CHAPTER 10

Changing perspectives in the management of international watercourses: An international law perspective

Laurence Boisson de Chazournes

Abstract

The adoption of the UN Convention on the Law of Non-Navigational Uses of International Watercourses in May 1997 constitutes an important step towards the joint management of watercourses. Even should the UN convention never enter into force, it is and will remain a reference document for negotiations. However, the legal and policy framework as it presently stands in the convention is not precise enough, nor sufficiently streamlined and overarching to deal in a comprehensive and effective manner with joint management issues. Accordingly, there is a need for further developing the policy and legal regime applicable to watercourses from a substantive, procedural and institutional viewpoint, through regional and basin agreements, taking into account the specificity of each watercourse.

Introduction

International law plays a significant role in managing international watercourses. While the rule of law does not in and of itself provide solutions to the many concerns about water utilisation, conservation or protection, it certainly provides the means of reaching potential solutions to international water problems. Of course, international law cannot guarantee cooperation over international watercourses. Such cooperation, however, is very unlikely to be sustainably established without appropriate legal support (see McCaffrey 2001). In providing stability and predictability to regulation, it contributes both to the avoidance and settlement of disputes. But this crucial function cannot be fulfilled efficiently in an area where the principles and rules remain rather vaguely elaborated or phrased. Building workable institutional and conventional frameworks, within which states interact, consult and exchange information, is thus essential. The rules applicable to international watercourses must therefore not only be substantive and procedural, but also institutional, providing suitable mechanisms for ensuring cooperation and sustainable management of international watercourses (see, for example, the cases of the Rhine and Danube in Sands & Klein 2001).

Until the United Nations General Assembly adopted the UN Convention on the Law of Non-Navigational Uses of International Watercourses (1997) – opened for

signature and ratification by member states in May 1997 – the international community did not have at its disposal a set of written rules and principles dealing with this issue and universally negotiated by states. Until this time, the Helsinki Rules on the Uses of the Waters of International Rivers, adopted by the International Law Association (ILA) in 1966, were the only set of written rules that could be referred to.

However, the Helsinki rules had not been endorsed by an interstate political body, but only by a non-governmental agency. In addition, discussions centred around their status as customary law, which is their binding character. The UN convention shed some light on this and enabled clarification. The codification effort initiated in 1970 by the UN International Law Commission (ILC) - a subsidiary body of the UN General Assembly - took almost three decades. Although the result of political compromises among groups of states with different interests, it helped to clarify and codify various rules and principles of the regime applicable to international watercourses.

However, the legal and policy framework as it presently stands in the UN convention is not precise enough, nor sufficiently streamlined and overarching to deal in a comprehensive and effective manner with joint management issues. Accordingly, there is a need for further developing the policy and legal regime applicable to watercourses from a substantive, procedural and institutional viewpoint, through regional and basin agreements, taking into account the specificity of each watercourse.

The UN convention as a framework for integrated management of international watercourses

Although the UN convention is the result of a compromise between the different interests, it nonetheless provides a reasonable framework for governing non-navigational uses of international watercourses. The elements of such an architecture have been negotiated at the universal level within the context of a so-called 'framework convention'. The fifth paragraph of the preamble to the UN convention clearly states:

> "the conviction that a framework convention will ensure the utilization, development, conservation, management and protection of international watercourses and the promotion of the optimal and sustainable utilization thereof for present and future generations."

Uncertainties and minimal common denominators are the price to pay for such an endeavour as the elaboration of a legal regime. The UN convention is not an exception in this respect. Many agreements, usually termed 'framework conventions' and to be found mostly in the fields of international environmental law or disarmament regulation, present similar features. Such treaties contain elements of a regulatory, programmatic and institutional nature. One of the virtues of these instruments is that

they lay down the constitutive foundations for a legal regime. The regime is then supposed to be further elaborated through additional treaties, protocols, amendments, guidelines or other types of instruments.

It is interesting to note that international watercourses are all distinctive from one another because of their characteristics, whether geographic, climatic or human, among others. This means that the UN convention is a framework convention for bilateral, regional or basin-wide agreements to be adjusted according to specific cases. It contains a common legal and policy language negotiated at universal level, to be specified and rendered more precise to meet particular needs in the context of each particular watercourse.

Another function of the UN convention is that when it enters into force, the forthcoming bilateral and regional watercourse agreements among parties to the convention will be negotiated in the light of the principles and rules it provides for, taking into consideration the specificities of each river basin. Article 3 of the UN Convention reads as follows:

> "3. Watercourse States will enter into one or more agreements, hereinafter referred to as 'water agreements', which apply and adjust the provisions of the present Convention to the characteristics and uses of a particular international watercourse or part thereof.
>
> 4. Where a watercourse agreement is concluded between two or more watercourse States, it shall define the waters to which it applies. Such an agreement may be entered into with respect to an entire international watercourse or any part thereof or a particular project, program or use except insofar as the agreement adversely affects, to a significant extent, the use by one or more other watercourse States of the waters of the watercourse, without their express consent."

