Chapter 45

The Future of International Water Law: Regional Approaches to Shared Watercourses?

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On May 21, 1997, the United Nations General Assembly (UNGA) adopted, by a majority exceeding one hundred members, the United Nations Convention on the Law of the Non-Navigational Uses of International Watercourses (the Watercourses Convention, or the Convention).[1] The adoption of the Convention was hailed by a large segment of scholars and practitioners specializing or working on water resources management as a major milestone in the codification and progressive development of international water law. Indeed, the UNGA decision was a culmination of extensive work by the International Law Commission (ILC) that spanned from 1971 to 1994, as well as deliberations by the Sixth Committee and the General Assembly thereafter and until May 1997. Furthermore, the work of the ILC itself was a continuation of earlier efforts by the UNGA, dating back to the 1950s, to compile data on, and try to address the complex and intricate issues related to international watercourses. In parallel with the work of the United Nations and the ILC, two scholarly non-governmental organizations (NGOs), namely the Institute of International Law (IIL) and the International Law Association (ILA) provided significant contributions to the field of international water law through their resolutions and declarations, and the commentaries thereon. As such, the adoption of the Watercourses Convention was seen by those scholars and practitioners as the beginning of a new era for the cooperative management, sharing and protection of international watercourses, governed for the first time by the provisions of an international convention.

However, twelve years after its adoption, the Convention has yet to obtain the necessary number of instruments of ratification to enable it to enter into force and effect. As of April 2009, only sixteen countries have ratified or acceded to the Convention, far less than the thirty-five instruments needed for that purpose. Given the high expectations and optimism expressed by many water resources specialists when the Convention was adopted, there has been a marked disappointment at the failure of states to become parties to the Convention. That disappointment has grown as time passes, with little or no action towards ratification or accession by the states

1 *See* G.A. Res. 51/229, U.N. Doc. A/RES/51/229 May 21, 1997). For the text of the Convention, see 36 I.L.M. 700 (1997).

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that voted for the Convention. This situation is now raising considerable concerns that the momentum might have been lost, and that the Convention, after all, may not enter into force and effect. Note was taken, by way of comparison, of the length of the period that it has taken many other conventions to enter into force. Particular note is taken of the United Nations Convention on the Law of the Sea (UNCLOS), which is a more detailed and complex instrument, spanning over more than 300 articles. The UNCLOS opened for signature on December 10, 1982, and entered into force on November 16, 1994, twelve years after its adoption, when sixty states completed the ratification/accession process.[2] That number is almost double the number of states needed for entry into force of the Watercourses Convention.

Nonetheless, this Essay argues that despite the failure of states to follow-up their vote at the UNGA with signature and ratification of, or accession to the Convention, the Convention has been, since its adoption in 1997, the principal reference point for international water law, and will continue to be so. Indeed, it has, by and large, codified and progressively developed existing and emerging principles of customary international water law. It has also provided a framework that states would use to develop regional treaties and agreements on their shared watercourses, taking into account the particular characteristics of the watercourse in question, and their interests, concerns and needs. The Essay will also argue that the wide range of endorsements that the Convention has received underscores the above thesis.

I. The Road to the Watercourses Convention

The UN started paying attention to the issue of international rivers in the late 1950s. In 1959, almost forty years before it adopted the Watercourses Convention, the UNGA issued a resolution calling for initiation of "preliminary studies on the legal problems relating to the utilization and use of international rivers with a view of determining whether the subject was appropriate for codification."[3] The Resolution requested the Secretary-General of the UN to prepare and circulate to the member states a report containing: (i) information provided by member states regarding their laws and legislation in force on the matter; (ii) a summary of existing bilateral and multilateral treaties; (iii) a summary of decisions of tribunals, including arbitral awards; and (iv) a survey of studies made by non-governmental organizations concerned with international law. Consequently, a report entitled "Legal Problems Relating to the Utilization of International Rivers" was completed and presented to the UNGA in 1963.[4] The Report included detailed information provided by states on their legislation on international waters, and the bilateral and multilateral treaties on such waters. It also included a compilation of the judicial and arbitral decisions, as well as the rules and resolutions issued by the IIL and ILA on international waters.

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2 United Nations Convention on the Law of the Sea, Dec. 10, 1982, 1833 U.N.T.S. 396.

3 *See* G.A. Res. 1401 (XIV) (Nov. 21, 1959).

4 *See* United Nations, Legal Problems Relating to the Utilization and Use of International Rivers, Report of the Secretary General, A/5409, April 15, 1963 [hereinafter "the Report"].

Although the Report was widely circulated and discussed, it took seven more years before the UNGA would return to the topic of international watercourses. On December 8, 1970, the UNGA adopted Resolution 2669, asking the ILC to "take up the study of the law of the non-navigational uses of international watercourses with a view to its progressive development and codification."[5] The Resolution also requested the Secretary-General of the United Nations to continue the studies initiated under Resolution 1401 in order to prepare a supplementary report on the legal problems relating to the utilization and use of international watercourses.

Seven more years would elapse before the Secretary-General would complete and submit a report entitled "Register of International River Basins"[6] showing shared rivers by region, and indicating that such rivers totaled 214 world-wide. The Register was issued in connection with the United Nations Water Conference that was held in March 1977, in Mar del Plata, Argentina, and which was the first global meeting to address exclusively water resources issues. Shared watercourses were widely and extensively debated and one of the recommendations of the Conference directed that the work of the ILC on the Law of the Non-Navigational Uses of International Watercourses be given higher priority and coordinated with other international bodies dealing with the same topic. The Conference also recommended that, in the absence of bilateral and multilateral agreements, member states should continue to apply generally accepted principles of international law in the use, development, and management of shared water resources, and should take note of the useful work of the non-governmental and other expert bodies on international water law.[7]

Pursuant to Resolution 2669 of 1970, the ILC started working on the topic of international watercourses in early 1971. The task was clearly a complex one. It took more than twenty-three years, five rapporteurs, and fifteen reports before the final draft articles of the Convention were agreed upon by the ILC.[8] A number of issues proved controversial and complex even for the members of the ILC itself. Such issues included definition of the term "international watercourses;" transboundary groundwater; the status of existing watercourses agreements *vis-à-vis* the Convention; the relationship between the principle of equitable and reasonable utilization and the obligation not to cause significant harm; and the procedures and mechanisms for dispute settlement. Differences on those issues were finally resolved, and a draft Convention was agreed upon by the ILC and submitted to the General Assembly in 1994.[9] That draft Convention was subsequently deliberated by the Sixth Committee of the General

5 *See* G.A. Res. 2669 (XXV) (Dec. 8, 1970).

6 *See* United Nations, Register of International River Basins, Report of the Secretary General, E/C.7/71 (Mar. 11, 1977).

7 *See* United Nations, Report of the United Nations Water Conference, Mar del Plata, March 14-15, 1977, Sales No. E.77.11.A.12, at 53 (1977).

8 For the full list of the ILC rapporteurs, and the reports on the topic and the dates on which they were issued, see 2 Arthur Watts, The International Law Commission 1949-98, at 1335 (1999).

