



# The 1997 International Watercourses Convention – Background and Negotiations

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## Introduction

Rivers were always of great importance to society, and especially the great watercourses of the world played an important role in the social and economic progress of mankind. Therefore, when nation-states started to utilize international waters to a significant extent in the last century, it soon became obvious that the externalities associated with certain uses caused negative effects downstream. This created a rising potential for conflict that is also intensified by a decline in the availability of clean freshwater resources. Over time, the necessity for international regulation emerged.

On the international level, the first attempts to regulate the utilization of international watercourses for purposes other than navigation were made in 1966 when the International Law Association (ILA) published its Helsinki Rules. In 1992, the Economic Commission for Europe (ECE) adopted the 'Convention on the Protection and Use of Transboundary Watercourses and International Lakes' (Helsinki Convention). Five years later, on 21<sup>st</sup> May 1997, the United Nations General Assembly (GA) adopted the 'Convention on the Law of the Non-Navigational Uses of International Watercourses' (hereinafter referred to as the International Water Convention or IWC) by an overwhelming majority of states. By this stage, there had been a delay of 27 years from the first dealing with the topic on the United Nations' (UN) level in 1970, partly caused by the difficulty of resolving legal and hydrologic intricacies by the International Law Commission (ILC).

This article gives an overview over the last round of the negotiation process within the Sixth (Legal) Committee of the UN GA, aiming at the establishment of the IWC. The negotiations were characterized by strong resistance against several provisions of the proposed Convention. As a result, the delegates were unable to complete the negotiations in scheduled time, which necessitated a second meeting. The most contentious provisions of the draft convention were contained in articles 5 and 7. In short, they provide that every riparian state should use an international river in an equitable and reasonable manner to reach its optimal and sustainable utilization. However, the upstream state has to take all appropriate measures to avoid significant harm to co-riparians. The downstream state has to accept harm that is under the threshold of significant harm. To avoid harm, the co-riparians are to work together. As this would impact on the national sovereignty of states, the articles created fierce discussion. Therefore they represent the center of this analysis. You will find a detailed analyses in my master's thesis "Negotiating the final round of the UN – International Water Convention" that I finished in January 2001 at the Technical University of Berlin.

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The first part of this essay will offer an overview of freshwater as a scarce and highly valuable resource and will demonstrate the need for cooperation and regulation (chapter 1). It will then introduce international water law (chapter 2). The second part will firstly introduce the IWC by depicting the elaboration process, its contents and perception in the international arena (chapter 3). The following chapters 4 to 7 primarily deal with articles 5 and 7 of the IWC which will be delineated in chapter 4. The institutional framework of the negotiation process and the most important actors including their riparian position will then be described. After showing the motivation of states to cooperate on international water issues, the important votes on the Convention will conclude chapter 5. Chapter 6 will offer an overview of the negotiation process as a whole before the last chapter 7 describes and assesses the negotiations concerning the articles 5 and 7 in the Sixth Committee. The conclusion will combine the most important findings of the separate analysis of articles 5 and 7.

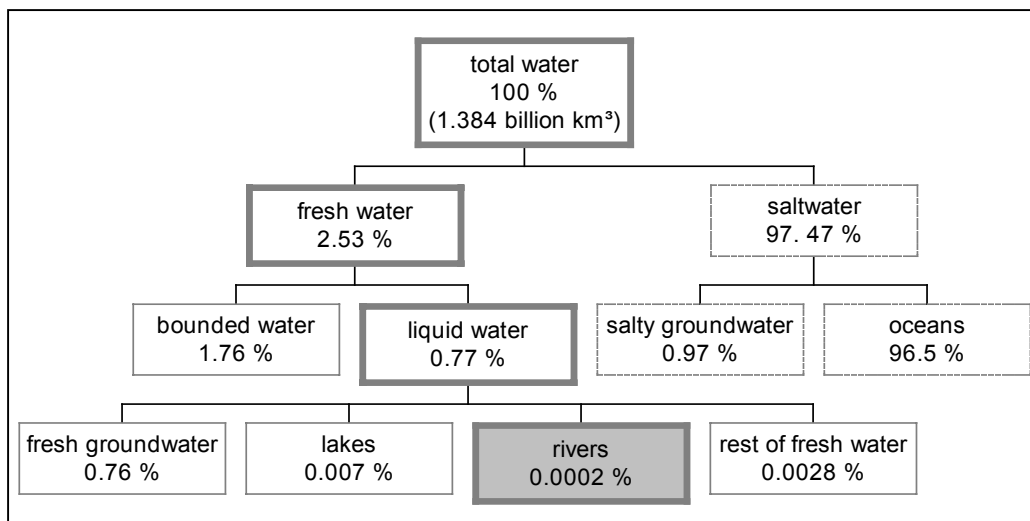
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## 1 Features of International Watercourses

### 1.1 Fresh Water's Ecology, Utilization and Limitation

Approximately 97.5% of all water on earth is found in oceans or as salty groundwater, the remaining 2.5% is freshwater of which two thirds (1.76% of total water) are locked in the form of glaciers and permanent snow cover or ground ice. The last third (0.77% of total water) embraces fresh groundwater, lakes and rivers as well as soil moisture, biological and atmospheric water. From this, only a small, extractable part of the groundwater and the water in rivers and lakes is available to humankind. The extractable groundwater makes up almost all of the available freshwater, whereas rivers and lakes, representing the main sources for human consumption, contain only a quarter of one per cent of the total global freshwater reserves (Ediger 1997: 37; Mays 1996: 1.24; Shiklomanov 1993). The following table illustrates the water resources on earth (Shiklomanov 1993). The percentages relate to the total amount of water; e.g. rivers contain 0.0002% of all water on earth (but 0.006% of freshwater).

The striking feature of freshwater is its organization in drainage basins which are delimited on the surface by a natural boundary called the watershed or drainage divide. All rivers, lakes and groundwaters within a basin are substantially united



because they are almost always interrelated components of one and the same hydrologic cycle. Thus, any changes of factors such as climate, geology, topography, soils, flora and fauna, either naturally or by human intervention through waterworks and land use, effect the entire watercourse system through adjustments in volume, rate of flow, discharge, sediment load and quality of water (Caponera 1992: 183; Teclaff 1996:

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360). Applying this to international rivers, each action taken by a state that modifies the natural water regime within its own territory, either quantitatively or qualitatively, will have repercussions on the share of the water of the other states in the same basin. While most of these actions only have an effect on the states further downstream (Caponera 1992: 183), a few as, for example, groundwater withdrawal in one country, may also affect upstream countries in the same basin (Berthelot 1997: 83). Although the drainage basin is the striking feature of freshwater, the International Water Convention focuses on the watercourse. Thus, this essay will do the same.

Another significant feature of the freshwater resource is its vital importance for mankind. It is needed for many purposes for which no substitute exists such as drinking and domestic tasks. It is also necessary for irrigation and industrial applications, navigation, transport, hydroelectric power generation, fishing, waste disposal and recreation (Chenevert 1992: 501; Gleick 1993: 79).

As a fact, water supplies are globally abundant and humanity has enough freshwater resources at its disposal. What makes it scarce is its uneven distribution among and even within countries (Haftendorn 1998: 32; WRI 1998: 188). Furthermore, natural reasons such as lack of rain, high evaporation or drought as well as manmade reasons like population growth, urbanization, economic development or (inefficient) agricultural irrigation may contribute to the limitation of fresh water (cf. Frey 1993: 54f). The latter reasons cause, on one hand, quantitative scarcity because an increasing world population needs ever more water per capita and on the other hand, the natural resource is degraded through misuse, i.e. through contamination of freshwater, resulting in qualitative scarcity (Chenevert 1992: 498; Westing 1986: 4). Furthermore, the access to freshwater is unequally available for only the riparians have access for purposes other than navigation (Appelgren & Klohn 1997: 91; Benvenisti 1996: 388). In the whole, freshwater's vitality, scarcity, uneven distribution, as well as its often international character, increases the pressure on international watercourses. Thus, nation-states have attempted to preserve and optimize the beneficial uses of their national water resources. Because the optimal development of a river system was often beyond the competence of individual states, the need for international cooperation became evident (cf. Chenevert 1992: 500).

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## 1.2 The International Dimension of Watercourses

Regarding their political geography, international rivers can be classed into two different types: *Contiguous* rivers serve as boundaries between states while *successive* international rivers cross the territory of two or more states (Caponera 1992: 185).

The number of shared rivers world-wide amounts to 261 (GCI 2000: 2; Wolf 1998: 251). Most of them flow through only two countries. The Danube river is the most international, shared by 12 riparians (WRI 1998: 311). Hence, freshwater has – economically and ecologically – a large international dimension (Simonis 1996: 23).

The main problems that arise over international rivers are caused by externalities which describe direct impacts on one state's welfare or productivity, resulting from actions of another state. Their occurrence can be put down to the fact that water-related actions in an international river basin are not always confined to the originating state (Rogers 1993: 118). Against this natural background, externalities occur because all riparian nations seek to nationalize (internalize) its benefits and to internationalize (externalize) its burdens, resulting in the raising of questions on pollution, compensation and the protection of the environment in the suffering state (Benvenisti 1996: 388; Frey 1993: 54). Almost all externalities occurring on successive international watercourses are *unidirectional* (Scherer 1997: 334). Thus, the upstream state can directly influence both the quantity and the quality of the water, whereas the downstream state has almost no possibility of reciprocal actions (Correia & Silva 1999: 86,88). Countries with a less favorable position along a stream may e.g. suffer from the passing on of industrial and domestic wastes or the reduction of water flow after the construction of upstream dams (LeMarquand 1977: 1,9). On the other hand, pollution of an internationally shared lake or contiguous rivers results in *reciprocal* externalities (Durth 1996: 50).

Against this background it seems natural that when dealing with unidirectional externalities, the downstream state would in most cases profit from a joint solution, while the upstream state has little incentive to change the situation because the downstream country has no reciprocal power over it. As a consequence, it is assumed that downstream states are more interested in transboundary cooperation than the upper countries (Durth 1996: 50; Correia & Silva 1999: 86,88), inducing an asymmetric influence constellation. However, if the downstream state is much more powerful in terms of control of natural resources (prior uses) as well as in economic and military terms, like Egypt at the Nile river, the upstream states are more interested in

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cooperation for they need some kind of 'permission' for the development of their international water resources (cf. Grey & Dombrowski 2000: 3). To overcome the negative impacts of externalities, its internalization through e.g., the incorporation of the riparian states into a larger unit, such as a Joint River Commission, that provides a new legal and institutional mechanism for the protection and management of the shared resource, is necessary. However, due to the nation-states concerns regarding their sovereignty transboundary cooperation is not easy to establish (Frey 1993: 55; Lazerwitz 1999: 2).

Although interstate hostilities over freshwater are well known<sup>1</sup>, Wolf says that, in the last century, apart from seven minor skirmishes no real water war has been fought. On the contrary, 145 water-related treaties have been signed, most of which were strikingly resilient over time, "even between otherwise hostile riparians and even as conflict is waged over other issues" (Wolf 1998: 251). These patterns suggest that the characteristics of this vital resource tend to induce cooperation, inciting violence only in the exception (ibid.; Biswas 2000). While water wars may occur quite seldom, the connection between water stress and political instability is striking. Nevertheless, the causal pathway from freshwater scarcity to violent conflict is in general an indirect route via secondary (social) instability that in turn may create an environment more conducive to political or even military conflict (Carius et al. 1996: 7; Wolf 1998: 261). Current international water conflicts are observable in the Middle East (Euphrates, Jordan, Nile) and in Asia (e.g., Indus, Ganges and Mekong). In the former regions, it is

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<sup>1</sup>Typical conflicts result from the fact that, apparently, downstream countries have made intensive use of the waters from an international river before their upstream neighbours, for their topography generally lends itself more readily to agriculture than that of countries at the head of international rivers. (Downstream (hydrologic) societies needed to develop early because they had to deal with floods (e.g. Egypt). In contrast, their upstream neighbours were in a geographically advantageous position and, until the 20<sup>th</sup> century, received enough rainfall to satisfy their everyday needs (phenomenon of downstream 'hydraulic societies' and later development upstream) (Grey & Dombrowski 2000: 3). Examples are Egypt and Sudan in relation to the countries in the upper Nile Basin and Mexico in relation to the USA.) Subsequently, measures planned by the upstream state almost always face the opposition of their downstream neighbours. These mostly regard water as belonging to all riparian states and argue that they have acquired rights to receive the quantity of water as they have had in the past (McCaffrey 1993a: 99; Haftendorn 1998: 50f). In contrast, the upstream countries usually base their claims for water on hydrography relying on where a river originates and how much of it falls within their territory. They stand for the national control of territorial water resources or rely upon the principle of equitable utilisation for they did not have the need or the capability to develop their water resources earlier or the technology for such development simply did not exist. At the same time, they argue, the lower riparians developed their dependence on the water as in the case of hydroelectric facilities (Lorenz & Erickson 1999: 31). However, due to

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debatable whether these are raised by water scarcity or if the water issue is only one arena to carry out the various other conflicts in the region. In both regions and in many parts of Africa the scarcity of freshwater already dominates interstate relations. In other regions of Africa (e.g. Niger and Zambezi rivers) and the Americas (e.g., Rio Grande), although there are no current tensions a potential for conflict prevails. The necessity to protect the geographically disadvantaged downstream states at international watercourses from suffering of avoidable externalities as well as the difficulties to establish agreements in regions where tensions are the order of the day, require an international legal framework for the fair utilization of transboundary watercourses and their protection. In addition, the widespread over-exploitation and pollution of international watercourses require a consensus regarding the delicate balance between national sovereignty and the management of international basins in the sense of sustainable, fair and optimal utilization and protection (GCI 2000: 6). Compared with the mere elaboration of many regional agreements, the advantage of an international agreement lies in the fact that it would also apply to regions not yet covered by regional treaties, though the countries access it. In addition, an international legal framework would set a minimum standard for the conduct of member-states of regional treaties against those, who are not parties to the agreement in question. Furthermore, it could provide guidelines and principles as well as a certain degree of stability to the process of creating regional agreements (ibid.: 10). It could also function in an advisory capacity to participants who are willing to initiate regional cooperation on how to present their case.

