to natural resources and ensuring the process of development. Something must be done urgently to end this inhuman treatment towards the people of Bangladesh. We firmly believe that arrangements must be made to ensure a fair sharing of the water resources of the Ganges by signing a permanent agreement immediately.

Id.

25. *Report of ILC's Forty-Sixth Session, supra* note 8, at 218.

26. *Id.*

weaken the rule.²⁷ The concept or principle of sustainability is perhaps more relevant than optimum utilization.

Far more damaging, however, is the reframing of Article 7, which amends a substantive rule of customary international law and abridges the rights of states. It changes adversely the relationship between Articles 5 and 7. The peremptory obligation not to cause significant harm is diluted to that of exercising "due diligence" in utilizing watercourses in such ways as to not cause significant harm.²⁸ This preemptory obligation has raised the threshold of harm that can be caused. This is reflected in the commentary by Rapporteur Rosenstock, who states that "due diligence is an obligation of *conduct not result*."²⁹ The current formulation of Article 7 has thus adopted a more permissive attitude despite the increasingly scarce and competing uses of water resources. It has led to the assertion that even though an activity results in significant harm, that fact does not necessarily constitute a basis for barring it. In other words, the obligation the Article establishes relates to the means and not the ends. Bangladesh, like other lower riparians, strongly disagrees with this view. In Bangladesh's view, the equitable and reasonable utilization of an international watercourse by definition rules out significant harm to another watercourse state.

One of the critical elements of change in the Draft Articles was the replacement of the word "appreciable" with "significant."³⁰ It is Bangladesh's contention that harm can be measured and quantified in precise terms through sensitive and reliable scientific techniques. Thus, on a broad plain, varying degrees of harm can be identified. Lesser harm is generally tolerated by states without the need for compensation in accordance with the principle of good neighborliness. A second category is significant or substantial harm that is unacceptable in the absence of suitable compensation or the consent of the affected state. Yet, another category, that of devastating harm, is generally intolerable. Degrees of harm in the higher categories should certainly give rise to liability since the rights of other watercourse states will have been violated. The obligation of due

27. *Id.*

28. *Id.* at 236 (emphasis added).

29. *Id.* at 237 (emphasis added).

30. *Id.* at 236.

diligence is incumbent on states at all times. The "result" of "conduct" is a key ingredient in the test of due diligence.

The relationship between the principle of equitable utilization in Article 5 and the obligation not to cause significant harm is critical in balancing the Draft Articles as a whole. Bangladesh maintains that the obligation not to cause significant harm is the controlling principle of customary international law. This is the single rule that seeks to place restrictions on the actions of upper riparians and is the legal means for giving practical expression to theory of absolute territorial integrity, which has long been regarded as the legal basis of lower riparian interests. In the context of Bangladesh's dispute with India, the "No Significant Harm" rule is the only protection against the prolonged denial of negotiations as a weapon deployed to pressure Bangladesh.

Another fundamental rule of customary international law is the general obligation placed on states to cooperate under Article 8. This obligation constitutes an essential legal underpinning for the entire legal framework established by the Draft Articles and in Bangladesh's view constitutes a duty under customary international law. Article 8, however, does not specify the consequences when consultations between parties are inconclusive or fail altogether. The need for the elaboration of guidelines on negotiations and how to proceed if differences persist should be covered in the Draft Articles. This lacuna can perhaps be filled by a precise definition of the duty to cooperate, identification of specific examples of its breach, and specific provisions identifying the nature of "interim measures" to take care of adverse affects.

CONCLUSION

The above negative factors are only very broadly indicative of some of the concerns facing Bangladesh and other lower riparians. One of the reasons Bangladesh called for a longer gestation period in adopting the convention was precisely to study the complex implications of the balance called for in the Draft Articles. Bangladesh is conscious that too many radical amendments may unravel the agreement on the whole, in which many positive elements are manifest. Bangladesh does believe, however, that there is room for improvement in the text of the present Draft Articles.