9 *See* 1994 Yearbook of the International Law Commission, Volume II, Part Two, 88 (1997).

Assembly (the Legal Committee), convened as a Working Group of the Whole (the Working Group). Thereafter, on May 21, 1997, following lengthy discussion of the ILC draft, as amended by the Working Group, the UNGA adopted the Convention. One hundred and three countries voted for the Convention, and only three countries opposed it,[10] with twenty-seven abstentions; while fifty-two countries did not participate in the vote. Subsequent to the vote, Nigeria and Fiji (which did not vote), and Belgium (which abstained), informed the Secretariat of the General Assembly that they had intended to vote for the Convention. This would have brought the number of the countries voting for the Convention to 106, and decreased the abstentions to 26.[11]

In parallel with the work of the United Nations and ILC, the IIL and the ILA were actively involved with international watercourses. Actually, both institutions commenced their work on this subject long before the ILC. The IIL issued its first set of rules on international rivers entitled "International Regulations Regarding the Use of International Watercourses for Purposes Other than Navigation" (known also as the "Madrid Declaration") in 1911.[12] Those regulations were the first set of rules in the field. They were followed 50 years later by the Resolution on the "Utilization of Non-Maritime International Waters (Except for Navigation)" (known as the Salzburg Resolution).[13] In 1979 the IIL issued a resolution entitled "Pollution of Rivers and Lakes and International Law" (the Athens Resolution),[14] and in 1997 it issued three resolutions on the Environment.[15] The term "environment" is defined in the first resolution to include "abiotic and biotic natural resources, in particular air, water, soil, fauna and flora, as well as interaction between these factors." The first resolution also states that international law would determine the basic models and minimum rules required for protection of the environment. Generally speaking, the IIL work confirmed the rights of states to exploit their natural resources but subjected that right to their obligation not to cause harm to other riparians, with little emphasis on the principle of equitable and reasonable utilization.

Although the ILA's deliberations on international waters started relatively later than the IIL, its work has been more extensive and frequent. In 1956, the ILA issued its first set of principles entitled "A Statement of Principles upon which to Base Rules of Law Concerning the Uses of International Rivers," also known as the "Dubrovnik

10 Those countries were China, Burundi and Turkey. *See supra* note 1.

11 *See supra* note 1.

12 *See* 24 Annuaire de l'Institut de Droit International 365 (1911).

13 *See* 49 Annuaire de l'Institut de Droit International 370 (1961); *see also* 56 Am. J. Int'l L. 737 (1962).

14 *See* 58 Annuaire de l'Institut de Droit International 196 (1979); *see also* 1 Harald Hohmann, Basic Documents of International Environmental Law 256 (1992).

15 The resolutions are entitled: "The Environment," "Responsibility and Liability for Environmental Damage under International Law," and "Procedures." *See* 67-1 Annuaire de l'Institut de Droit International 219 (1997).

Statement."[16] Those principles were followed by new rules almost every other year, culminating in the famous Helsinki Rules on the Uses of the Waters of International Rivers issued in 1966.[17] The Helsinki Rules were the first set of comprehensive and authoritative principles dealing with international watercourses to be issued, and they continued to be so until the Watercourses Convention was adopted thirty years later, in 1997. They covered a wide spectrum of issues, including both navigational and non-navigational. The Helsinki Rules established the principle of equitable and reasonable utilization as the guiding principle of international water law, and laid down the widely quoted factors for determining the equitable and reasonable utilization for the watercourse states.[18] The Helsinki Rules have been widely accepted by both downstream as well as upstream riparians, and are considered by many experts in the field as representing customary international law.[19]

The ILA's work did not taper off after the issuance of the Helsinki Rules. Many other rules on various areas related to international watercourses were issued there-

16 *See* ILA, Report of the Forty-Seventh Conference (Dubrovnik 1956), at 241. The intention of the ILA was not to state rules of law, but only to lay down principles on which rules of law could be formulated. *See* Charles Bourne, *The International Law Association's Contribution to International Water Resources Law*, 36 Nat. Resources J. 155, 159-60 (1996).

17 *See* ILA, Report of the Fifty-Second Conference 486 (Helsinki 1966) [hereinafter the Helsinki Rules].

18 Article V of the Helsinki Rules states that the relevant factors to be considered include, but are not limited to:

(a) the geography of the basin, including in particular the extent of the drainage area in the territory of each basin state;

(b) the hydrology of the basin, including in particular the contribution of water by each basin state;

(c) the climate affecting the basin;

(d) the past utilization of the waters of the basin, including in particular existing utilization;

(e) the economic and social needs of each basin state;

(f) the population dependent on the waters of the basin in each basin state;

(g) the comparative costs of alternative means of satisfying the economic and social needs of each basin state;

(h) the availability of other resources;

(i) the avoidance of unnecessary waste in the utilization of waters of the basin;

(j) the practicability of compensation to one or more of the co-basin states as a means of adjusting conflicts among uses; and

(k) the degree to which the needs of a basin state may be satisfied, without causing substantial injury to a co-basin state.

Paragraph 3 of Article V states that the weight to be given to each factor is to be determined by its importance in comparison with that of other relevant factors. *See* Helsinki Rules, *supra* note 17.

19 *See* Bourne, *supra* note 16.

after, including the 1986 Seoul Rules on transboundary groundwater.[20] Thus, while the ILC was working on the law of international watercourses, a large body of legal literature was being developed by those two organizations. Indeed, the Convention is based largely on the ILA work, particularly the Helsinki Rules, and to some extent on the work of the IIL. The Convention itself recognizes "the valuable contribution of international organizations, both governmental and non-governmental, to the codification and progressive development of international law in this field."[21] In addition, the Convention also recalled the existing bilateral and multilateral agreements regarding the non-navigational uses of international watercourses.

Hence, the adoption of the Watercourses Convention by the UNGA should be seen as a culmination of the lengthy process that started with the work of the IIL and the ILA, as well as the UNGA, and ended with the successful completion of the ILC draft Convention. The adoption has no doubt heightened the expectations that at long last the world community was able to agree on an international legal instrument regulating the use, sharing and protection of international watercourses, including principles for avoidance and resolution of international water disputes. A wide dissemination of the Convention and its provisions has been undertaken at the large number of international water conferences held since 1997. It has also been facilitated by the tri-annual global water forum that started with the First World Water Forum held in Marrakesh, Morocco, in March 1997. The Convention was one of the main topics of the Second World Water Forum held in The Hague, the Netherlands, in 2000, and the third one held in Kyoto, Japan, in 2003, as well as the subsequent ones in Mexico and Turkey in 2006 and 2009, respectively.[22]

II. An Overview of the Provisions of the Watercourses Convention

The Convention is *a framework convention* that aims at ensuring the utilization, development, conservation, management and protection of international watercourses, and promoting optimal and sustainable utilization thereof for present and future generations. As a *framework convention*, it addresses the main basic procedural aspects and some substantive ones, and leaves the details for the riparian states to complement in agreements that would take into account the specific characteristics of the watercourse in question. The main areas that the Convention addresses include the definition of the term "watercourse;" watercourses agreements; equitable

20 *See* Seoul Rules, International Law Association, Report of the Sixty-Second Conference (Seoul, 1986) at 238. By the late 1980s and early 1990s it became clear to the ILA that the rules it had adopted were expanding, and provisions governing the same issue may be scattered in more than one instrument. Accordingly, the ILA decided to consolidate those rules in one instrument. The Berlin Rules, issued in 2004, include such consolidated rules. *See* ILA, Report of the Seventy-First Conference 334 (Berlin 2004).