## **2 International Water Law**

### **2.1 General Introduction to International Law**

International law lacks the characteristic features of domestic legal systems as a compulsory jurisdiction and centralized enforcement (McCaffrey 1993a: 97). Thus, unlike individuals under national law, nation-states may only exercise their rights by going to court when the defendant party agrees to bring a specific case to the International Court of Justice (ICJ). International Law represents a decentralized system wherein the nation-states create their own law and enforce it by themselves; it is thus a 'coordination law under equals' (Biermann 1996: 249; Cano 1989: 167).

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their geographically disadvantageous position, in most basins, downstream countries are at the mercy of their upstream neighbours.

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The body dealing with the codification and progressive development of international law is the International Law Commission, a specialized agency of the UN General Assembly since 1947 (Kimminich 1997: 168, 229). The ILC's tasks are the codification<sup>2</sup> and progressive development<sup>3</sup> of international law through the preparation of draft conventions on issues still in a formative state and on those on which substantial agreements exist in state practice (Caldwell 1996: 148). Due to the ILC's authority and political acceptability, those draft articles are often adopted without, or with only minor alterations, into the final convention by the ensuing diplomatic conference. As such, the Commission occupies a predominant role in the building up of international law and, thus, represents a quasi-legislative body for the international community (Villiger 1997: 85). Regarding the IWC, the ILC developed the draft articles, which served as the basis for the negotiations in the Sixth Committee of the GA in 1996 and 1997. Thus, the IWC before its ratification also represents international soft law whose turning into international customary law is very likely.

## **2.2 Sources of International Water Law**

### **2.2.1 General Principles**

International law and international relations are based on general legal principles which represent one source of international law to be resorted to in the absence of international conventions or customary rules (Caponera 1992: 191). After their adaptation, most of these general legal principles also became valid in the field of international water law (Scott 1994: 321),<sup>4</sup> where almost all of them serve as a basis for limitations to the sovereignty of states sharing common water resources.

The following principles of international water law are accepted globally:

- The principle of equity reformulates the general principle that international law does not operate in favor of any particular state or group of states (ibid.).

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<sup>2</sup> '*Codification of international law*' means the more precise formulation and systematisation of certain customary or unwritten rules into a written body of rules ('codified rules') in fields where there already has been extensive state practice and precedent.

<sup>3</sup> '*Progressive development of international law*' means the preparation of draft conventions on issues which have not yet been regulated by international law (Caponera 1992: 190; ILC 1998: 2).

<sup>4</sup> This is due to the fact that watercourse utilisation differing from navigation only became an issue in international law after World War II. According to Scott, in newly emerging fields "in

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- The principle that there should be no abuse of rights ('*sic utere tuo ut alienum non laedas*') says that you should use things belonging to you in such a way that no other person is harmed (ibid.).
- The principle of good neighborliness between all basin states prohibits the conduct of activities that are likely to have negative impacts on another state's territory (ibid.: 191).
- The principle of equitable apportionment and use of waters among riparian states (ibid.: 191f).
- The obligation to the peaceful settlement of disputes (Wouters 1996: 420);
- The principle of reciprocity; if a state acts in accordance with its rights and responsibilities under international law, it expects the same conduct from other states (Heintze 1997: 287).
- The general duty to cooperate and to negotiate with a genuine intention to reaching an agreement (Caponera 1992: 190);
- Some international lawyers already treat the precautionary and the polluter-pays principles as general principles in international environmental law (Kimminich 1997: 406).

### 2.2.2 International Custom: The Helsinki Rules

International custom, i.e. unwritten rules, which were not agreed upon in specific international agreements, is one source for the rules of international water law. It develops over time as the practice of states, i.e. the application of or reference to a rule in a concrete case (Kimminich 1997: 218ff; Villiger 1997: 16,26). It is especially important in fields not yet covered by international treaties or conventions.

When turning to customary international water law, it must be pointed out that it still presents the only global set of rules that is applicable when seeking to solve disputes over the utilization of international rivers, because the International Water Convention has not yet come into force.<sup>5</sup>

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which a set of rules has not yet been widely agreed upon, lawyers tend to rely on the application of broad principles to uphold the ideology" (Scott 1994: 321).

<sup>5</sup> However, according to Dellapenna, for "the general absence of a neutral enforcement mechanism ... customary international law has proven unable by itself to solve the problem of managing transboundary water resources. This in turn means that the settlement of disputes

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Evidence of customary international water law is given by the work of recognized experts as the *International Law Association*, an international organization of high repute that formulates *soft law* (Lorenz & Erickson 1999: 29). Because the principles have no binding legal effect, their acceptance and the possibility of them subsequently turning into binding international *hard law*<sup>6</sup> highly depends on the prestige of the formulating organizations (Cano 1989: 167; Porter & Brown 1996: 44).

In 1966, the ILA formulated its Helsinki Rules on the Uses of the Waters of International Rivers. They became widely regarded as the appropriate norms for the use of international rivers so that they were ultimately adopted in the form of multilateral conventions or were followed by states as state practice, and, thus, became legally binding (cf. Lazerwitz 1999: 4). There is widespread evidence that they are being used as the foundation for customary law: all treaties currently in force in North America and central Europe that deal with the utilization of international watercourses are based on them (Barandat 1999: 38). Additionally, they are the statutes most referred to by scholars and most cited by courts. They also provided the basis for the 1997 International Water Convention.

The following most important provisions currently describe customary international water law:

- The establishment of the principle of restricted territorial sovereignty as the valid rule in international water law (Godana 1985: 45).
- The prohibition of "substantial injury in the territory of a co-basin state" through actions affecting an international watercourse (art.X (1.a)). In the case of a violation of this rule, the state causing the injury is to compensate the suffering state (art.XI (1)) (Bourne 1996: 155,165).
- Regarding the relationship between these two principles, The Helsinki Rules support the pre-eminence of equitable utilization over no-harm, seeing harm "as only one factor to be taken into account in determining whether a particular utilization is equitable" (McCaffrey 1996a: 308).
- The identification of the principle of equitable utilization as *the* basic rule of international water resources law, entitling each basin state to a reasonable and equitable share of the benefits of international waters (art.IV) (Bourne 1996:

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over internationally shared water resources has nearly always required negotiation of a treaty regime to resolve the sharing of the transboundary water" (Dellapenna 1997: 123).

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155,165). The 1986 'Complementary Rules' clearly subordinated the rule prohibiting injury to the rule of equitable utilization (ibid.: 203).

### 2.2.3 Treaties and Conventions: The Helsinki Convention

International treaties and conventions<sup>7</sup> are the most important source of international law for they create a state of law between several parties. In the case of a dispute, treaties and conventions are the primary evidence of international law. They are given precedence when in conflict with a provision of customary law. Conventions lay down binding international norms for states' interaction. Thus, they fulfil quasi-legislative functions in the international arena (Kimminich 1997: 212ff,228; Lorenz & Erickson 1999: 29). The absence of a real international legislature results in the fact that an international convention is only valid if it rests upon the free consent of the parties (Klabbers 1996: 72; Villiger 1997: 139). Therefore, the nation-states need to express their consent to be bound by the treaty's obligations by ratification, acceptance, approval or accession (Parry et al. 1988: 320). As others, the IWC incorporates a ratification clause i.e. that the respective treaty or later adjustments only become binding after the deposit of a set minimum of ratification instruments e.g. with the UN secretary-general (Kimminich 1997: 213).

Special cases of international treaties are '**framework conventions**' as the International Water Convention. In general, a framework convention "is intended to establish a set of principles, norms, and goals and formal mechanisms for cooperation on the issue..., rather than to impose major binding obligations on the parties" (Heintze 1997: 294). The parties to the convention are free in their choice of means to convert the provisions into state practice. In addition, they are given enough scope to take into account both domestic interests and exceptional features of the region (ibid.).

If the IWC enters into force, it will represent the second multinational treaty relating to the use of international watercourses since 1923. The first of its kind was the multinational Convention on the Protection and Use of Transboundary Watercourses and International Lakes (Helsinki Convention). It was elaborated by the Economic

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<sup>6</sup> This is only possible by their adoption in the form of a multilateral convention or if they are followed by states as state practice (Lazerwitz 1999: 4).

<sup>7</sup> The term 'convention' is generally used for multilateral treaties which are open for participation by the international community as a whole, or at least by a large number of states. The term usually applies to the instruments negotiated under the auspices of international organisations or those adopted by an organ of an international organisation (Cano 1989: 168; UN 2000b: 3).

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Commission for Europe (Caldwell 1996: 130). The instrument in question was signed in Helsinki on 17<sup>th</sup> March 1992 and came into force on 6<sup>th</sup> October 1996 (ECE 1998: 1).

In contrast to the Helsinki Rules that emerged as soft law and were only intended as a framework for regional treaties, the Helsinki Convention as a treaty provides more: On the one hand, it serves as a framework determining the issues that its parties are to regulate in specific watercourse agreements, and, on the other, it imposes minimum standards applying to all signatories, regardless of whether they are party to specific watercourse agreements or not (Hey 1998: 293). It focuses on the limitation of transboundary externalities and the improvement of water conditions (ECE 1998: 2; Wouters 1996: 426).

The following provisions are established in the Convention:

- "The parties shall take all appropriate measures to prevent, control and reduce any transboundary impact" (art.2, para.1) especially by cutting pollution (ECE 1998: 2);
- Environmental protection is to be ensured;
- The precautionary and polluter-pays principles as well as the interests of future generations are established as the guiding principles when preventing resp. dealing with negative externalities;
- The principle of equitable & reasonable utilization of transboundary watercourses is established;
- States should be guided by the principle of environmentally sound and sustainable development;
- States are to carry out environmental impact assessment;
- The parties shall adapt existing agreements to eliminate contradictions with its principles.

### **2.3 Theories and Doctrines of International Water Law**

This section examines the principles of 'equitable utilization' and 'not to cause significant harm' as contained in the articles 5 and 7 of the IWC. They represent the focus of my thesis for they determined the discussion of the IWC to a large extent. Thereby, a specific state's support of a respective principle "depends mainly on its position with relationship to the watercourse" (Barandat & Kaplan 1998: 15).

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### **2.3.1 The Theories of Absolute Territorial Sovereignty and Absolute Territorial Integrity**

The sovereignty of states as the constituting principle of international law determined two theories advocated by states: the theories of absolute territorial sovereignty or absolute territorial integrity.

While the '*theory of absolute territorial sovereignty*' states that every nation can utilize the waters of an international river flowing on its territory as it likes, regardless of the consequences in other countries and without the duty to consult (Correia & Silva 1999: 89), the '*theory of absolute territorial integrity*' regards an international river as the common property of its co-riparians, which means that no state is allowed to deprive the others of the benefits of the waters in question (Barandat & Kaplan 1998: 15). Consequently, the lower riparian has the right to demand the continued, uninterrupted flow of water from the territory of the upper riparian, "no matter what the priority" (Lazerwitz 1999: 3). Under the first theory, the upstream state would be free to divert all the water from a shared river, leaving nothing to the downstream states (McCaffrey 1996b: 549); under the second, the lower riparian would have a veto power over any upstream water utilization that could disturb the natural flow, as the alteration of the course or flow rate of the stream or of the volume or quality of its waters (Berber 1955 quoted in Lazerwitz 1999: 3).

Obviously, both theories completely ignore the equal territorial sovereignty of all riparian states and neither represent determining factors in contemporary international water law (cf. Caponera 1992: 213; Godana 1985: 36ff). However, the theory of absolute territorial sovereignty is still used as a bargaining tool by some upper riparians to justify or excuse harm inflicted to downstream neighbors (Chenevert 1992: 503). In contrast, the theory of absolute territorial integrity is used by some downstream states to strengthen their position in arguments concerning upstream projects.

### **2.3.2 The Theory of Limited Territorial Sovereignty**

As the utilization of international watercourses became more intense, another concept guiding the conduct of states stepped forward because the theories mentioned above did not allow transboundary cooperation. The theory of limited territorial sovereignty reflects the general legal principle of '*sic utere tuo ut alienum non laedas*' and is based on the assertion that every state is free to use the waters of shared rivers flowing on its territory as long as such utilization does not prejudice the rights and interests of the

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co-riparians. In this case, sovereignty over shared waters is relative and qualified. The co-riparians have reciprocal rights and duties in the utilization of the waters of their international watercourse and each is entitled to an equitable share of its benefits (Caponera 1992: 213; Falkenmark 1986: 103; cf. Lazerwitz 1999: 3).

The advantage of this theory is that it simultaneously recognizes the rights of both downstream and upstream countries as it guarantees the right of reasonable use by the upstream country in the framework of equitable use by all interested parties (Correia & Silva 1999: 89). Today, it counts among customary international water law (Godana 1985: 42f) and is widely reflected in attempts to codify international water law (Lazerwitz 1999: 3); e.g. the Helsinki Rules and the IWC.