21 Preamble to the Convention, Recital X.

22 For more details on each of the five world water forums, see the website of the World Water Council at http://www.worldwatercouncil.org/. The World Water Council is the institution that organizes the forum, in collaboration with the host country.

and reasonable utilization and the obligation not to cause significant harm; notification for planned measures; protection, preservation and management; and dispute settlement. Article 1(2) of the Convention asserts that the uses of international watercourses for navigation are not within the scope of the Convention, except insofar as other uses affect navigation or are affected by navigation; hence the title of "non-navigational uses."

The Convention defines the term "international watercourse" to mean "a watercourse, parts of which are situated in different states." It defines the term "watercourse" to include both "surface water and groundwaters constituting by virtue of their physical relationship a unitary whole and normally flowing into a common terminus." This definition includes only groundwater that is connected to surface water. It does not include transboundary aquifers that do not contribute water to, or receive water from, surface waters. Realizing this lacuna, the ILC issued a separate resolution recommending that other types of groundwater be governed by the same rules laid down in the Convention.[23]

Watercourse agreements are dealt with in Article 3 of the Convention. The Article indicates that the Convention shall not affect the rights or obligations of a watercourse state arising from agreements that are in force. However, the Article asks the parties to consider, where necessary, harmonizing such agreements with the basic principles of the Convention. Article 3 also allows watercourse states to enter into agreements, which apply and adjust the provisions of the Convention to the characteristics and uses of a particular international watercourse. Furthermore, the Article states that when some, but not all, watercourse states to a particular international watercourse are parties to an agreement, nothing in such an agreement would affect the rights or obligations under the Convention of watercourse states that are not parties to such an agreement.

The Convention embraces the principle of equitable and reasonable utilization, and lays down in Article 6 certain factors and circumstances, by and large, similar to those of the Helsinki Rules[24] that should be taken into account for determining the equitable and reasonable utilization for each of the riparian states. Article 6(1) of the Convention states that utilization of an international watercourse in an equitable and reasonable manner within the meaning of Article 5 requires taking into account all relevant factors and circumstances, including: (a) geographic, hydrographic, hydrological, climatic, ecological and other factors of a natural character; (b) the social and economic needs of the watercourse states concerned; (c) the population dependent on the watercourse in the watercourse state; (d) the effects of the use or uses of the watercourse in one watercourse state on other watercourse states; (e) existing

23 Resolution on Confined Transboundary Groundwater, *supra* note 9, at 135; *see also* Stephen McCaffrey, *International Groundwater Law: Evolution and Context*, *in* Groundwater: Legal and Policy Perspectives, World Bank Technical Paper No. 456, 139 (Salman M.A. Salman ed., 1999); Raj Krishna & Salman M.A. Salman, *International Groundwater Law and the World Bank Policy for Projects on Transboundary Groundwater*, *in id.* at 163.

24 *See supra* note 18.

and potential uses of the watercourse; (f) conservation, protection, development and economy of the water resources of the watercourse and the cost of measures taken to that effect; and (g) the availability of alternatives, of comparable value, to a particular planned or existing use. In this connection, the Convention follows the same approach adopted 30 years earlier by the Helsinki Rules, which established, as stated earlier, the principle of equitable and reasonable utilization as the guiding principle for international water law. In comparing the above factors with those under the Helsinki Rules, it can be concluded that the factors under the Watercourses Convention are based largely on those of the Helsinki Rules. In line with Article V of the Helsinki Rules, Article 6 of the Convention states that the weight to be given to each factor is to be determined by its importance in comparison with that of other relevant factors. Similarly, Article 6 clarifies that in determining what constitutes reasonable and equitable use, all relevant factors are to be considered together and a conclusion reached on the basis of the whole.

The Convention also deals in Article 7 with the obligation not to cause significant harm, and requires the watercourse states to take all appropriate measures to prevent the causing of significant harm to other watercourse states. Agreement on which of the two rules (equitable and reasonable utilization, or the obligation not to cause significant harm) takes priority over the other proved quite difficult, and the issue occupied the ILC throughout its work on the Convention. Each rapporteur dealt with the issue differently, equating the two principles, or subordinating one principle to the other.[25] The issue was later discussed in the Working Group where sharp differences between the riparian states on those two principles also surfaced. It is worth clarifying in this connection that lower riparians tend, generally, to favor the no-harm rule, as it protects existing uses against impacts resulting from activities undertaken by upstream states. Conversely, upper riparians tend, by and large, to favor the principle of equitable and reasonable utilization, because it provides more scope for states to utilize their share of the watercourse for activities that may impact on downstream states. After a lengthy debate in the Working Group, a compromise regarding the relationship between the two principles was reached. The compromise addressed Articles 5 and 6 (equitable and reasonable utilization) and Article 7 (obligation not to cause significant harm). The new language of Article 7 requires the state that causes significant harm to take measures to eliminate or mitigate such harm "having due regard to articles 5 and 6."[26]

25 *See generally* Stephen McCaffrey, The Law of International Watercourses (2007).

26 *See* Lucius Caflisch, *Regulation of the Uses of International Watercourses*, *in* International Watercourses – Enhancing Cooperation and Managing Conflict, World Bank Technical Paper No. 414, at 13-15 (Salman M.A. Salman & Laurence Boisson de Chazournes eds., 1998) [hereinafter International Watercourses]. Note, in particular, Caflisch's statement that "The new formula was considered by a number of lower riparians to be sufficiently neutral not to suggest a subordination of the no-harm rule to the principle of equitable and reasonable utilization. A number of upper riparians thought just the contrary, namely that, that formula was strong enough to support the idea of such a subordination."