The only, but seriously controversial, open question today is the scope and nature of the limitations imposed by international law upon a state's sovereignty in the utilization of the waters in its territory in the interest of its co-riparians (Godana 1985: 36; Epiney 1995: 318). In other words: What determines the threshold above which the harm caused by a certain utilization of a particular state becomes unlawful?

The use-orientated **Doctrine of Equitable Utilization** as well as the following one is part of the theory of limited territorial sovereignty. It reflects the 'principle of the sovereign equality of states' (Tanzi 1997b: 242) by entitling each basin state to an equitable and reasonable use resp. share in the beneficial uses of an international watercourse (Gleick 1993: 106). Thereby, the standard does not define equitable utilization by referring to a particular state's activities but, rather, by regarding the use in relation to other states' uses of the same river. Thus, if water becomes scarce, watercourse states have to adapt or accommodate their uses on the basis of equity in order to achieve a fair result. In this context, equitable share does not mean equal division of the waters. Rather, it means that all relevant factors such as population, geography, pre-existing uses, or the availability of alternative resources have to be considered in each individual case when allocating water rights (Lazerwitz 1999: 7; Kroes 1997: 83). The aim is to distribute the water of an international river in such a manner as to satisfy the co-riparians' conflicting economic and social needs to the greatest extent possible and, thereby, to achieve maximum beneficial and minimum detrimental effects among the states. Thus, there exists a relative rather than absolute equality of the basin states, and the respective share of each basin state has to be identified on a case-by-case basis (Caponera 1992: 214; Chenevert 1992: 506; Godana 1985: 55). As far as the occurrence of negative externalities is concerned,

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harm to the lower riparian represents only one factor for the determination of equitable utilization (McCaffrey 1993b: 108). Today, equitable utilization is the controlling principle governing the uses of international watercourses (Godana 1985: 64).

This doctrine is generally favored by upstream states because it most effectively safeguards their right to develop later, even if this requires impairment of earlier uses downstream (McCaffrey 1993b: 108).

The **Doctrine not to Cause Significant Harm (No-Harm Rule)** reflects the principle of '*sic utere tuo ut alienum non laedas*' but regards the equality of states from the protection-orientated side (Gleick 1993: 107; McCaffrey 1993b: 98f). The territorial integrity of states plays a key role (Epiney 1995: 357). The 'doctrine not to cause significant harm' says that a state's right to use the waters of an international river is limited by the right of the co-basin states to not being harmed significantly. Thus, every state is obliged to take all measures necessary to prevent extraterritorial damage through actions to international watercourses that would harm public health, activities, property or the environment of co-basin states (Caponera 1992: 214; Lazerwitz 1999: 6), "whatever the level of benefit to other states or to the watercourse generally arising from the use in question might be" (Fitzmaurice 1995: 368). Thus, the no-harm rule limits the sovereign freedom of states to exploit their water resources (Arcari 1997: 173).

The specification of harm as 'significant' expresses the inclusion of the *de minimis* rule according to which the co-riparians have the duty to overlook insignificant damage (Tanzi 1997a: 115). On the legal level, 'significant' defines the threshold above which an activity's harmful consequences become legally relevant to the application of the rule or, in other words, for tolerable state behavior (Fitzmaurice 1995: 366; Hey 1998: 294). Thus, the definition of 'significant' is necessary to clear the extent of the limitation to the sovereignty of states. To answer the question if the consequences of a certain use is significant and therefore prohibited, the qualification of the environmental and economic impacts resulting from this use and the determination of the extent of responsibility for those impacts are necessary. Because this data is difficult to ascertain, the application of the no-harm rule already becomes complicated before the states even started to argue about the threshold of permitted harm (cf. Caponera 1992: 214; Gleick 1993: 107).

Today, the doctrine counts among customary international water law. No country claims the right of being allowed to substantially harm the environment of other states

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even if it is actually doing so. It is then not the validity of the norm but causality, seriousness or responsibility, which are denied, for the amount of a country's contribution to a certain damage is mostly not to identify (Kunig 1992: 17).

This doctrine is often cited by downstream states to protect their environment and pre-existing uses. In contrast, upper riparians emphasize that the rule forecloses development (cf. McCaffrey 1993a: 99).

In conclusion, a convention is needed that clears the question, which of the 2 principles is superior over the other. It has to protect both the right of downstream states to not suffer harm and the right of upstream states to develop their water resources later. Indeed, during the negotiations of the IWC, the question of superiority was one of, if not *the* most controversial question.

### **3 The IWC: Elaboration Process, Contents and Perception**

#### **3.1 Historical Overview of the Elaboration Process: 1963-1997**

At the beginning of the 20<sup>th</sup> century, the utilization of water for purposes other than navigation started to raise legal questions (Godana 1985: 51). The intensity of the non-navigational uses of international rivers was growing so fast that the slowly developing body of law dealing with those uses could not keep pace. Therefore, when the need arose for riparians with an international watercourse to regulate their relations on this issue, they had to rely upon more general principles of international law (McCaffrey 1996b: 550).

For these reasons, the UN-Secretariat presented a report on 'Legal Problems Relating to the Utilization and Use of International Rivers' in 1963. In 1970, the GA requested an updating of this study because substantial developments in practice and theory had occurred in this field in the 1960's. The supplementary report was issued in March 1974 (Kearney 1975: 609).

In the same year as the update was requested by the GA, it was decided to take action in the field of international water resources law. It was the General Assembly resolution 2996 (XXV) from 8<sup>th</sup> Dec. 1970 that commissioned 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". The reasons for this step were the great number of disputes and the increasing awareness among the state communities about the limits of natural freshwater resources (Chenevert 1992: 495f), combined with

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the rapid increase in world population and technological and industrial expansion, that resulted in the need for preservation and optimal utilization of freshwater.

While the discussion within the UN GA from 1963 – 1970 can be regarded as phase I, phase II lasted until 1994 and was dominated by the codification work of the ILC.

In 1974, the ILC firstly nominated a special rapporteur as for each subject under consideration, who was responsible for editing the draft (Cano 1989: 169). After asking the world governments if the new convention should also deal with the problem of pollution of international rivers, the ILC started working on the subject. Its main preoccupation was the question of the equitable apportionment of freshwater (Tanzi 1997a: 112).

It was not before 1991 that the ILC presented a complete set of 32 'Draft Articles on the Law of the Non-Navigational Uses of International Watercourses' which were founded on the principle of restricted territorial sovereignty (Barandat & Kaplan 1998: 18). The delay of the development of the draft might may, at least partially, be due to several changes in the special rapporteurship because most of the special rapporteurs were appointed judges at the ICJ (Arcari 1997: 170). The 1991 draft articles were transmitted to Governments for comments and observations, setting the date for transmission to 1<sup>st</sup> January 1993 (A/CN.4/447:3).

Considering these comments and the statements given in the debates in the GA, the ILC completed the second reading of the draft articles of the IWC in July 1994 (ILC 1994a). In general, the 37 articles are in great parts similar to those adopted in 1991. However, several important changes were made. The most obvious were the adding of another article 33 about the settlement of disputes and the fundamental amendment of article 7. By submitting the set of draft articles and a commentary as a supplementary means of interpretation to the UN GA for debate, the ILC completed its task (cf. Cano 1989: 168).

The body that dealt with the ILC in its final phase III was the Sixth Committee of the GA. Based upon the recommendation from the ILC, on 9<sup>th</sup> December 1994 the GA adopted the following resolution with a broad majority of states: After inviting states "to submit, not later than 1 July 1996, written comments and observations on the draft articles...", the resolution provides that "...the Sixth [legal] Committee shall convene as a working group of the whole open to all States Members of the United Nations or

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members of specialized agencies<sup>8</sup>, for three weeks from 7 to 25 October 1996, to elaborate a framework convention on the basis of the draft articles adopted by the International Law Commission in the light of the written comments and observations of States..." (GA Res. A/49/52, paras. 2 and 3).

According to this resolution, the Sixth Committee was to represent the negotiation forum for the International Water Convention. It is one of the 6 main committees of the General Assembly and the primary forum for dealing with legal questions in the GA. Entitled to representation on the Sixth Committee are all of the 185<sup>9</sup> UN member states. Its task is the discussion of legal issues and, where possible, the search for how to harmonize the various approaches of states. In the end, the Sixth Committee presents a draft resolution to a plenary meeting of the Assembly for consideration (UN 2000: 2). It is those recommendations on which the GA grounds most of its decisions (Morris & Bourloyannis 1993: 306). The members of the Sixth Committee are usually international lawyers that work for national foreign offices and represent their governments (Luard 1994: 46,82). Thus, in contrast to the ILC, whose annual reports and final drafts always get discussed intensely<sup>10</sup>, the Sixth Committee can be seen as a forum where international politics are made (Kim & Russett 1996: 629).

Shifting the focus back on the elaboration of the IWC, the Sixth Committee resp. the Working Group of the Whole (WG) failed to complete the negotiations by 25<sup>th</sup> October 1996. On request of the WG, the General Assembly passed another resolution on the topic, convening a second session of the WG for a period of two weeks from 24<sup>th</sup> March – 4<sup>th</sup> April 1997 to finish its work (GA Res. A/51/206). After this second round of negotiations, the Sixth Committee submitted its final version of the Convention as part of its report A/51/869 to the GA, which adopted it as part of GA Res. A/51/229 on 21<sup>st</sup> May 1997.

### **3.2 Contents of the IWC**

The International Water Convention consists of a preamble, 37 articles in 7 parts, and one annex. There are 33 articles regarding content and four procedural articles, the

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<sup>8</sup> This provision "had the effect of allowing certain important riparian states, such as Switzerland, to participate in the negotiations ..." (McCaffrey & Sinjela 1998: 97).

<sup>9</sup> As at Oct. 1996; the time when the negotiations took place (Kimminich 1997: 168).

<sup>10</sup> This is one of the most important agenda items of the Sixth Committee (Villiger 1997: 83). All things considered, there exists a close working relationship between the two UN bodies (ILC 1998: 3).

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latter constituting part VII: 'final clauses'. While only a short overview is given here, the complete text is reprinted in the annex of this thesis.

Preamble: Among other things, the preamble defines the problems of international watercourses as, inter alia, an "increasing demand and pollution" and points out that the IWC is a framework convention.

Part I: Introduction (arts. 1-4): Article 1, para.1 sets out the general scope of the Convention, namely that it applies to the use, protection, preservation and management of international watercourses and not to navigational purposes.<sup>11</sup> Article 2 defines the term 'watercourse' as the entire "system of surface waters and groundwaters constituting by virtue of their physical relationship a unitary whole and normally flowing into a common terminus". It does not include confined groundwater, i.e. aquifers that are intersected by international boundaries but are not connected to surface water.<sup>12</sup> The article also defines 'watercourse State', as "a State, Party to the ... Convention in whose territory part of an international watercourse is situated...". Article 3 states that the Convention has no repercussions on existing regional watercourse agreements (para.1). The article's third paragraph obliges states who are party to the convention, when negotiating future agreements, to "apply and adjust the provisions of the ... Convention to the characteristics and uses of a particular international watercourse or part thereof". Paragraph 6 additionally states that the general principles and rules of the IWC directly apply in the absence of specific agreement among the states concerned (Chenevert 1992: 496). Finally, article 4 provides every riparian state with the right to participate in the negotiation of regional agreements.

Part II: General Principles (arts. 5-10): Part II lays down the 5 major general obligations of watercourse states, namely equitable and reasonable utilization of, and participation in, watercourses by watercourse states (arts. 5 and 6) and the duty not to cause significant harm to other riparian states (art.7). These principles are the most important basic principles of the Convention (see chapter 4). Article 8 provides for a general obligation to cooperate "on the basis of sovereign equality, territorial integrity [and] mutual benefit...", while the following article points out the duty to regularly "exchange readily available data and information on the condition of the watercourse" including

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<sup>11</sup> This article provides the basis "for the structural linkage between the core principles of equitable utilization and no-harm ..., on the one hand, and the water quality issues – also encompassed in articles 5-7 and further specified in Part IV on protection, preservation and management – on the other" (Tanzi 2000a: 6).

<sup>12</sup> The relation of international rivers to hydrological concepts (→ basin approach) was strongly opposed by some countries, for this could eventually lead to the idea of jurisdiction over land areas (Solanes 1987: 359).

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those of an ecological nature and data related to water quality (art.9). The principle that "no use of an international watercourse enjoys inherent priority over other uses" is laid down in article 10. It also provides that "in the event of conflict between uses..., it shall be resolved with reference to articles 5 to 7...". So, this principle interacts with the first two.

Part III: Planned Measures (arts. 11-19): This part provides a detailed procedure for watercourse states planning measures that might have negative effects on a watercourse and other riparian states. It starts with the exchange of information concerning planned measures (art.11) and the notification of the other riparian states if adverse effects are possible (art.12). During the stipulated period for reply the notifying state is under specific obligations to cooperate and to interrupt the implementation of the planned measures. The IWC also provides periods for reply to notification and regulations for procedures in its absence (arts. 13-18). Article 19 sets a procedure for the urgent implementation of planned measures.

Part IV: Protection, Preservation and Management (arts. 20-26): Part IV sets out major general obligations concerning the protection of the environment: The "watercourse States shall, individually and, where appropriate, jointly, protect and preserve the ecosystems of international watercourses" (art.20). Article 21 defines 'pollution of an international watercourse' as "any detrimental alteration in the composition or quality of [its] waters ... which results directly or indirectly from human conduct" (para.1). "Watercourse States shall ... prevent, reduce and control the pollution of an international watercourse that may cause significant harm to other watercourse States or to their environment, including harm to human health and safety..." (para.2). Paragraph 3 proposes possible measures and methods to achieve these objectives. The protection and preservation of the marine environment, including estuaries, is regulated in article 23. In addition, international watercourses should be managed jointly, including the planning of its sustainable development (art.24). Article 25 states that the watercourse states shall cooperate when the need for the regulation of the flow of a watercourse arises and article 26, finally, demands that each state has to ensure the safe operation and maintenance of its installations and facilities related to an international watercourse.

Part V: Harmful Conditions and Emergency Situations (arts. 27-28): This part requires watercourse states to take response action to harmful effects arising from harmful conditions and emergency situations.

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Part VI: Miscellaneous Provisions (arts. 29-33): Part VI provides the application of international law to international watercourses in times of armed conflict (art.29). Article 30 determines which indirect procedures are to be used when there are serious obstacles of direct contact between states. Article 31 exempts data and information vital to national defense or security from their duty to regularly exchange information on the condition of watercourses as laid down in article 9. Article 32 provides the rule for non-discrimination while the IWC's last article regarding content deals with the settlement of disputes (art.33). In the event of failure of consultations and negotiations, the article provides for fact-finding machinery.

Part VII: Final Clauses (arts. 34-37): It lays down the time the Convention will be open for signature, viz. 21.5.1997 – 20.5.2000 (art.34). Article 35 sets the Secretary-General as the depository for the instruments of ratification, acceptance, approval or accession. Article 36 says that the "Convention shall enter into force on the ninetieth day following the date of deposit of the thirty-fifth instrument of ratification ... with the Secretary-General of the United Nations". The last article lists the languages in which the original of the IWC is equally authentic, namely Arabic, Chinese, English, French, Russian and Spanish.

The Annex is titled "Arbitration" and lists steps to be taken at the emergence of conflict. The procedure only comes in useful if both conflicting parties have agreed to submit the dispute to arbitration.

### **3.3 Effects of the Convention**

This chapter will consider the effects of the IWC regarding both its normative contents and the case that not enough states will ratify the instrument to enter it into force.

The value of the International Water Convention has to be estimated by its contribution to the generation of peaceful and cooperative regional agreements especially in crisis areas, to reach an equitable distribution and sustainable use of the resource (Barandat & Kaplan 1998: 13). However, international scholars do not share the same opinion when assessing the possible effects of the IWC.

On the one hand, Hey and Biswas deny that the IWC will contribute to the resolution of disputes over the uses of the Danube, Ganges, Jordan, Nile, Mekong or the Euphrates. While Hey (1998: 297f) explains this with the IWC's provisions, namely that it neither furthers sustainable water use nor regulates the discretionary powers of watercourse states and Wolf supports this view by stating that the IWC "...provides few

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practical guidelines for allocations, the heart of most water conflicts..." (Wolf 1998: 252), Biswas does not even consider its provisions: he rather points out that in all basins with conflicts at least one country voted against the IWC, abstained or was absent (see chapter 5.3.1). Thus, its provisions and ratification do not matter at all (Biswas 2000). Demeter sees this differently: The fact that all riparians in a certain region need to be a party to the IWC hinders its effects as a Convention but does not impede its influence as soft law (Demeter 2000).<sup>13</sup>

In contrast to Hey and Biswas, McCaffrey and Tanzi expect or already see positive effects although they do not directly address the values mentioned above. For example, Tanzi interprets the wide support of the general principle of cooperation during the WG sessions as "enhanc[ing] the expectation that watercourse problems will be tackled in an integrated and co-ordinated manner through consultation and negotiation" (Tanzi 1997a: 116; see also McCaffrey 1997: 56). The IWC's positive effect on interstate cooperation and communication is also supported by Grey and Demeter, who, in terms of a basis for negotiations, called it a very valuable piece of soft law (Grey 2000; Demeter 2000). According to Scheumann and Schiffler, the adoption of the IWC by the GA can be considered a major step forward, because this is the first document showing a large international consensus on this issue (Scheumann & Schiffler 1998: 2). The sponsors of the resolution containing the Convention additionally declared in the GA that the IWC will contribute to the equitable and reasonable utilization as well as preservation of international watercourses and their ecosystems, to the benefit of current and future generations (cf. McCaffrey & Sinjela 1998: 107).

However, Hey again counters, denying both the furthering of cooperation by the IWC and that it provides the means and ways to attain sustainable water use,<sup>14</sup> for although "the Convention acknowledges that these are goals that should be pursued by watercourse states ... it does not impose the concomitant legally binding obligations on its Parties" (Hey 1998: 291f).

In conclusion, Hey especially is of the opinion that the Water Convention will not have any, but certainly no positive effects. Accordingly, she regards *this* IWC as unnecessary for it only specifies that a number of general environmental law

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<sup>13</sup> The main disadvantage is that there are no meetings of the parties intended, as in the Helsinki Convention (Demeter 2000).

<sup>14</sup> The IWC "does not require that states protect basic human needs, nor that they develop integrated water policies". It does not even "provide minimum standards that watercourse states are to further develop through cooperation among themselves" (Hey 1998: 291).

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obligations apply to international watercourses but does not impose on watercourse states obligations that are not already binding upon them by virtue of customary international law. Furthermore, legally binding global instruments that deal with issues of environmental protection<sup>15</sup> impose relevant obligations upon their Parties. Additionally, where available, regional treaties such as the Helsinki Convention may provide a relevant framework (ibid.: 292). In contrast, Tanzi does not share the opinion that the IWC only codifies existing customary water law and that it is therefore useless. For him, the IWC contributes to the consolidation and creation of international customary water law and, therefore, has to be considered positively (Tanzi 1997b: 244). The provisions of the Convention that progressively develop international water law may, because of the Convention's "authoritative guideline function", enhance its spontaneous abidance also by states who are not party to the IWC. This conduct may, over time, lead to the generation of new customary law (McCaffrey & Sinjela 1998: 106; Tanzi 2000a: 54).

After this short overview of the perception of the IWC's contents in the international scientific community, the question arises if the Convention will have a chance to develop any influence at all on the conduct of states and the drafting of future regional agreements, because at present it does not seem as if it would ever enter into force. Until November 2000, only 8 countries had ratified the convention while 35 are necessary to enter the IWC into force (see chapter 5.3.2).

However, most scholars share the opinion that this framework convention is likely to prove of significant value in international water relations<sup>16</sup> even in the case that not enough states ratify the instrument. As Tanzi puts it: The IWC "can be regarded as representing an essential frame of reference ... for states ... irrespective of [its] entry into force..." (Tanzi 2000a: 52). This assessment relies upon the following reasons, which make it more difficult for states to ignore the Convention or challenge its existence (cf. McCaffrey 1997: 56):

- The IWC represents the opinion of the leading experts in international law for it was based on a draft prepared by the ILC (Heintze 1997: 294; McCaffrey & Sinjela 1998: 106); it is therefore endowed with *scientific authority* (cf. Villiger 1997: 133);

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<sup>15</sup> Examples are the Conventions dealing with the protection of the marine environment from land based sources, with the protection of biodiversity or of habitat and species (Hey 1998: 292).

<sup>16</sup> Inter alia, this means that "diplomats and lawyers, judges and arbitrators negotiating a specific watercourse agreement or handling a watercourse dispute", will, together with other

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- The most important provisions of the Convention like equitable use and the no-harm rule are, in large measure, codifications of existing norms (McCaffrey & Sinjela 1998: 106; Nussbaum 1997: 52);
- The fact that numerous comments from states have been taken into account by the ILC when elaborating the instrument (Heintze 1997: 294; McCaffrey 1995: 404) and the possibility for virtually every interested state to participate in the negotiations (McCaffrey & Sinjela 1998: 106), contribute to the Convention's high *political authority* (cf. Villiger 1997: 132)<sup>17</sup>;
- The Convention's political authority is also enhanced by its adoption in the GA by a great majority of countries<sup>18</sup> (see chapter 5.3.1), indicating broad agreement among states on the general principles set out in the Convention. McCaffrey says that this implies a significant bearing of the IWC, even if it does enter into force, "on controversies between states one or more of which is not a party to it" (McCaffrey & Sinjela 1998: 106; cf. Villiger 1997: 132);
- Already the 1994 ILC draft articles influenced the drafting of specific regional agreements.<sup>19</sup> Thus, it is likely that states negotiating future agreements will now resort to the provisions of the IWC as a starting point because it took the place of the ILC draft as the only world-wide instrument (McCaffrey & Sinjela 1998: 106; Nussbaum 1997: 52).<sup>20</sup>
- The IWC already has an authoritative guideline function in international water relations, which is proven by the fact that the International Court of Justice referred

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authoritative texts, refer to the IWC with a view to corroborating their interpretation of the body of international water law (Tanzi 1997b: 244).

<sup>17</sup> According to Villiger, conventional ILC drafts in general – and GA Resolutions based on ILC drafts adopted by a broad majority of states in particular – provide the only form which combines *scientific and political authority* (Villiger 1997: 144).

<sup>18</sup> This is of special importance for the number of states that are riparians to international watercourses is relatively limited (Tanzi 1997b: 244).

<sup>19</sup> They have already been used as a basis to drafting the Protocol on Shared Watercourse Systems in the Southern African Development Community in 1995 that was adopted, inter alia, by Zambia, Mozambique and South Africa (SR.12:10; SR.13:4). It also served as a basis for the 1995 Agreement on the Cooperation for the Sustainable Development of the Mekong River Basin between Cambodia, Laos, Thailand and Vietnam (McCaffrey & Sinjela 1998: 106; Tanzi 1997a: 117). On 12<sup>th</sup> December 1996, India and Bangladesh concluded a watercourse agreement on the Ganges River (Tanzi 1997a: 116).

<sup>20</sup> This is also backed by Villiger, who states that the work of the ILC "exerts influence on the legal opinion of states, courts and writers long before states have ratified the resulting conventions" (Villiger 1997: 85).

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to it in its sentence regarding the *Gabcikovo-Nagymaros* case between Hungary and Slovakia (Tanzi 2000a: 52).<sup>21</sup>

The assessment that the IWC, in every case, will develop considerable influence is supported by Müller who states that international conventions, even if they do not enter into force, may serve as a basis and help arguing in bi- and multinational negotiations (Müller 1996: 465). However, Biswas emphasized that the IWC's perception in the regions is the most important factor (Biswas 2000).

In conclusion, the success of the IWC should not be measured by the number of signatures affixed, but instead by changes in the actual use of the new text in regional agreements and by its effects on the environment. Nevertheless, its entry into force would certainly enhance its authority (Sebenius 1994: 279; Tanzi 1997b: 244). However, its overall political negotiation has already established transboundary water problems as a permanent item on the international agenda.

#### **4 The Most Contentious Articles 5 and 7**

Articles 5 and 7 define the most fundamental rights and obligations of states sharing the same river. As such, they are the focus of my thesis. The 1994 and 1997 versions of the articles are quoted in chapters 7.1 and 7.2 respectively. Amendments regarding content are emphasised in grey in the 1997 version.

After shortly explaining the two versions of the articles, which represent the basis (input) and result (outcome) of the negotiations in the Sixth Committee, the relationship between the articles 5 and 7 in both the 1994 draft articles and the 1997 Convention will be assessed. The latter discusses the question, which of the two articles should prevail in the event of conflict.

**Article 5** was not altered much by the WG. It sets out the fundamental rights and duties of states concerning the utilization of international watercourses by providing for the equitable and reasonable utilization of the watercourse by the riparian states. This obligation is to be pursued with a view to attaining optimal and sustainable utilization, 'consistent with adequate protection of the watercourse'. A non-exhaustive selection of relevant factors that are to be taken into account when determining equitable and

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<sup>21</sup> The ICJ referred to the IWC as evidence of the consolidation of the principle of the equality of rights between co-riparians within the context of international watercourse law (Tanzi 2000a: 51). This implies that the Court regards the provisions in question as evidentiary of international customary principles (ibid.: 50f).

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reasonable utilization is listed in article 6. In every concrete situation, the factors need to be weighed and balanced, without giving priority to any such factors over the others (Arcari 1997: 172f). Paragraph 2 of article 5 provides a duty for participation between riparian states when using an international river. Therefore, the article includes both the right to utilize and the duty to cooperate.

Concerning the principle of equitable and reasonable utilization, the ILC emphasized in its commentary that the principle contains both the right of each watercourse state to have a reasonable and equitable share of the uses and benefits of an international watercourse within its territory and that it is obliged not to exceed its right to equitable utilization or, in other words, "not to deprive other watercourse states of their right to equitable utilization" (ILC 1994b: 218). Thus, when using an international watercourse, the national sovereignty of the riparian states is limited as far as they have to take the interests of their co-riparians into account when using the river.

On the other hand, **article 7**, which is meant to set forth "a process aimed at avoiding significant harm as far as possible while reaching an equitable result in each concrete case", was amended substantially (ibid.: 236). While the first paragraph incorporates the no-harm rule, the second paragraph deals with a situation where a use still causes significant harm to another watercourse state although all appropriate measures had been taken.<sup>22</sup> In both versions, paragraph 1 sets out a due diligence obligation to prevent the causing of significant harm to other riparians. The 2. paragraph comes into effect when, despite the exercise of due diligence, significant harm has been caused.