However, notwithstanding this compromise language, the prevailing view is that the Convention has subordinated the obligation not to cause significant harm to the principle of equitable and reasonable utilization. This conclusion is based on a close reading of Articles 5, 6 and 7 of the Convention. The factors enumerated in Article 6 for determining equitable and reasonable utilization include (i) "the effects of the use or uses of the watercourse in one Watercourse State on other Watercourse States," and (ii) "existing and potential uses of the watercourse." Those same factors will also need to be used, with other factors, to determine whether significant harm is caused to another riparian, because harm can be caused by affecting the water flow or availability to other riparians, and thereby impacting their existing uses. Moreover, Article 7(1) of the Convention obliges watercourse states, when utilizing an international watercourse in their territory, to take all appropriate measures to prevent the causing of significant harm to other watercourse states. When significant harm nevertheless is caused to another watercourse state, Article 7(2) of the Convention requires the state causing the harm to "take all appropriate measures, having due regard to Articles 5 and 6, in consultation with the affected State, to eliminate or mitigate such harm, and where appropriate, to discuss the question of compensation." As noted above, Articles 5 and 6 of the Convention deal with equitable and reasonable utilization. As such, Article 7(2) requires giving due regard to the principle of equitable and reasonable utilization when significant harm has nevertheless been caused to another watercourse state. The paragraph also indicates that the causing of harm may be tolerated in certain cases such as when the possibility of compensation may be considered. Accordingly, a careful reading of Articles 5, 6 and 7 of the Convention should lead to the conclusion that the obligation not to cause harm has indeed been subordinated to the principle of equitable and reasonable utilization. Hence, it can be concluded that, similar to the Helsinki Rules, the principle of equitable and reasonable utilization is the fundamental and guiding principle of the Watercourses Convention.[27] This conclusion should, however, not mean that the Convention is biased in favor of upstream riparians. The principle of equitable and reasonable utilization is based on the equality of all the riparian states, and requires taking into account existing uses that may be affected.[28]

The view that the guiding principle of the Convention is equitable and reasonable utilization has been endorsed by the International Court of Justice (ICJ) in the *Gabčíkovo-Nagymaros* case.[29] The case was decided in September 1997, four months after the Convention was adopted by the UNGA. In that case the ICJ emphasized the concept of equitable and reasonable utilization when it directed that "the multi-pur-

27 It should be added that there are authors in this field who believe that the Convention treats both principles as equal. *See* Attila Tanzi & Maurizio Arcari, The United Nations Convention on the Law of International Watercourses (2001).

28 *See* Salman M.A. Salman, *The Helsinki Rules, the UN Watercourses Convention and the Berlin Rules: Perspectives on International Water Law*, 23 Int'l J. Water Resources Management 625-40 (2007).

29 *See* Case Concerning the Gabčíkovo-Nagymaros Project (Hung. v. Slovk.), 1997 I.C.J. 1, 63 (Sept. 25).

pose programme, in the form of a co-ordinated single unit, for the use, development and protection of the watercourse is implemented in an equitable and reasonable manner."[30] The ICJ did not refer to the obligation not to cause harm.

Other basic obligations under the Convention include the obligation to cooperate through, *inter alia*, the establishment of joint mechanisms or commissions, and the regular exchange of data and information, and through notification of other riparian states of planned measures with possible significant adverse effects. The Convention addresses a number of aspects related to notification of other riparians of such planned measures. Those aspects include the period for reply; obligations of the notifying state during the period for reply; reply for notification, and absence of reply; consultations and negotiations concerning planned measures; procedures in the absence of notification; and urgent implementation of planned measures.

Environmental protection of international watercourses is dealt with by the Convention under "Protection, Preservation and Management" of international watercourses. Under this part, the Convention establishes a number of obligations on the watercourse states, including protection and preservation of ecosystems; prevention, reduction and control of pollution; non-introduction of alien or new species; and protection and preservation of the marine environment.[31] Article 33 and the Annex to the Convention deal with dispute settlement mechanisms and procedures. The Article lays down a number of methods for settlement of disputes, including negotiations, jointly seeking the good offices of, or mediation and conciliation by a third party, or use of joint watercourse institutions. It also includes the options of submission of the dispute either for arbitration in accordance with detailed rules laid down in the Annex to the Convention, or to the ICJ. However, the method for settlement of a particular dispute should be agreed upon by both parties. The only obligatory method set forth in the Convention is impartial fact-finding. Although Article 33 lays down detailed procedures for such fact-finding, it only requires the parties to consider the report of the fact-finding commission in good faith.

This overview indicates that the Convention is basically a *framework convention*, which lays down basic principles and procedures, leaving the details to the watercourse states to complement in agreements that take into account the characteristics and uses of their specific watercourse.

III. Status of the Watercourses Convention

The Watercourses Convention was opened for signature on May 21, 1997, and remained open for three years, until May 20, 2000. By that time only sixteen states had signed the Convention. As indicated earlier, the Convention requires thirty-five instruments of ratification or accession to enter into force. As of this year, twelve years after its adoption, the Convention has yet to command sufficient ratifications to enter

30 *See id.* ¶ 150; *see also id.* ¶¶ 78, 85.

31 *See* David Freestone & Salman M.A. Salman, *Ocean and Freshwater Resources*, *in* The Oxford Handbook of International Environmental Law 337, 352 (Daniel Bodansky, Jutta Brunnee & Ellen Hey eds., 2007).

into force. It has only been ratified or acceded to by 16 states, a number far short of that required under the Convention.[32]

A number of factors have contributed to the slow pace of the ratification/accession process, and the reluctance of some states to become parties to the Convention.[33] One such factor is the concern of some states about which of the two principles of international water law is the governing one under the Convention: equitable and reasonable utilization, or the obligation not to cause significant harm? As indicated earlier, lower riparians tend generally to favor the no harm rule, as it protects their existing uses; whereas upper riparians tend, by and large, to favor the principle of equitable and reasonable utilization because it provides them with a fair share even if that may impact downstream riparians. Some downstream riparians view the Convention as biased in favor of upstream riparian because of the emphasis on the principle of equitable and reasonable utilization, and accordingly are reluctant to be parties to it. Conversely, some upstream riparians believe the exact opposite of this, that the Convention, through the obligation not to cause significant harm, protects existing uses, and thus favors downstream riparians. As indicated earlier, the guiding principle of the Convention is equitable and reasonable utilization which protects the rights of all the riparian states. Thus, the notion that the Convention is biased in favor of downstream or upstream riparians is not correct.

In line with the above notion, notification for planned measurers is viewed by many upstream riparians as favoring downstream riparians, and even giving them veto power over the development plans of the upstream riparians. The Convention actually requires timely notification of other watercourse states for planned measures which may have significant adverse effect upon them, and does not limit notification to downstream states only.[34]

Another factor relates to existing agreements. Some riparians who are parties to existing agreements believe that the Convention stance regarding such agreements is not strong enough because it does not adequately protect such agreements. On the other hand, riparians who are not parties to such agreements believe that the provisions of the Convention should prevail over those existing agreements. The dispute settlement provisions of the Convention are seen as weak by some riparians as they only reinforce the fact-finding process. Conversely, some riparians believe that the whole process of dispute settlement should be left to the riparians to choose and

32 As at April 2009, the states that have ratified or acceded to the Watercourses Convention are: Finland, Germany, Hungary, Iraq, Jordan, Lebanon, Libyan Arab Jamahiriya, Namibia, Netherlands, Norway, Portugal, Qatar, South Africa, Sweden, Syrian Arab Republic, and Uzbekistan. For further details, see http://treaties.un.org/Pages/ViewDetails.aspx?src=IND&id=530&chapter=27&lang=en.

33 *See* Salman M.A. Salman, *The United Nations Watercourses Convention Ten Years Later – Why Has Its Entry into Force Proven Difficult?*, 32 Water Int'l 1 (2007).

34 For a detailed discussion of the requirement of notification to both downstream as well as upstream riparians, and the reasons therefor, see Salman M.A. Salman, The World Bank Policy for Projects on International Waterways: An Historical and Legal Analysis (2009).

manage themselves.[35] As a result of the inaccurate interpretations of, and misconceptions about, some of the provisions of the Convention, the process of ratification of the Convention has been markedly slow. Indeed, the process threatens that the Convention may not enter into force and effect.

However, the failure of states to become parties to the Convention should not be taken to mean rejection of the principles of international water law enunciated therein. In fact, a number of agreements concluded at the regional level reflect those principles, as discussed below.

IV. Regional Approaches to Shared Watercourses

As indicated earlier, the main principles enunciated by the Convention such as equitable and reasonable utilization and the obligation not to cause harm, exchange of data and notification for planned measures, environmental protection and dispute settlement represent the basic principles of customary international water law.[36] Indeed, the Watercourses Convention reiterated, by and large, many of the principles embodied in the rules and resolutions issued by the IIL and ILA, as well as some of the main principles set forth in bilateral and multilateral agreements on international watercourses, and in judicial and arbitral decisions. Thus, the Convention has basically codified many of those principles and consolidated them in one instruments. In turn, many of the Convention's principles have been reflected in some subsequent regional treaties and agreements, as discussed below. As such, the Convention has become the focal point of the principles of international water law.

The majority of the bilateral and multilateral agreements concluded on international watercourses since the 1970s, have incorporated, by and large, the basic principles of international water law discussed above. However, those instruments differed on the emphasis of some principles over the others. The difference on emphasis is dictated by a number of factors including regional considerations, the immediate concerns and interests of the watercourses states, and the nature and characteristics of the watercourse in questions. The variation in issues emphasized by the riparians, and the underlying reasons therefor, can be clearly discerned in three regional instruments on international watercourses. Those instruments are: the Treaty for Amazonian Cooperation, the United Nations Economic Commission for Europe (UN/ECE) Convention on the Protection and Use of Transboundary Watercourses and International Lakes, and the Revised Protocol on Shared Watercourses in the Southern African Development Community (SADC). Each of those instruments is briefly discussed and analyzed below.

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35 *See* Press Release, General Assembly, General Assembly Adopts Convention on Law of Non-Navigational Uses of International Watercourses, U.N. Doc. GA/9248 (May 21, 1997).

36 *See* Stephen McCaffrey, *The UN Convention on the Law of the Non-Navigational Uses of International Watercourses: Prospects and Pitfalls*, *in* International Watercourses, *supra* note 26, at 26.

A. The Treaty for Amazonian Cooperation

This Treaty (the Amazon Treaty) was concluded by the eight riparian states of the Amazon River, namely, Bolivia, Brazil, Colombia, Ecuador, Guyana, Peru, Suriname and Venezuela, in Brasilia on July 3, 1978.[37] The overall aim of the parties, as set forth in the Treaty, is to promote the harmonious development of the Amazon region, to permit an equitable distribution of the benefits of said development among the parties so as to raise the standards of living of their peoples and to achieve total incorporation of their Amazonian territories into their respective national economies. Yet, the Treaty hastens to emphasize the necessity of maintaining a balance between economic growth and conservation of the environment, and to underscore that cooperation among the parties would facilitate fulfilment of these responsibilities by continuing and expanding the joint efforts for the ecological conservation of the Amazon region. The Treaty restates the agreement of the parties for joint actions and efforts for the harmonious development of their respective Amazonian territories for attainment of equitable and mutually beneficial results and achievement of the preservation of the environment, together with the conservation and rational utilization of the natural resources of these territories.

The Treaty acknowledges the need for the exploitation of the flora and fauna of the Amazon region, but requires that such exploitation be rationally planned so as to maintain the ecological balance within the region and preserve its species. Such rational planning would be achieved through, *inter alia*, promotion of scientific research and exchange of information and technical personnel among the competent agencies within the respective countries so as to increase their knowledge of the flora and fauna of their Amazonian territories and prevent and control diseases in said territories. The Treaty also calls for cooperation in ensuring that measures adopted for the conservation of ethnological, and archeological wealth of the Amazon region are effective.[38]

A number of other specific areas are also addressed by the Treaty. Complete freedom of commercial navigation is mutually guaranteed on a reciprocal basis by the parties to the Treaty. Indeed, the Treaty goes on to record the agreement of the parties to create a suitable physical infrastructure among the respective countries, especially in relation to transportation and communications, and to undertake studies of the most harmonious ways of establishing or improving road, river, air and telecommunication links bearing in mind the plans and programs of each country. The Treaty also calls for the development, under equitable and beneficial conditions, of retail trade of products for local consumption among the respective Amazonian border populations, as well as cooperation to increase the flow of tourists, without prejudice to the protection of indigenous cultures and natural resources. It also calls

37 *See* Treaty on Amazonian Cooperation, 17 I.L.M. 1045 (1978).

38 For a description of some of these measures, see B. Braga, E. Salati & H. Mattos de Lemos, *Sustainable Water-Resources Development of the Amazon Basin*, *in* Management of Latin American River Basins: Amazon, Plata, and São Francisco 3 (Asit K. Biswas, Newton V. Cordeiro, Benedicto P.F. Braga & Cecilia Tortajada eds., 1999).

for the rational utilization of the hydropower resources of the Amazonian rivers for the social and economic development of the region.

The Treaty goes on to state the agreement of the parties to maintain a permanent exchange of information and cooperation among the parties, and to prepare operational agreements and understandings, as well as the pertinent legal instruments which would assist in achieving the aims of the Treaty. Two institutional mechanisms are established to ensure that the aims and objectives of the Treaty are achieved. The Ministers of Foreign Affairs of the parties would convene meetings when deemed opportune or advisable in order to establish the basic guidelines for common policies for assessing and evaluating the general development or the process of Amazonian cooperation, and for taking decisions designed to carry out the aims set out in the Treaty. In addition, the Amazonian Cooperation Council comprising top level diplomatic representatives is established with a wide mandate, and is required to meet once a year. The mandate of the Council includes ensuring that the aims and objectives of the Treaty are complied with, carrying out the decisions taken at meetings of the Ministers of Foreign Affairs, and recommending to the parties the advisability and the appropriateness of convening meetings of the Ministers of Foreign Affairs, and of drawing-up the corresponding agenda. Moreover, the Council is responsible for taking under consideration initiatives and plans presented by the parties, as well as adopting decisions for undertaking bilateral or multilateral studies and plans. It also has the mandate for evaluating the implementation of plans of bilateral or multilateral interests, and drawing up rules and regulations for its proper functioning.