At this point, one should also mention that the 1991 wording of this article was totally different from the later versions. The article as it was adopted by the ILC in the first reading, reads as follows:

*"Watercourse States shall utilize an international watercourse in such a way as not to cause appreciable harm to other watercourse States"* (ILC 1991).<sup>23</sup>

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<sup>22</sup> The harm-causing state only has to follow the obligations laid down in this paragraph if the watercourse states concerned have not already agreed to such use. This fact is expressed by the phrase 'in the absence of agreement to such use' (ILC 1994b: 240). Thus, in the event of mutual consent, states are allowed to harm the environment or not to oppose existing disturbances (Kunig 1992: 21).

<sup>23</sup> In 1994, article 7 was controversially discussed in the ILC. Its members did not agree if the matter of the causing of harm needed to be addressed in the draft articles at all. However, those who wanted to refer to the subject in question succeeded over the others and those who wanted to address the matter as done in 1994 prevailed over the supporters of the 1991 wording (ILC 1994b: 244).

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In contrast, article 5 was not amended in 1994.

## **5 Negotiation Structure, Actors and Votes**

### **5.1 The Institutional Framework of the Negotiation Process**

The IWC was negotiated within the Sixth Committee of the UN GA, which convened for that purpose as a 'Working Group of the Whole', for three weeks in October 1996 and two weeks in March/April 1997.

The procedure to be followed by the WG in elaborating the framework convention emerged from the resolution's annex "Methods of work and procedures". The annex provides that the work shall be distributed between the Working Group and a Drafting Committee (DC). The draft articles should be discussed on an article-by-article basis, allowing the joint discussion of closely connected articles. After consideration in the WG, the single or group of articles should be referred to the DC for examination and the making of recommendations in the light of the discussion in the WG. The decision process was outlined through formal rules of procedure as voting stipulations. The GA ordered that "the Working Group ... should endeavor to adopt all texts by general agreement. Failing such an agreement within a reasonable period of time, it will take its decisions in accordance with the rules of procedure of the GA" (GA Res. A/49/52). In sequence, the WG has to adopt the articles separately before adopting the draft convention as a whole (SR.52:3). In addition, the GA requested the Secretary-General to arrange the presence of the last special rapporteur on that subject in the ILC, namely Robert Rosenstock, as an expert consultant at the WG meetings (GA Res. A/49/52). After the negotiations had failed in 1996, the GA convened a second session of the Sixth Committee to finish its work (GA Res. A/51/206).

All UN member states were permitted to participate in the WG (GA Res. A/49/52). Therefore, the plenary to discuss the issues consisted of plenipotentiaries from those nations that had an interest in the subject.

As mentioned above, the WG operated under a consensus-decision rule, meaning the establishment of a broad consensus where a simple or two-third majority would be enough. However, although the WG had to take all efforts to reach general agreement, if this proved impossible within due time, decisions could be reached by vote. According to the official rules of procedure of the GA, for such a vote concerning the adoption of the IWC in the WG, a simple majority would be sufficient. Having this

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simple-majority-rule in mind, the GA's provision for consensus in the WG only becomes comprehensible through the fact that, unofficially, the GA also operates under a consensus-decision rule. In contrast to voting, the unofficial rule is considered as creating the optimum chance for the overall implementation of a resolution (Friedheim 1993: 45; Imber 1992: 179; UN 2000: 2).<sup>24</sup> The consensus-rule is breached only in very rare cases. Its main disadvantage is that it only supports an agreement at the level of the lowest common denominator. "The challenge is to place this ... at the highest level possible" (Borione & Ripert 1994: 96).

The Working Group had an elected leadership. ILC-member Prof. Chusei Yamada, Ambassador from Japan, was the Chairman of the Working Group. Prof. Hans Lammers, Deputy Legal Adviser of the Netherlands Foreign Ministry, served as Chairman of the Drafting Committee (SR.12:2). Following a proposal from the Chairman, at the beginning of the meeting-period in October 1996 it was decided that the "DC should be open-ended and that in order to facilitate maximum participation by all interested delegations, there should be no simultaneous meetings of the WG and the DC" (SR.12:3). It was also recommended that the articles should be considered in clusters before referring the whole set to the DC. "When appropriate, coordinators would be designated to conduct informal consultations<sup>25</sup> on controversial issues" (ibid.). The articles were arranged into 5 clusters.

## **5.2 The Actor's Network: Structure and Main Positions**

### **5.2.1 The Network's Composition and the Riparian Position of the Main Actors**

Although all UN-member states theoretically constituted the inner network of actors, only statements from delegations of 54 nations were recorded in the official Summary Records of the negotiations (SR's 12-25; 51-62); those countries made up the factual inner network. Most countries were represented by lawyers from the Foreign Ministries or just by the lawyers or diplomats posted with their Mission to the UN, only a few delegations were composed of experts (e.g. NL) (Tanzi 2000b).

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<sup>24</sup> In the GA, it is an unwritten rule that voting in favour means "that the country so voting agrees to carry out the recommendations in that resolution" (McDonald 1990: 242).

<sup>25</sup> "Working in secrecy on an unofficial text enabled representatives to negotiate with more flexibility, since they did not in this process commit their governments to any particular formulation" (Benedick 1998: 72).

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From the actors of the inner network, a group of states was selected in order to diminish the complexity of the analysis. It was determined by the following criteria: About only half of the 54 countries of the inner network made more than one statement in the WG and, therefore, were actively participating in the discussion. Among those, the focus was put on states that made several statements, abstained or voted against the Convention, are internationally powerful, have conflicts in the region or are in a special situation as Egypt as a powerful downstream state. The selected states are introduced in the next chapter.

During the negotiations of the IWC, the positions of the national delegations "were largely shaped by their perceptions of their country's geographic circumstances as upstream states..., as downstream states ... or as states having both interests (e.g., the USA...)" because they are upstream and downstream states at different rivers or share big lakes (Crook & McCaffrey 1997: 375). The usual regionalism did not have any influence on the results.

In order to make clear that the states with both interests acted in accordance with national interests as upstream or downstream states and that environmental protection was not an end in itself for them as well, according to Gehring (1994)<sup>26</sup> they will be called 'mixed-motive countries' in this thesis.

The following list will divide the main actors according to their riparian position along their most important national river(s) because, to a large extent, it determined their negotiation positions. Thereby, midstream riparians will be classified as upstream or downstream countries depending on the particularities of the situation along the stream. For example, Hungary as a midstream state at the Danube will be classified as a downstream state because all industrialized countries lay upstream. Thus, its major problem is the dealing with inflowing pollutants. Mixed-motive countries will be listed in the last section.

The most important **upstream countries** were Turkey and Ethiopia, supported by India, China and, clearly discernible, France. Other countries joining this group were Switzerland, Slovakia, the Czech Republic and Spain. Especially Turkey as an upstream country in a hostile region played a crucial role in the negotiations. Details concerning the national situation of each country will be found in my thesis.

The core of **downstream states** consisted of the Netherlands, Portugal, Hungary, Egypt, Syria and Iraq. Other important states were Bangladesh, Mexico and Greece.

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The **mixed-motive countries** formed the least uniform group which is made up of states that are both, upstream and downstream countries on different rivers, and others that have main rivers as borders or share big lakes. The most important members were Finland, Canada and the USA. Germany, South Africa, Brazil and Israel also belong to this group.

### **5.2.2 The States' Motivation for Cooperation on International Water Issues**

Keeping in mind the geographical positions of the most important participating states, their preferences regarding the achievement of an (unanimous) agreement are of interest because the ranking of preferences is likely to determine the countries negotiation strategies and influence their acceptance of results.

Following Gehring's assessment of transboundary air pollution and noting the distribution of geographical advantages along the river it can be assumed that downstream countries, which often suffer from negative externalities passed on by their neighbors, would strive most fervently for the international enactment of their rights and the others duties since their regional negotiation position is normally quite poor. In contrast, upstream states are interested in their national freedom of action and would attempt to prevent the adoption of international stipulations regarding their conduct at shared watercourses, or to tone down the obligations (cf. Gehring 1994: 329f).<sup>27</sup> In sum, upstream states would gain from an unregulated situation while downstream states would be the beneficiaries of international cooperation.

These facts infer the following ranking of preferences: Most upstream states' first preference during the negotiations would be the establishment of a situation according to the principle of territorial sovereignty. Their second preference would be defection, meaning that the countries would prefer no-agreement to mutual cooperation (compromise) which would take the last place. In contrast, most downstream states' first preference would be a situation according to the principle of territorial integrity and the reflection of high environmental standards, followed by the establishment of mutual cooperation (compromise). Defection, would be their last preferred option.

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<sup>26</sup> Gehring analysed the international negotiations on transboundary air pollution (Gehring 1994: chapter 8).

<sup>27</sup> "Developing upstream states that now have advantageous bilateral watercourse agreements with neighbouring countries are reluctant to tie their hands with a global convention – and even more reluctant if they have no such agreement, particularly if they are in the process of undertaking major water development programmes" (Tanzi 1997a: 110).

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The riparian position of upstream and downstream states along an international watercourse generates joint interests due to common views of the problem. In contrast, the geographical position of the last group, which consists of mixed-motive states, does not recommend a clear strategy. Accordingly, the interests pursued by those countries within the negotiations are likely to vary (cf. Gehring 1994: 335). Thus, depending on the issue-area, individual states are supposed to join different groups during the negotiations. As an example, one state could realign with the downstream states due to its appreciation of environmental protection, while the same country would join the group of upper riparians when defending the sovereignty of states. Consequently, the preferences of this group are the least homogeneous. However, the first preference of many mixed-motive countries could be the achievement of (any) international agreement because once they have all their major rivers covered by agreements they would not really be affected by the IWC and be able to pursue the codification of international law as an end in itself. Thus, it can be assumed that they support the ILC text. Their second preference will probably be the adoption of provisions contributing to the peaceful resolution of water conflicts in crisis regions and of high environmental standards, because many of them are industrialized countries which already used their international water resources for development. Thus, they are perfectly aware of the problems arising from environmental degradation and consider high environmental standards as of high political value. Defection is quite unlikely.

The following table summarizes the preferences of the three groups as described above.

<b>Overview of the Preferences of States</b>			
	<b>first preference</b>	<b>second preference</b>	<b>last preference</b>
<b>upstream states</b>	situation according to the principle of absolute territorial sovereignty / low environmental standards	defection	compromise
<b>downstream states</b>	situation according to the principle of absolute territorial integrity / high environmental standards	compromise	defection
<b>mixed-motive states</b>	achievement of any agreement (→ codification of international law)	high environmental standards / stabilization of crisis regions	low environmental standards / defection

To sum up, downstream countries are usually more interested in achieving international regulations. This suggests that lower riparians will give in earlier than their

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upstream neighbors because for them, reaching an agreement at all is more important than to persist on a special position. Although this does not apply to such powerful downstream states as Egypt, it is unlikely that many downstream positions will succeed during the negotiations and, finally, be reflected in the Convention. Mixed-motive countries are supposed to push forward the process leading to an international water convention. They will probably either support the ILC text or come out in favor of more environmental protection. This group can be considered as quite important for it comprises a number of key countries in the world. On the other hand, upstream states are probably least interested in cooperation. They are likely to attempt to prevent the adoption of the IWC or at least to weaken the obligations for they would gain from an unregulated situation. Their negotiation position is considerably stronger due to the fact that the IWC was intended to help pacifying conflict regions. The cooperation of upstream states with ongoing international water conflicts that could turn out to become violent was quite essential to the success of the IWC. Thus, states such as Turkey or China had the potential to block strong international action or at least weaken the text.

Besides the three geographical groups, another category e.g. used by Fitzmaurice (1997: 502) and Nussbaum (1997: 49) needs introduction. In this thesis, the term 'environmentally-minded' will be used literally, i.e. for states to whom environmental protection is a decisive element. As a consequence, this term indicates a *politically* determined group whose composition changes depending on the issue-area.

During the negotiations, this group was composed of downstream states and of members of the group of mixed-motive countries. The involvement of lower riparians becomes clear when bearing in mind that their objective is to minimize the negative externalities passed on by their neighbors in order to secure national integrity. This group also comprised a considerable number of mixed-motive countries.

### **5.3 Votes and State of Ratification**

#### **5.3.1 Voting pattern**

According to its rules of procedure, the WG first had to adopt the draft articles on an article-by-article basis. Most of the articles of the IWC were adopted without any discussion or after short statements and without a vote (SR.62:6-11). However, a recorded vote was requested regarding the articles 3, 5-7, and 33 plus annex. Thus, the first vote of importance was the separate vote on the package of articles 5-7 in the

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WG (1). After adopting the draft convention by article, at the very end of its second session the WG voted on the draft Convention as a whole (2). The third vote was taken by the GA on the adoption of the resolution that contained the International Water Convention (3).

(1) → Turkey requested the recorded vote on the articles 5-7 in the WG. The package was adopted with 38 affirmative votes, 22 abstentions and four negative votes, namely those of China, France, Tanzania and Turkey (SR.62:3).<sup>28</sup>

(2) → In the WG, the draft Convention as a whole was adopted by 42 votes in favor, 19 abstentions and China, France and Turkey voting against the Convention (SR.62/Add.1:2).<sup>29</sup> This does not even represent a two-thirds majority.