In addition, each party would establish a Permanent National Commission charged with enforcing in its respective territory the provisions set out in the Treaty, as well as carrying out the decisions taken at meetings of the Ministers of Foreign Affairs and by the Amazonian Cooperation Council, without jeopardizing other tasks assigned to them by the respective state. No specific provisions on dispute settlement are included in the Treaty, perhaps because of the nature of the objectives of the Treaty itself. However, the general authority given to the Ministers of Foreign Affairs can be read to include discussing and resolving any issues regarding interpretation and application of the Treaty.[39]

Hence, the Amazon Treaty deals with the overall aim of the harmonious development of the Amazon region and the equitable sharing of the benefits so as to raise the standard of living of its inhabitants. A number of areas, such as exploitation of flora and fauna, transportation and free navigation, hydropower, trade, sanitation and tourism are specified in the Treaty as means for achieving such regional development. However, the Treaty requires that said regional development should maintain a balance between economic growth and conservation of the environment.

39 *See* Article XX of the Amazon Treaty.

B. UN/ECE Convention on the Protection and Use of Transboundary Watercourses and International Lakes

This Convention, generally known as the Helsinki Convention, was adopted by the United Nations Economic Commission for Europe (UN/ECE)[40] on March 17, 1992.[41] It entered into force on October 6, 1996, and as of April 2009, the Convention had 36 parties.[42] As those dates indicate, the work on the Helsinki Convention was undertaken in parallel with the work of the Watercourses Convention. Entry into force of the Helsinki Convention took place a few months before the Watercourses Convention was adopted by the UNGA.

The Helsinki Convention expresses concerns over the existence and threats of adverse effects, in the short or long term, of changes in the conditions of transboundary watercourses and international lakes on the environment, economies and well-being of the member countries of the UN/ECE. The aim of the Convention is to protect international rivers and lakes from transboundary impact through enhanced cooperation, and to ensure that transboundary waters are used in a reasonable and equitable way, taking into particular account their transboundary character.

The Helsinki Convention defines transboundary impact to mean any significant adverse effect on the environment of one state resulting from a change in the conditions of transboundary waters caused by a human activity, the physical origin of which is situated wholly or in part within an area under the jurisdiction of another party. The definition goes on to state that such effects on the environment include effects on human health and safety, flora, fauna, soil, air, water, climate, landscape and historical monuments or other physical structures, or the interaction among these factors. They also include effects on the cultural heritage or socio-economic conditions resulting from alterations to those factors.

Article 2 of the Helsinki Convention obliges the parties to take all appropriate measures to prevent, control and reduce any transboundary impact. It goes on to require the parties to take all appropriate measures to prevent, control and reduce pollution of waters causing or likely to cause transboundary impact, and to ensure that transboundary waters are used with the aim of ecologically sound and rational water management, and environmental protection. It lays down three principles to guide the parties when taking those measures. The first is the precautionary principle.[43] This principle requires that action to avoid the potential transboundary impact of the release of hazardous substances not be postponed on the ground that scientific research has not fully proven a causal link between those substances, on the one hand, and the potential transboundary impact, on the other hand. The second is the polluter pays principle, and the third is the sustainability principle. Under the lat-

40 The UN/ECE encompasses Europe, Central Asia, North America and Israel.

41 *See* 31 I.L.M. 1312 (1992).

42 For a list of the parties to the Helsinki Convention, see http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&id=519&chapter=27&lang=en.

43 *See* The Precautionary Principle and International Law: The Challenge of Implementation (David Freestone & Ellen Hey eds., 1996).

ter, water resources should be managed so that the needs of the present generations are met without compromising the ability of future generations to meet their own needs.[44] Furthermore, the Helsinki Convention requires the parties to develop, adopt and implement legal measures to ensure, *inter alia*, prior licensing of waste-water discharges, limits of waste-water discharges based on best available technology, biological treatment for waste water, application of environmental impact assessment and other means of assessment, and minimization of accidental pollution.[45] To ensure that transboundary waters are used in a reasonable and equitable manner, taking into particular account their transboundary character, the Helsinki Convention lays down detailed provisions on exchange of information and consultation. It obliges the parties to provide for the widest exchange of information as early as possible on issues covered by the Convention. It also requires exchange of data and information between the parties to cover, *inter alia,* the environmental conditions of the transboundary waters, emission and monitoring data, and measures taken or planned to be taken to prevent, control or reduce transboundary impact. It also calls for consultations to be held between the riparian parties on the basis of reciprocity, good faith and good neighborliness, at the request of any such party. Such consultations shall aim at cooperation regarding the issues covered by the provisions of the Convention.

The Helsinki Convention, similar to the Watercourses Convention, is a framework convention. It calls on the parties to enter into bilateral and multi-lateral agreements, on the basis of equality and reciprocity, to define their mutual relations and conduct regarding the prevention, control and reduction of transboundary impact. Those agreements shall provide for the establishment of joint bodies to carry out a number of technical tasks related to transboundary impacts.[46] In addition, the Executive Secretary of the UN/ECE is designated, by the Convention, to carry out a number of tasks, including the convening and preparing of the Meetings of the Parties,[47] the transmission of reports and other information received in accordance with the provisions of the Convention, and the performance of any other functions as may be determined by the parties.

Thus, the main concern of the members of the UN/ECE countries has been the prevention, control and reduction of any significant adverse effects to their transboundary waters. While the Amazonian countries are elaborating strategies for development of the Amazon region, the UN/ECE members are addressing the consequences of their advanced stage of industrialization and development on their

44 *See* Freestone & Salman, *supra* note 31, at 355.

45 For an analysis of the UN/ECE Convention, see Branko Bosnjakovic, *UN/ECE Strategies for Protecting the Environment with Respect to International Watercourses: The Helsinki and Espoo Conventions*, *in* International Watercourses, *supra* note 26, at 47.

46 *See, e.g.*, 1994 Convention on Co-operation for the Protection and Sustainable Use of the River Danube, available at http://www.icpdr.org/; *see also* the 1999 Convention on the Protection of the Rhine (also referred to as the 1999 Rhine Convention), *available at* http://www.iksr.org/index.php?id=327.

47 For more details on the Meetings of the Parties, see http://www.unece.org/env/water/meetings/meetings.htm.

international waters, and are concluding treaties and protocols to prevent or mitigate the negative environmental consequences.[48]

C. *Revised Protocol on Shared Watercourses in the Southern African Development Community (SADC)*

In 1992, ten countries in the Southern Africa region (Angola, Botswana, Lesotho, Malawi, Mozambique, Namibia, Swaziland, Tanzania, Zambia and Zimbabwe) concluded the Treaty of the Southern African Development Community (SADC), establishing SADC as an official international organization.[49] The Treaty laid down the foundations for cooperation among those countries in a number of areas, including shared water resources. In 1995 those SDAC members signed the Protocol on Shared Watercourse Systems in the Southern African Development Community Region.[50] However, adoption by the UNGA of the Watercourses Convention in May 1997 prompted the SADC countries to revise their Protocol to ensure its consistency with the Convention. By that time the member countries of SADC increased to fourteen, following the joining of the Democratic Republic of Congo, Mauritius, Seychelles and South Africa. The process of revising the Protocol started in 1998, and was completed on August 7, 2000 when SDAC members signed the Revised Protocol on Shared Watercourses in the Southern African Development Community.[51] The Revised Protocol entered into force on September 22, 2003.

The Revised Protocol is based, to a considerable extent, on the Watercourses Convention, and embodies a number of concepts adopted by the Convention. Indeed, the preamble to the Revised Protocol itself refers specifically to "the progress with the development and codification of international water law initiated by the Helsinki Rules and that of the United Nations Convention on the Law of the Non-Navigational Uses of International Watercourses." The areas where the provisions of the Revised Protocol are similar to those of the Watercourses Convention include definition of the term "watercourse," the factors for determining equitable and reasonable utilization, notification for planned measures, and the provisions on the environment, as well as on management, regulation and installations. One area of difference between the two instruments is navigation. Like the Amazon Treaty, the Revised Protocol establishes the principle of freedom of navigation of all the riparian states on a reciprocal basis.[52]

48 It should be added that the UN/ECE introduced an amendment to Articles 25 and 26 of the Helsinki Convention on November 28, 2003, pursuant to decision III/1, which opened the Convention to non-UN/ECE members to become parties. However, this amendment has not yet entered into force. As of April 2009, it has been ratified by 10 parties. It requires 23 ratifications to enter into force and effect. For further information, see the website of the UN/ECE at http://www.unece.org/env/water/status/amend.htm.

49 32 I.L.M. 120 (1993).

50 Unpublished, on file with the author.

51 40 I.L.M. 321 (2001).

52 *See* Article III of the Amazon Treaty, and Article 3 of the Revised Protocol.

The provisions regarding the obligation not to cause significant harm under the Revised Protocol are also based largely on the provisions of the Watercourses Convention, albeit with one difference. This difference relates to what a watercourse state should give "due regard to" when significant harm is nevertheless caused to another watercourse state, as a result of its utilization of the shared watercourse. Whereas the Watercourses Convention requires that due regard be given to the provisions of Articles 5 and 6 on reasonable and equitable utilization, the Revised Protocol requires that due regard be given to the requirement to take all appropriate measures to prevent the causing of significant harm. The requirement under the Revised Protocol to give due regard to the obligation not to cause harm itself, and not to the principle of reasonable and equitable utilization, is perhaps to give equal weight to the two principles, and to dispel the notion of subordination of one to the other, thus satisfying the proponents of both principles. However, the fact that the Revised Protocol tolerates the causing of harm by including provisions on mitigation of such harm, and that it also refers to compensation, are both indicative of the fact that the obligation is not absolute. Similarly, the inclusion of the two factors relating to (i) "the effects of the use or uses of the watercourse in one watercourse State on other watercourse States" and (ii) "existing and potential uses of the watercourses" as elements for determining reasonable and equitable utilization, similar to the Watercourses Convention, should still lead to the conclusion that the Revised Protocol has subordinated the obligation not to cause significant harm to the principle of equitable and reasonable utilization.

The Revised Protocol, like the Amazon Treaty, establishes a number of institutional structures starting with the Committee of Water Ministers whose responsibilities include overseeing and monitoring implementation of the Protocol. The structure also includes the Committee of Water Senior Officials, which is entrusted with preparing reports and plans, as well as the Water Sector Coordinating Unit that organizes and manages policy meetings. The dispute settlement procedures under the Protocol are simple. They require the parties to strive to resolve all disputes regarding implementation, interpretation or application of the provisions of the Revised Protocol amicably, in accordance with the principles enshrined in the Treaty establishing SADC. Disputes between member states, which are not settled amicably, shall be referred to the SDAC Tribunal whose decision shall be final and binding.

Similar to the Watercourses and the Helsinki Conventions, the Revised Protocol is also a framework treaty whose provisions are to be complemented by agreements between the riparians of the particular watercourse, taking into account the special characteristics of that watercourse. One agreement that reflects this approach is the "Agreement between the Governments of the Republic of Botswana, the Kingdom of Lesotho, the Republic of Namibia, and the Republic of South Africa on the Establishment of the Orange-Senqu River Commission." The Agreement was concluded in Windhoek, Namibia, on November 3, 2000, about three months after the Revised Protocol was signed.[53] The Preamble to the Agreement recalled the "Convention on the Law of the Non-Navigational Uses of International Watercourses, adopted by the General Assembly of the United Nations in 1997." The Preamble also indicated that

53 Unpublished, on file with author.

the parties have been "inspired by the spirit of the Protocol on Shared Watercourses Systems in the Southern African Development Community Region and the Revised Protocol." Article 7 of the Agreement obliges the Parties to utilize the resources of the Orange-Senqu River in "equitable and reasonable manner with a view of to attaining optimal and sustainable utilization thereof." It also obliges the Parties to "take all appropriate measures to prevent the causing of significant harm to any other Party." The Article goes on to state that the terms "equitable and reasonable," and "significant harm" shall be interpreted in line with the Revised Protocol."[54] As stated earlier, the Revised Protocol itself used those terms in a manner similar to that of the Watercourses Convention.

Accordingly, it can be concluded that the Revised Protocol, as well as the Orange-Senqu Agreement, have adopted the basic principles enunciated under the Watercourses Convention. It is interesting to note that the adoption by the SADC countries of the basic principles of the Watercourses Convention has taken place notwithstanding the fact that only two countries out of the SADC fourteen member countries are currently parties to the Convention. Those countries are Namibia and South Africa.[55]

V. The Regional Approaches and the Watercourses Convention

The instruments discussed above represent three regions, namely, South America, Europe and Africa. One of those instruments, the Amazon Treaty, was concluded long before the Watercourses Convention was adopted by the UNGA. In fact it was concluded when the ILC was still in the early stages of its work on the Watercourses Convention. The Helsinki Convention was prepared concurrently with the Watercourses Convention and entered into force a few months before the UNGA adoption of that Convention. The Revised Protocol, on the other hand, was issued specifically to incorporate the provisions of the Watercourses Convention.

As stated earlier, the objective of the Amazon Treaty is development of the Amazon region and the equitable sharing of the benefits, while maintaining a balance between economic growth and conservation of the environment. The Helsinki Convention aims at the protection of transboundary watercourses by preventing, controlling and reducing any transboundary impact resulting from the advanced stage of development and industrialization of the UN/ECE Region. The overall objective of the Revised Protocol is to foster closer cooperation for judicious, sustainable and coordinated management, sharing and protection of shared watercourses.

The issue of water scarcity is clearly not a major or immediate concern of either the Amazon riparians, or the parties to the Helsinki Convention. Indeed, those two regions are classified as water rich. Accordingly, it is not surprising that neither of the two instruments analyzed above emphasized the concept of equitable sharing of their watercourses. However, this is not the case with the countries of the SADC. Most of the fourteen-member SADC countries are water scarce, and there are a

54 *See* Articles 7.2 and 7.3 of the Agreement.

55 *See supra* note 1.

number of rivers shared by some of those countries.[56] On the other hand, navigation is addressed by both the Amazon Treaty and the Revised Protocol, but not by the Helsinki Convention, reflecting and needs and concerns of the South American and African counties.