(3) → On 21<sup>st</sup> May 1997, the General Assembly adopted the text of the IWC as it was worked out by the Sixth Committee on the basis of the ILC draft articles from 1994. When the resolution containing the Convention came before the General Assembly, Turkey requested a recorded vote (PV.99: 4). The vote was as follows (ibid.: 7f) (51 states did not take part in the vote (Barandat 1999: 37)):

<b>In favor:</b>	103 nations	(incl. Bangladesh, Czech Rep., Greece, Hungary, Mexico, NL, Portugal, Slovakia, Sudan, Syria, USA)
<b>Abstentions</b>	27 nations	(incl. Egypt, Ethiopia, France, India, Israel, Rwanda, Spain) <sup>30</sup>
<b>Against:</b>	3 nations	(Burundi <sup>31</sup> , China, Turkey)

<sup>28</sup> Votes in favour: e.g., Bangladesh, Brazil, Canada, Finland, Germany, Hungary, Iraq, Israel, Jordan, Mexico, Netherlands, Portugal, Russia, Switzerland, Syria, USA;

abstentions: e.g., Czech Rep., Egypt, Ethiopia, Greece, India, Lebanon, Pakistan, Rwanda, Slovakia, South Africa, Spain, Sudan

<sup>29</sup> Votes in favour: e.g., Bangladesh, Brazil, Canada, Czech Rep., Ethiopia, Finland, Germany, Greece, Hungary, Jordan, Mexico, Netherlands, Portugal, South Africa, Sudan, Switzerland, Syria, USA;

abstentions: e.g., Egypt, India, Israel, Jordan, Pakistan, Rwanda, Slovakia, Spain, Tanzania

<sup>30</sup> The other countries which abstained from voting were Andorra, Argentina, Azerbaijan, Belgium, Bolivia, Bulgaria, Colombia, Cuba, Ecuador, Ghana, Guatemala, Mali, Monaco, Mongolia, Pakistan, Panama, Paraguay, Peru, Tanzania and Uzbekistan.

<sup>31</sup> The vote of Burundi came as something of a surprise since it did not participate in the negotiations and since the state's hydro-geography in the upper Nile basin will prevent their activities from affecting Egypt or Sudan. "Burundi's position may owe more to political considerations than to hydro-geographic reality" (McCaffrey & Sinjela 1998: 105).

The following table shows the votes of the main state participants in the Sixth Committee and the GA. It additionally provides information about the watercourse(s) they share and their riparian position.

country	riparian position	watercourse	vote on arts. 5-7 in WG	vote on whole convention in WG	vote on whole convention in GA
<b>Bangladesh</b>	down	Ganges	in favor	in favor	in favor
<b>Egypt</b>	down	Nile	abstaining	abstaining	abstaining
<b>Greece</b>	down	Several	abstaining	in favor	in favor
<b>Hungary</b>	down	Danube	in favor	in favor	in favor
<b>Iraq</b>	down	Euphrates-Tigris	in favor	in favor	
<b>Mexico</b>	down	Colorado/Rio Grande	in favor	in favor	in favor
<b>Netherlands</b>	down	Rhine	in favor	in favor	in favor
<b>Portugal</b>	down	e.g., Tejo	in favor	in favor	in favor
<b>Syria</b>	down	Euphrates-Tigris	in favor	in favor	in favor
<b>Canada</b>	both	Great Lakes/ Mississippi	in favor	in favor	in favor
<b>Finland</b>	both	several	in favor	in favor	in favor
<b>Germany</b>	both	Rhine/ Danube/ Elbe	in favor	in favor	in favor
<b>USA</b>	both	Colorado/ Mississippi	in favor	in favor	in favor
<b>South Africa</b>	both	Lower Orange River	abstaining	in favor	in favor
<b>Brazil</b>	both	Paraná / Amazon	in favor	in favor	in favor
<b>Israel</b>	both	Jordan	in favor	abstaining	abstaining
<b>Burundi</b>	up	Nile			against
<b>China</b>	up	Mekong / Amur	against	against	against
<b>Czech Rep.</b>	up	Elbe	abstaining	in favor	in favor
<b>Ethiopia</b>	up	Nile	abstaining	in favor	abstaining
<b>France</b>	up	Rhine	against	against	abstaining
<b>India</b>	up	Indus / Ganges	abstaining	abstaining	abstaining
<b>Slovakia</b>	up	Danube	abstaining	abstaining	in favor
<b>Spain</b>	up	e.g., Tejo	abstaining	abstaining	abstaining
<b>Switzerland</b>	up	Rhine / Po	in favor	in favor	
<b>Tanzania</b>	up	Nile	against	abstaining	abstaining
<b>Turkey</b>	up	Euphrates-Tigris	against	against	against

When taking the preferences of states as described above as a basis, and knowing that the IWC does not completely reflect the first preference of upstream states, one would expect that both downstream and mixed-motive countries would vote in favor of

the Convention as a whole and that the upstream countries would either abstain or vote against it. As one can see in the table (last column), as far as the main actors are concerned, this assumption is right. Only Egypt, the Czech Republic, Slovakia and Israel did not vote as it was expected. Thus, this result confirms that the riparian position of a country along a river is the main factor determining the international positioning of states but that other factors of a political, economic or historical nature also play a role in certain cases. This assessment is supported by the vote on the package of articles 5 and 7 (fourth column). Being a vote without any binding force and with only minor symbolic character, except for Egypt, the other three states voted as expected. Thus, their final votes were likely determined by other factors like those mentioned above or the country's perception of the other articles of the IWC.

### **5.3.2 State of Ratification of the IWC**

The Convention was opened to signature at the UN Headquarters in New York on the day of its adoption. To enter the IWC into force, 35 nations needed to agree to its terms by the 20<sup>th</sup> of May 2000 (art.34).<sup>32</sup> By that date, only 8 countries had become a party to the convention, another 10 became signatories. Although, according to treaty law, that date only describes a symbolic deadline because those "who had not signed before can still accede to the Convention" (Tanzi 2000b). At the end of November 2000, the state of ratification had not changed. By then, the IWC was ratified by Finland, Hungary, Jordan, Lebanon, Norway, South Africa, Sweden, and Syria (UNIC 2000).

## **6 Overview of the Negotiation Process**

Before discussing articles 5 and 7, this chapter will give a brief overview of the negotiations leading to the adoption of the IWC and how the discussion of articles 5 and 7 fit into the whole negotiation process.

The first meeting of the WG in October 1996 started with the discussion of the different clusters of articles. Soon, it became clear that the leaders of the conference would not be able to pass the ILC draft articles as a 'balanced package' between the

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<sup>32</sup> According to Enderlein, 3 years represent an adequate period, because all concerned ministries have to agree to the text first before it goes before parliaments (Enderlein 2000). Benedick stresses that the completion of the respective internal ratification processes to adhere to international conventions might vary considerably in duration (Benedick 1998: 116).

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interests of all riparian states. As was already obvious in their comments regarding the ILC draft (A/51/275), a considerable number of states insisted in further discussing fundamental as well as specific issues, which resulted in the submission of countless proposals from delegations to change the text of the articles in order to bring their preferences into the discussion. It also made informal consultations necessary. Preceding this decision to conduct those consultations on clusters I and II, a general debate concerning the division of work between the Working Group and the Drafting Committee took place. The Hungarian delegate stressed that "the WG could not be expected to agree on every detail and send a finished text to the DC". Its task was rather to identify the major issues and most contentious points in order to enable the DC to carry out its work (SR.18:2). In contrast, the French representative said that the WG should reach consensus – especially on difficult articles – before sending them to the DC. "To rush matters would only lead to an unsatisfactory final text which most delegations would be unable to accept" (SR.18:2).<sup>33</sup> In contrast, the view expressed by the representative from Slovakia, namely that only the finding of consensual solutions to *substantive* questions should be required before sending the articles to the DC, was considered far more adequate (SR.18:4). Slovakia was supported by the UK, which tried to unite the different standpoints by emphasizing that the task of the DC after the first reading of a cluster in the WG was to technically consolidate the different proposed versions concerning the wording of the articles. The existence of clear minority views could be reflected by placing text in brackets, indicating that the text only represents a general trend, not a consensus (SR.18:4). This procedure was not formally adopted but was used when the negotiations proceeded.

On 18<sup>th</sup> October 1996, after the discussion about the last cluster, an open outburst occurred which affected almost every article. This confrontation could not be quelled throughout the whole of the last week of negotiations. It became obvious that a large number of states were not ready to make any compromises. "Contrary to the intended spirit of the document under discussion, the individual contributions clearly reflected the explicit [riparian] interests of the particular states concerned" (Bernadette & Kaplan 1998: 21). Thus, there was no chance to conclude the meeting successfully.

To sum up, the first round stood under the impression of the statements from the state representatives, followed by informal consultations and consolidated proposals. While controversies regarding most articles could be settled one after the other by arguing and disappeared from the agenda, at the end of the first round the DC declared

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<sup>33</sup> This French viewpoint reflects the delaying strategy of this delegation, because it would take

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in its report that especially the articles 3, para.3, 7 and 33 were still contentious. The discussion on the preamble and the final clauses had not even started (DC 1997a). However, the DC had finally considered the rest of the articles, some of which still contained elements in brackets and footnotes as, for example, article 5.

The second round in March/April had the adoption of the single articles on its agenda, with which the WG started at once. Only the articles that were still controversial were postponed to a later date. At the opening session of the WG on 24<sup>th</sup> March 1997, the Chairman said that the DC needed to complete the consideration of the still controversial articles within 4 days and suggested that it should begin its work immediately. As far as the articles which still contained elements in brackets were concerned, the Chairman said that "there would be a need for informal [unrecorded] consultations, presided over by coordinators, to tackle any difficult issues" (SR.51:2). The aim was a clearer, clean text (SR.51:2).

When this two-track approach of separately considering articles 5 and 7 – article 5 informally and article 7 officially in the DC and through informal consultations – could not bring about conclusive results, the Chairman decided two days before the end of the meeting that the articles 5 – 7 should be considered together in order to reach agreement on their substance. The reason was that "delegations ... indicated that they could not take a final decision on ... articles [5-7] without knowing the results of the considerations on the other articles" (SR.57:6). Or, as Tans stresses: "... some delegations would hold their approval of a given formula in one of the articles in hand hostage to the acceptance of another formula in another of the three provisions in point, and vice versa" (Tans 1997b: 241).

The Chairman called for cooperation and the contribution of all members of the WG to achieve a viable convention that would be acceptable to the majority of watercourse states, reminding them that they should not only take a decision for their own benefits, but also "for the sake of the peace and stability of watercourse systems" (SR.57:6). However, it was exactly those articles on which agreement could not finally be reached. Thus, on the penultimate day of the meeting, the Chairman tabled a compromise proposal for these articles in order to not let the IWC fail (CRP.94). Slightly changed, this package was finally adopted by the WG.

The difficulties in reaching consensus might appear strange because the differences between the 1994 and 1997 versions of the articles in question are not very significant. Therefore, one has to follow the negotiations in the WG to understand the states'

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much more time to reach a complete consensus on each article than was available.

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different ideas. This is especially true for the changes made in article 7. Some of the submitted proposals differed significantly from the final wording of the Convention. These have to be assessed, in order to understand the winding process that resulted in the final wording of the article. In addition, one always has to keep in mind that there were 31 other articles of which especially the articles 3 and 33 were cause for controversies and abstentions in the WG.

## **7 Negotiating Articles 5 and 7**

This chapter gives an overview over the negotiation process of articles 5 and 7 (7.1 and 7.2). Thereby, an attempt will be made to explain the conduct of states during the discussion. For a thorough analysis of the negotiations of those articles see my thesis. Before briefly analysing the negotiations of articles 5 and 7, it needs to be said that there are basically three groups of states to distinguish which are supposed to have different ideas of the new wording of the articles. As already implicitly shown above, the countries' riparian positions suggest the following line-up of states:

**A first group** consists of downstream states throughout the world as well as of mixed-motive states. This group of especially environmentally-minded countries probably aims at strengthening the environmental alignment of the future Convention. They are supposed to favor the amendment of the text of article 7 in order to strengthen the no-harm principle and to insert language reflective of developments in the field of environmental law into article 5.

**A second group** is composed of the remaining mixed-motive countries, which support the ILC draft.

**A third group** consists of upper riparian states. Their objective might be to strengthen the principle of equitable and reasonable utilization against the no-harm rule. In addition, they probably come out in favor of weakening the duty to cooperate.

According to Nussbaum (1997: 50) and Fitzmaurice (1997: 504), the first and the third group formed as suggested. As far as the second group is concerned, the authors observed that it was not only composed of mixed-motive countries but of a few upstream and downstream states as well. However, they neither indicate the countries nor give explanations for this behavior.

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Thus, beside their riparian position other factors like prior uses and economic or military power in a region also influence a country's position regarding a specific issue under discussion.

### 7.1 Negotiating Article 5

As briefly described in chapter 4.1, article 5 deals with equitable and reasonable utilization as well as participation. The use-orientated doctrine of equitable utilization is thoroughly explained in chapter 2.3.2. The following table shows the wording of article 5 as drafted by the ILC in 1994 and as finally adopted by the WG in 1997. Amendments regarding content are emphasized in grey in the 1997 version.

As one can see, article 5 was not altered fundamentally by the Working Group. The only amendments were the inclusion of the principle of sustainability in conjunction with optimal utilization and the obligation that a state utilizing an international river has to 'take into account the interests of the watercourse States concerned'.