Yet, despite the differences in the regions, timing and concerns of each of those three legal instruments, a number of common themes still emerge. The three instruments are inclusive of all the parties, and the equality of such parties is underscored under each such instrument. The need for the participation of and cooperation among the riparians is stressed as the *sine qua non* for the achievement of the purposes of each of the three instruments. Such cooperation would be achieved, *inter alia*, through the regular exchange of data and information, as well as consultation, and in the establishment of joint institutions to oversee the implementation of the agreement. Those institutions in the three regional instruments start with one that includes high level officials. Ensuring that international waters are used in an equitable and reasonable manner is another common theme to the three instruments, although the approaches differ. While the Amazon Treaty emphasizes equitable sharing of benefits, the Helsinki Convention underscores the need to protect international rivers and lakes from transboundary impact through enhanced cooperation. The Revised Protocol embraces the concept of equitable and reasonable utilization enunciated by the Watercourses Convention, and reiterates the same factors for determining such equitable and reasonable utilization.

Protection of the environment is one other major concern of each of the three instruments. The main emphasis of the Amazon Treaty is maintaining the balance between development and the environment. The Helsinki Convention goes further by aiming to protect its international watercourses from impacts of existing and expanding industrial developments. The environmental provisions of the Revised Protocol mirror those of the Watercourses Convention, which pays more attention to the quantitative sharing of the watercourses than to the qualitative aspects.

Thus, while the Amazonian countries are elaborating strategies for development of the Amazon region, the UN/ECE members are paying more attention to the qualitative aspects of shared watercourses by addressing the existence and threats of adverse effects to their international waters, and are concluding treaties and protocols for that purpose. The parties to the Revised Protocol are more concerned with the quantitative aspects and the equitable and reasonable sharing of their watercourses, reiterating the principles of the Watercourses Convention.

As discussed earlier, the Watercourses Convention has, by and large, codified and developed the basic principles of international law that were prevalent during the years 1970–97. Those principles include cooperation and participation, the need for exchange of data and information, notification, the equitable and reasonable utiliza-

56 At least eleven major rivers are shared in the SADC region. Of those rivers, the Congo is shared by nine countries, while the Zambezi is shared by eight. For a discussion of the water resources situation in the SADC Region, and for the list of those rivers, see Salman M.A. Salman, *Legal Regime for Use and Protection of International Watercourses in the Southern African Region: Evolution and Context*, 41 Nat. Resources J. 981 (2001).

tion, management and protection of the watercourse, and the peaceful settlement of disputes. As noted before, the Watercourses Convention does not lay down rigid rules to be followed. Rather, it is a framework convention which sets forth basic principles, and allows the states discretion in applying and adjusting those principles to the particular characteristics of their shared watercourse, and to their priorities and concerns.

It is perhaps because of this basic feature that the Watercourses Convention has received major endorsements since its adoption by the UNGA in May 1997. In September 1997, only four months after its adoption, the International Court of Justice confirmed the concept of the perfect equality of all the riparian states in the use of the shared watercourses, and stated that "[m]odern development of international law has strengthened this principle for non-navigational uses of international watercourses as well, as evidenced by the adoption of the Convention of 21 May 1997 on the Law of the Non-Navigational Uses of International Watercourses by the United Nations General Assembly."[57]

A similar endorsement, but with less legal weight, was the statement of the World Commission on Dams in 2000 that "the principles embodied in the 1997 UN Convention on the Law of the Non-Navigational Uses of International Watercourses warrant support. States should make every effort to ratify the Convention and bring it into force."[58] Along the same lines, the World Water Council described the provisions of the Convention as sensible but noted that "[s]adly enough, even after all that time [it took to prepare the Convention], it now seems unlikely that this Convention will be ratified by enough countries to enter into force."[59] Although the World Commission for Water in the 21st Century referred to the Watercourses Convention as "weak", the Commission added "[s]urely, weak as it is, it [the Convention] deserves to be approved if only as a first step towards a greater appreciation of the international character of water."[60] The ILA, during its Helsinki Conference held in August 1996, adopted a resolution on the then draft Watercourses Convention. The resolution took note "with satisfaction of the completion of the work of the United Nations International Law Commission on the topic of the non-navigational uses of international watercourses."[61] It also took note with satisfaction of the General Assembly resolution convening the Sixth Committee as a Working Group of the Whole to elaborate a convention on the basis of the ILC draft. This wide range of endorsements indicates a clear recognition of the Watercourses Convention as the principal authoritative reference for international water law.

57 *See* Gabčíkovo-Nagymaros case, *supra* note 29, para. 85.

58 Dams and Development, A New Framework for Decision-Making (The Report of the World Commission on Dams) 252-53 (2000).

59 William J. Cosgrove & Frank R. Rijsberman, World Water Vision – Making Water Everybody's Business 44 (2000).

60 World Commission for Water in the 21st Century, A Water Secure World – Vision for Water, Life and the Environment 32 (2000).

61 ILA, Report of the Sixty-Seventh Conference 416 (Helsinki 1996).

VI. Conclusion

The adoption by a large majority of the UNGA of the Watercourses Convention on May 21, 1997, is no doubt a milestone in the evolution and progressive development of international water law. Building on the work of the IIL, the ILA, the ILC and the UNGA, the Convention has codified, consolidated and streamlined the basic principles of international water law in one instrument. It is a framework convention that lays down some basic procedural and substantive principles and leaves a considerable space to the riparians to complement its provisions through agreements that take into account the particular characteristics of the said watercourses, and their special needs and priorities. Hence, it is indeed disappointing that twelve years after its adoption, many states have not yet followed their vote at the UNGA with ratification of, or accession to the Convention. As stated earlier, of the thirty-five instruments of ratification/accession that the Watercourses Convention needs to enter into force and effect, only sixteen have thus far been completed.

However, the failure of those states, thus far, to become parties to the Watercourses Convention should in no way be seen as a setback to the Convention or to the general principles of international water law enunciated therein. By codifying and developing those principles, the Watercourses Convention has become a convergence point of all the earlier work on international water law. As the previous discussion indicates, the Amazon Treaty and the Helsinki Convention incorporate the same basic principles enshrined later in the Watercourses Convention. The discussion has also shown the influential guidance that the Convention has provided on the SADC Protocol and other subsequent agreements in the SADC region. The wide range of endorsements of the Watercourses Convention, particularly of the International Court of Justice, is a clear recognition of the role and place of the Convention.

Thus, it can be concluded that the Watercourses Convention has codified and progressively developed the principles of international water law, and that it has become the principal authoritative instrument in this field. Even if it does not enter into force and effect, it has provided, and will continue to provide, influential guidance to riparian states for adopting and adapting the provisions of international water law contained therein to the particular characteristics of their watercourse, and to their regional needs, priorities and concerns. Because of the differences in such needs and priorities, states will continue to progressively develop the principles of international water law, codified in the Watercourses Convention, through regional agreements that are tailored for their particular needs and priorities, but are based on those principles.