Article 5 in 1994	Article 5 in 1997
<p>1. Watercourse States shall in their respective territories utilize an international watercourse in an equitable and reasonable manner. In particular, an international watercourse shall be used and developed by watercourse States with a view to attaining optimal utilization thereof and benefits therefrom, consistent with adequate protection of the watercourse.</p>	<p>1. Watercourse States shall in their respective territories utilize an international watercourse in an equitable and reasonable manner. In particular, an international watercourse shall be used and developed by watercourse States with a view to attaining optimal <b>and sustainable</b> utilization thereof and benefits therefrom, <b>taking into account the interests of the watercourse States concerned</b>, consistent with adequate protection of the watercourse.</p>
<p>2. Watercourse States shall participate in the use, development and protection of an international watercourse in an equitable and reasonable manner. Such participation includes both the right to utilize the watercourse and the duty to cooperate in the protection and development thereof, as provided in the present articles.</p>	<p>2. Watercourse States shall participate in the use, development and protection of an international watercourse in an equitable and reasonable manner. Such participation includes both the right to utilize the watercourse and the duty to cooperate in the protection and development thereof, as provided in the present Convention.</p>

Although the amendments do not appear to be significant, the article was fiercely debated in the WG, being partially due to the fact that many delegations regarded article 5 as the cornerstone of the entire Convention. One has additionally to keep in mind that the hotly debated question concerning the superiority of either the principle of equitable utilization or the no-harm rule was always present. Furthermore, the negotiations on article 5 were also closely linked to those on article 6, which includes criteria for determining when a particular use is equitable and reasonable.

The most contentious points during the negotiations were the degree of environmental protection that the article's first paragraph should reflect, the objective of equitable and reasonable utilization, namely 'optimal utilization ... consistent with adequate protection of the watercourse', and the principle of cooperation in the second paragraph (see my thesis). The first took up the most time among these points. Chapter 7.1.1 will summarize the most important findings of the analysis of article 5.

The negotiating of article 5 started with a half-day debate in the WG on 8<sup>th</sup> October 1996 (SR.15). After the consideration of the whole second cluster, informal consultations were started which resulted in CRP.35 submitted by the USA, Canada, Germany, Italy and Romania. Although the countries in the WG could neither agree on this formula nor develop a better proposal through informal consultations, the article was sent to the DC. The DC's Chairman appealed to the delegations to keep the text as it was proposed by the ILC, but no solution could be found that allowed a general agreement (Tanzi 1997a: 114). Thus, in its report at the end of the first session in October 1996, the DC presented a bracketed text. When meeting again in spring 1997, the WG started at once with informal consultations to attain a clearer text. As the delegations insisted that those consultations could not be completed without knowing the final wording of article 7, the articles were considered together in the last two days. When those consultations did not lead to a result, the Chairman submitted a compromise proposal (CRP.94), which was adopted by the Working Group without amendments to article 5.

### **7.1.1 Summary of the Discussion of Article 5**

Regarding the final wording of article 5, excepting the inclusion of the term 'taking into account the interests of the watercourse states concerned', upstream and a few mixed-motive countries were quite successful in their ambition not to amend the article's first paragraph. It was only the most ambiguous of the proposed environmental principles

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that was finally included in the Convention, namely the sustainability concept. As far as the second paragraph's duty to cooperate is concerned, upstream states could not assert themselves against a coalition of downstream and mixed-motive countries, when they tried to shift the specification of the modalities of cooperation from the IWC to regional agreements concluded between the watercourse states.

All things considered, the negotiations concerning article 5 were not as controversial as expected. This might largely be due to the fact that the environmentalist delegations did not insist upon the updating of the article to reflect recent developments in international environmental law, even though they represented the largest group and included almost all of the EC member states. Their behavior might have been due to the fact that cooperation is of higher priority for them than for upstream states. Another reason might have been that the USA as one of the most important states in every international negotiation did not openly support the environmentally-minded states. They followed a quite pragmatic approach because they wanted to push the negotiations towards a suitable result as scheduled. The fact that China did not want to amend the ILC draft as well gave this group considerable strength. The upstream states were also quite strong because their cooperation was essential for a successful agreement.

An outstanding point while regarding the actual line-up of states concerning different issues, was that the groups of states that had formed were not coherent; they did not exclusively reflect their riparian position as well. During the discussion about the inclusion of environmental principles, a group of environmentally-minded states which did not include all downstream countries, argued against a group of upstream, mixed-motive and a few downstream states. Regarding the question of optimal utilization, industrialized downstream and mixed-motive states had other ideas of how to further qualify the concept than developing downstream states. The third group consisted of upstream states. As far as the discussion about the duty to cooperate is concerned, upstream states wanted to change the article's second paragraph, which was rejected by downstream and mixed-motive countries.

Thus, for each issue under consideration the groups of countries were formed anew. Although there was a broad direction discernible and in some cases two groups simply merged, one cannot speak of upstream and downstream states as having always occupied opposing positions. The mixed-motive countries on the other hand did take different stands according to the issue.

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As a result, one may conclude that the standpoints of states in the debate were not only determined by their riparian position but they also reflected their actual economic situation or the political situation in the region. The downstream states especially seem to have argued in accordance with their particular national situation, because their group was much more inconsistent than the upstream group. The concept of optimal utilization is a good example: While the debate showed the gap between industrialized and some developing downstream countries, e.g. Bangladesh did not support Syria and Iraq with their attempt to further define optimal utilization. This suggests that the political situation is important as well, because Bangladesh reached an agreement with India in 1996.

Having in mind that the entirety of these factors influences the interest profile of a state, it becomes understandable that the lower riparians did not form a lasting coalition to carry through their interests.

## 7.2 Negotiating Article 7

Article 7 means to set forth a process aimed at avoiding significant harm as far as possible. The protection-orientated doctrine of no significant harm is explained in detail in chapter 2.3.2. The following table shows the wording of article 7 as drafted by the ILC in 1994 and as finally adopted by the WG in 1997. Amendments regarding content are emphasized in grey in the 1997 version.

In contrast to article 5, article 7 was modified more fundamentally by the Working Group. Changes were made in both paragraphs of the ILC's text. In the first paragraph, the phrase 'exercise due diligence' was replaced with 'take all appropriate measures' and the *prevention* of harm was emphasized. Regarding the second paragraph, the two sub-paragraphs were formulated into its text and an obligation of 'all appropriate measures' was introduced to further qualify the duty to eliminate or mitigate significant harm. In contrast, the 1994 draft articles only provided an obligation to consult the harmed state. Furthermore, a reference to article 5 was included in the second paragraph.

Article 7 was discussed very controversially in the Working Group. The reason for this lies in the fact that "this article touches most substantively upon the freedom of exploitation of natural resources inherent in the territorial sovereignty of upper riparian countries and, conversely, on the right of neighboring lower riparians to insist that such

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a freedom be exercised in a way that would not unjustly restrict their own" (Tanzi 1997a: 114).

Article 7 in 1994	Article 7 in 1997
<p>1. Watercourse States shall exercise due diligence to utilize an international watercourse in such a way as not to cause significant harm to other watercourse States.</p> <p>2. Where, despite the exercise of due diligence, significant harm is caused to another watercourse State, the State whose use causes the harm shall, in the absence of agreement to such use, consult with the State suffering such harm over:</p> <ul style="list-style-type: none"> <li>a) the extent to which such use is equitable and reasonable taking into account the factors listed in article 6;</li> <li>b) the question of ad hoc adjustments to its utilization, designed to eliminate or mitigate any such harm caused and, where appropriate, the question of compensation.</li> </ul>	<p>1. Watercourse States shall, in utilizing an international watercourse in their territories, take all appropriate measures to prevent the causing of significant harm to other watercourse States.</p> <p>2. Where significant harm nevertheless is caused to another watercourse State, the State whose use causes the harm shall, in the absence of agreement to such use, take all appropriate measures, having due regard for the provisions of 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.</p>

The most contentious points during the negotiations were the questions if the adjective 'significant' and the obligation of due diligence in the first paragraph should be deleted. The second discussed amendment was the introduction of another obligation of all appropriate measures in the article's second paragraph. The by far most controversial issue in the debate referred to the question which of the two articles 5 and 7 should be superior if they come into conflict. This discussion was closely linked to the further qualification of the obligation in the second paragraph, which was the main point in the Chairman's compromise proposal CRP.94. All those questions will be assessed in detail in my thesis. In contrast, the issue of compensation was hardly discussed and not changed by the WG; therefore, it will not be assessed.<sup>34</sup> Chapter 7.2.1 will summarize the most important findings of the analysis of article 7.

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<sup>34</sup> "The final text of article 7, para.2 does not depart from the ILC version with regard to the question of compensation. In both cases, compensation is not the direct object of an obligation which arises automatically from the occurrence of the harm, but is rather the object of an obligation of consultation as a means of balancing the interests of the concerned states" (Tanzi 1997b: 242).

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The negotiations of article 7 started with a half-day debate in the WG the morning after the discussion of article 5 (SR.16). After the consideration of the whole second cluster, informal consultations were started because countries could not find a common denominator. They were conducted by the Canadian delegation and resulted in CRP.42, which was intended to serve as a basis for further discussion (SR.20:2). Although countries could not agree on this formula, on 14<sup>th</sup> October the article was sent to the DC. During the second week of the conference, the Chairman tried to convince delegations that the ILC text was the best compromise possible but he got little support. Informal consultations proceeded and a coordination meeting – chaired by the Head of the Irish delegation, Ambassador F. M. Hayes, an experienced multilateral negotiator – was held. At this meeting Hayes was able to submit a compromise text (CRP.68) (Crook & McCaffrey 1997: 376; Tanzi 1997a: 115). However, this proposal found no support. On the last day of the meeting in 1996, Austria, Canada, Portugal, Switzerland and Venezuela submitted CRP.72, a promising proposal but there was not enough time to discuss it (Tanzi 1997a: 115). At the end of the session in 1996, the DC could not suggest a text for article 7. Thus, at the beginning of the second session, the DC started to consider article 7 at once. When the Committee reported about its work three days and 6 sessions later (DC 1997a), the Canadian coordinator of the consultations regarding Article 7 got additional time from the DC to try to reach consensus (SR.52:2,8). On 31<sup>st</sup> March 1997, the Chairman of the DC reported that they still had not reached consensus on article 7 (DC 1997b, cited in SR.53:2,5). After another day of informal consultations (SR.56:2), on 2<sup>nd</sup> April 1997, the Canadian delegate reported that CRP.72 had received the most support but that more consultations would be necessary to reach a compromise solution acceptable to all delegations (SR.57:5). After another round of consultations regarding the package of articles 5-7, the delegations could still not agree on a wording acceptable to all. As a result, the Chairman submitted a compromise proposal (CRP.94), which, with certain amendments to article 7, was adopted by the Working Group.

### **7.2.1 Summary of the Discussion of Article 7**

The article's first paragraph was hardly changed by the WG.

The most noticeable feature of the first issue under consideration was that the upstream states, except for the Czech Republic, did not come out in favor of replacing 'significant' with 'substantial'. Instead, some of them supported mixed-motive countries in their ambition not to amend the ILC text while the majority of upper riparians did not

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take part in the discussion at all. The unusual line-up of states in the debate concerning the due diligence standard was due to the fact that the discussion quickly turned to the question if the term counted among customary international water law or not. This overlaid the positions taken by states in reflection of their riparian positions. As a result, countries arranged differently than it was expected. Downstream and environmentally-minded mixed-motive countries spread rather evenly in two groups which either wanted to delete or to keep this to downstream states disadvantageous standard.

The decision to keep the terms was the result of a debate dominated by arguing. In this process, many downstream and mixed-motive countries which wanted to delete the terms in the first place, gradually saw that the provisions belonged to international customary law and, therefore, should be included in the IWC. In both cases, the expert consultant supported the group that wanted to keep the terms.

The, at first view, unexpected non-participation of most upstream states is probably due to the fact that they wanted to delete the entire article, a proposal that would have made both discussions superfluous. However, if they had considered the situation more realistically, they probably could at least have reached the replacement of 'significant' through 'substantial', as was proposed by the Czech delegate.

In contrast, the ILC's text for paragraph 2 was changed significantly. As it deals with the relationship between the articles at hand, it was the focal point of contention in the WG. In the beginning of this debate, it was again the composition of the group supporting the ILC text that occurred unexpectedly. Beside mixed-motive countries, a few upstream states (e.g. China) and the Netherlands joined this group. It was only at the very end of the debate about articles 5 and 7, namely when the WG discussed the Chairman's proposal and when it was clear that the ILC text was not longer an option, that all upstream states shared the same first preference, namely a wording more favorable to them. Except for Egypt, downstream and mixed-motive countries supported the Chairman's proposal. This alignment might be due to the fundamental importance of the issue because the result affects the sovereignty of both, upstream and downstream states. The insertion of 'having due regard for the provision of articles 5 and 6' can be regarded as a success for the upstream states although many of them were still not satisfied. In addition, they rejected the inclusion of 'consistent with...' into article 5. In contrast, downstream states which would have had much more reasons to refuse the compromise were, apart from Egypt, prepared to accept it; a conduct in line with their ranking of preferences. Egypt's special role was to be expected because the country presents the only heeded downstream state that is most powerful in a region.

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Regarding the final wording of this paragraph, McCaffrey and Sinjela (1998: 101) hit the nail right on the head when saying that "[t]he final text ... has all the hallmarks of a hard-won compromise: it is rather awkward, somewhat ambiguous and probably not entirely satisfying to anyone, but something most delegations could live with".

All things considered, the negotiations concerning article 7 were much more controversial than those of article 5. This might be due to the fact that environmentalist delegations did not give in as easily as with article 5, for the formulation of the article's second paragraph affected their national sovereignty. There were far more proposals submitted than for article 5 and they reflected the particular country's riparian situation and were, as such, incompatible with one another. In this process, the role of Canada was decisive for reaching an agreement. The country was responsible for informal consultations in both rounds of the conference. While considerably changing its initial stand, the delegation was able to integrate most standpoints. The fact that the last proposal favored the upstream states was quite pragmatic because downstream and environmentally-minded mixed-motive countries had already proved that, to them, agreement was more important than to completely carrying through their interests. Thus, upstream states proved again quite strong.

## **Conclusion**

The texts of articles 5 and 7 as finally adopted by the Sixth Committee in April 1997 were quite ambiguous. The rules do not possess the clear and determined contents which are necessary for the effective functioning of international provisions, because states must know with some certainty what it is that is expected of them (cf. McCaffrey 1993a: 97). Therefore, despite the success of the convention being adopted by a great majority of states, it does not represent a final solution because possible conflicts about transboundary watercourses have not been successfully resolved by the text. However, ambiguity was the key to its success since the states would most probably not have adopted an unambiguous solution.

In addition, the wording of the articles did not entirely satisfy anyone. Many upstream states still thought that the Convention had unjustifiably limited their rights to use and develop international watercourses. The majority of downstream states also regarded their interests as insufficiently protected, especially because the text allowed upstream states in certain cases, to use an international river in such a way that would inflict significant harm downstream. The dissatisfaction on both sites became obvious

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when countries like Egypt and Turkey, when explaining their vote on the final Convention, said that they would not accept the formation of international custom on the basis of the IWC. While its provisions went too far for Turkey, Egypt probably feared that the instrument would affect its existing agreement with Ethiopia, which did not only establish the no-harm rule as the leading principle but also referred to the principles of international customary water law when consulting and cooperating on mutually beneficial projects.

When regarding the negotiation process of articles 5 and 7 as a whole, several conclusions can be drawn:

- **The basic conditions for reaching an agreement were auspicious.**

The most important prerequisite for the success of the IWC was the availability of draft articles on the subject which had been elaborated by the ILC as a basis for negotiations. This created the possibility for states to suggest changes on the draft articles rather than offering alternative versions of the whole text in the Sixth Committee. It additionally provided a precondition for the avoidance of the '*dilemma of negotiations*'.

The ILC's consideration of the comments from states during its elaboration of the draft articles represented an additional advantage because it meant that the basis for negotiations already represented a compromise between the interests of upstream and downstream states.

Furthermore, the ILC's commentary to its draft articles was very important as a supplementary means of interpretation and for the explanation of the contents of the articles. This feature was improved by the attendance of the last special rapporteur of the ILC on this subject at the meetings, where he served as an expert consultant. During the negotiations, he was able to set right any misunderstandings and was always approachable when questions emerged. This guaranteed that the negotiations were not unnecessarily delayed.

Fast progress was also likely because 'only' 54 countries took part in the negotiations of the international agreement, which represents a relatively low number of states in international negotiations. The fact that only about half of them played an active role, also increased the prospects for success.

Right at the beginning of the negotiations, it was decided that the Working Group and the Drafting Committee should not meet simultaneously. A democratic process was started through this step, enabling each country to take part in both the

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consideration of principles in the WG and the thorough formulation of consolidated articles in the DC. Alternative wordings were shown in brackets. The advantage of this procedure was that the countries were able to discuss only the most important questions in the WG, knowing that they could influence the details in the DC. That is why the WG was able to concentrate on key issues.

However, in some cases this concept did not work and the Chairman decided to establish parallel informal consultation under the leadership of one country. This was an important step in the direction of reaching consensus, because unofficial talks allowed delegations to hold positions that they could not explain in plenary (cf. McDonald 1990: 241).

Another precondition for the success of the second round of negotiations was that the GA had provided a deadline, meaning that the delegations had to decide if they wanted to establish an international framework agreement for managing international watercourses or not.

As far as the consensus-decision rule is concerned under which the WG operated, it prolonged the negotiations and promoted agreement on the lowest common denominator, but it was appropriate for the subject considered, because the integration of key states in crisis regions was crucial to the success of the instrument. However, after strenuous efforts had been made to achieve the consent of all, some countries still had serious reservations. The rules of procedure allowed decisions to be reached by vote. The delegates prevented a failure of the Conference by using this possibility in the end. However, the voting resulted in many abstentions and the defection of Turkey and China, who among others, were meant to be integrated into the agreement of the Convention.

- **The discussion was characterized by four especially important turning points.**

In general, there were four turning points discernible in the discussion.

The first concerned article 5 and was marked by a proposal submitted by the USA and other states (CRP.35) at the beginning of the 1996 session of the WG. It reflected the downstream states' position of updating the article to reflect current trends in international environmental law.

The submission of a proposal concerning article 7 by the Canadian conductor of the informal consultations, namely Canada and a couple of other states (CRP.72) described the second turning point. This last proposal submitted in the first round,

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marks the change in the debate about the article in favor of upstream states. With Canada itself changing its position considerably, this amendment was regarded as necessary because of the strong resistance from especially Turkey and Ethiopia beforehand, which would have made an agreement impossible.

The third important turning point was marked through the reports of the conductors of informal consultations on the articles, which were given two days before the end of the final round in 1997. While the unofficial talks had not brought about a change of article 7 against the proposal that marked turning point number two, the amendments of article 5 were substantive. Obviously, the upstream states held a stronger position during the informal consultations because the newly proposed wording dropped the environmental principles again. The only concession made to downstream states was the inclusion of the sustainability concept.

The last turning point of special importance was marked by the submission of a compromise proposal through the Chairman on the penultimate day of the meeting (CRP.94). With this proposal, the chance for the successful conclusion of the negotiations was re-offered, because it contained enough for those who wanted 'more' but not too much for those who wanted 'less'. In fact, the proposal provided wordings which changed the situation a bit in a positive sense for downstream states, offering a compromise that was better than nothing for most of them.

A precondition for the proposal's success was the timing of its presentation. Keeping the GA deadline in mind, an earlier submission would have ended in basic discussions and further proposals, while a later submission would have prevented a last debate and, thereby, the adoption of the compromise (cf. Oberthür 1993: 64). Thus, although neither downstream nor upstream countries were satisfied with the wording, most of them were prepared to adopt it in order to conclude the meeting successfully.

- **The general behavior of states approximated their preference structure.**

During the negotiations of articles 5 and 7, the downstream states almost always gave in earlier than the upstream states. One of the few exceptions was the issue of the superiority of either of the two articles 5 or 7, which caused the lasting opposition of downstream states at the very end of the debate. For they had already accepted article 5 without environmental updating, their rising opposition concerning article 7 indicated that they would not accept compromise at all costs. This behavior had some success because the Chairman approached them in his compromise proposal. However, the wording was still much closer to the initial upstream states' suggestions than their own,

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but it was nevertheless accepted by the most lower riparians at the end. As far as the upstream states are concerned, except for their most radical proposals, they were in most cases at least able to carry through their second preference.

The downstream states' behavior complied with their assumed strong wish to reach a compromise, whereas the upper states preferred an unregulated situation to international legislation.

Assessing the behavior of mixed-motive countries, they also acted in accordance with their assumed ranking of preferences, which means that reaching (any) agreement did have the highest priority for them. Even the environmentally-minded members of this group, who supported the downstream states throughout the debate, adopted the Convention in the end, with Canada and the USA stating that they would have accepted any wording in order to codify international law. This conduct was a decisive factor for the outcome because especially Canada had supported downstream interests in the beginning. When the representative thought that consensus could not be achieved, he initiated a proposal where the wording favored upstream states, which marked a turning point in the debate.

- **The states' positions in the negotiations were determined by their regional background and their particular political situation.**

The division of states into a group of downstream and environmentally-minded mixed-motive states that wanted to strengthen the no-harm rule, a second group of other mixed-motive countries who supported the ILC draft and a last group of upstream states that aimed at establishing the superiority of article 5 is too simple. As was already observed by Fitzmaurice (1997: 504) and Nussbaum (1997: 49), especially the group of states who wanted to retain the 1994 wording of the articles was composed of countries with different riparian positions. Furthermore, it was not only mixed-motive countries who changed their group depending on the issue, up- and downstream states occasionally did the same as well.

Thus, just knowing about the riparian position of states is not enough to explain their behavior during the negotiations. One also has to take the political situation in the countries' particular regions into account, including the existence of agreements governing the use of the watercourse, the distribution of prior uses and of economic and military power in a region. This background example makes the Egyptian position during the negotiations more comprehensive because the country is in the most powerful position in the Nile basin. While all the other regarded downstream states

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adopted the IWC in the end, although their interests had not been met completely, Egypt abstained from voting because its position allowed the country to insist on its interests. The tensions in a region also influenced certain parts of the negotiations. For example, Syria's and Iraq's behavior often reflected their ongoing conflict with Turkey.

Another important factor determining the actors' behavior was their interest in the codification or progressive development of international law. It was the main cause that formed the group that supported the ILC draft. It included countries like the USA, the Czech Republic and usually China. A good example for this is the debate about the due diligence obligation, where national positions were influenced by the countries' perceptions of customary international law. This led to a line-up of states which was quite unreflective of their riparian position.

In contrast, mixed-motive countries like Finland who supported the downstream position throughout the debate, were not only interested in the codification of international law but in its progressive development as well.

To sum up, a state's riparian position on its international river does not solely explain its preferences during negotiations. This applies especially to those countries who are both upstream and downstream states at different international watercourses. Although it is a useful explanation for most cases when assessing the behavior of upstream and downstream states, one still has to keep the regional background and the particular political situation of a country in mind.

- **The states did not form coalitions during the negotiations.**

As far as one can derive from official records of the negotiations, neither up- or downstream states formed lasting coalitions in order to either increase their bargaining strength or to reach a joint objective. They neither held a joint position throughout the negotiations nor did they develop strategies to carry their interests through and they did not submit proposals jointly.

Instead, single states stepped forward. They either acted as lead states because they had a strong commitment to effective international action or took the role of blocking states.

Hungary and Portugal were especially active members of the downstream group, which was the weakest party in the negotiations. They pursued an information strategy.

In contrast, upstream states in conflict regions would have had the potential to block strong international action, for the IWC was inter alia intended to calm hostile regions.

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Although they could have realized more of their interests than downstream states, they did not form a blocking coalition with which they could have achieved even higher benefits for themselves.

Nevertheless, there were only single blocking states. They were led by Turkey and Ethiopia, who delivered the most arguments. Other state representatives supported their blocking position depending on the issue-area. While most blocking states did at least participate in the discussion, only France made destructive proposals and just tried to delay the process.

The development of an effective blocking coalition was especially prevented by the conduct of upstream countries such as China, Slovakia and India, which supported the ILC draft in many cases.

The behavior of mixed-motive countries was the least coherent. Finland especially supported the downstream states during the whole debate in order to strengthen the environmental protection provisions of the IWC; it functioned as a lead state in this group. In contrast, Canada and the USA tried to push the whole process forward, which was no problem for them because all their transboundary watercourses were already covered by agreements. Thus, the IWC's provisions would not affect them.

The difficulties of forming lasting coalitions might have been at least partially due to the line-up of states, which was unusual for international negotiations. It would have required states to work together which would not have done so under other circumstances (e.g. the mixed-motive countries USA and China). Thus, ideological, cultural or economic differences were probably factors that hindered the formation of coalitions.

- **The most obviously used strategies during the negotiations were cooperative strategies and the 'strategy of delay'.**

The most apparent strategy used in the negotiations was the 'strategy of delay', which was most obviously used by France. The country hardly took part in the debate regarding the content of articles 5 and 7 but, for example, preferred to indicate formal mistakes like the occasional lack of official translations of proposals. In addition, the country's representative emphasized during the whole discussion of the IWC that the text went too far for a framework convention. The most probable explanation for the French behavior is that the country refuses the codification of international law in general, in order to preserve their general line in foreign affairs (Barandat 1999: 41f).

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Besides France, other states pursued a strategy of delay as well, but in a far more cloaked manner. Especially in the first round, Turkey and Ethiopia tried to prevent the adoption of the Convention in general in order to be able to complete their existing upstream utilization projects without hindrance (ibid. 1997b: 413f). Thus, the failing of the first meeting in 1996 meant a political success for those states.

On the other hand, cooperative strategies were used by downstream and mixed-motive countries. While downstream states like Bangladesh tried to pin moral obligations upon upstream states by explaining their precarious situation, mixed-motive countries like the USA and Finland adopted an 'information strategy', trying to even out different interests through the provision of convincing arguments. They failed however, because upper riparians were not prepared to cooperate.

As there was only access to official documents, it is especially difficult to say if states strategically threatened to break the negotiations. Those moves were only documented at the last stage of the debate, when e.g. the Spanish representative implicitly threatened not to sign the IWC if the Chairman's proposal would not be changed to meet the upstream needs better. Although he was supported through other upstream states, the final wording was still not entirely satisfying to them.

In conclusion, the auspicious initial conditions did lead to an agreement, although it took a second round of negotiations. Its course was characterized by a high preparedness by downstream states to reach a compromise and by the absence of any real coalitions. Instead, single states stepped forward, either as leading or blocking states. Many countries used an information strategy or a strategy of delay to carry their interests through. It was furthermore learned that the positions of states were determined by their whole regional background, rather than just by their riparian position. Therefore, the states behaved differently than it could have been expected in a considerable number of cases.

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