From a policy viewpoint, it is also interesting to note that both the UN convention (though not yet in force) and the initiatives that led to its adoption (the ILC's draft articles on the non-navigational uses of international watercourses) have been taken into account in formulating international agreements in a variety of contexts. One such case is the draft of a cooperative framework for the sustainable and equitable use of the resources of the Nile basin (see Brunnee & Toope 2001:105) developed with the support of the World Bank, the United Nations Development Programme (UNDP) and other multilateral and bilateral donors. Another case has been the Revised Protocol on Shared Watercourses of the Southern Africa Development Community (SADC) (Salman 2001:981). These examples demonstrate the UN convention's virtue as a legal roadmap for negotiations, willingly chosen, without any legal constraint to do so.

It is in such a context that the value added by the UN convention should be assessed, in the sense that it allows for consolidation and developments based on notions and principles that have been universally defined in a framework instrument.

Scope of application of the UN convention

Another important feature of the UN convention is the expanded coverage of the term 'watercourse', which is defined as "a system of surface waters and groundwaters constituting by virtue of their physical relationship a unitary whole and normally flowing into a common terminus", and an "international watercourse [as] a watercourse, parts of which are situated in different States" (article 2(a) and 2(b); McCaffrey & Rosenstock 1996). It thus encompasses the main stream of an international river and its tributaries, as well as international lakes and groundwater that are connected to other parts of an international watercourse.

A broader conception would include all waters and lands, which are part of a drainage system (ILA 1966). The Helsinki rules define an international drainage basin as a "geographical area extending over two or more States determined by the watershed limits of the system of waters, including surface and underground waters, flowing into a common terminus" (article 2).

The definition of an international watercourse in the UN convention might appear to be insufficiently comprehensive from an ecosystem perspective. Such a perspective entails that a river or lake basin must be viewed "not merely as a unit in which water resources are interlinked, but as a unit in which many elements of the environment (freshwater, salt water, air, land and all forms of life) interact within the confines of the drainage area" (Teclaff 1991:370). This would imply that the focus is on the dynamics and linkages existing in freshwater, terrestrial, marine and atmosphere systems.

Although it is true that the scope of the convention does not go this far, it does provide for elements in this direction. Article 20 requires that "Watercourse States shall, individually and, where appropriate, jointly, protect and preserve the ecosystems of international watercourses."

This obligation entails that land-based activities have to be taken into account in such a context. With respect to the marine environment, in addition, article 23 provides that:

> "Watercourse States shall, individually and, where appropriate, in cooperation with other States, take all measures with respect to an international watercourse that are necessary to protect and preserve the marine environment, including estuaries, taking into account generally accepted international rules and standards."

A similar provision can be found in the UN Convention on the Law of the Sea (UN 1982 article 207(1)) that addresses pollution from land-based sources:

> "States shall adopt laws and regulations to prevent, reduce and control pollution of the marine environment from land-based sources, including rivers, estuaries, pipelines and outfall structures, taking into account internationally agreed rules, standards and recommended practices and procedures."

Although drafted in general terms, these obligations highlight the link between fresh and marine waters, keeping in mind that the greatest share of marine pollution results from land-based activities. These elements offer a broader perspective in stressing that the watercourse is an element of a bigger and more complex system.

Building blocks of international water management

The UN convention lays down the main building blocks for water management at international level. Such foundations delineate the path for an integrated approach composed of four main pillars, while a fifth, only superficially elaborated, deserves further exploration and refinement.

Water-sharing principles constitute the first pillar. They comprise the 'equitable and reasonable use' principle and the 'no-harm' rule. The first principle is set up in article 5, which deals with equitable and reasonable utilisation and participation:

> "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 and sustainable utilization thereof and benefits therefrom, taking into account the interests of the watercourse States concerned, consistent with adequate protection of the watercourse.
> 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."

Article 7 articulates the 'no-harm' rule under the heading of the obligation not to cause significant harm:

> "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.
> 2. Where significant harm nevertheless is caused to another watercourse State, the States whose use causes such 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."

Article 6 of the UN convention also enunciates a series of factors to be taken into account for such allocation, including social, economic, cultural, as well as historical considerations. They also favour a mutual and supportive application of the principles laid down in articles 5 and 7, as they include taking into account "the effects of the

use or uses of the watercourse in one watercourse State on other watercourse States" (article 6(1)(d)). Yet, it should be noted that the absence of priority ranking among the factors to be implemented generates the risk of maintaining the status quo, with no incentive to reach an agreement.

The second pillar is riparian states' *general obligation to cooperate*. According to the UN convention, such cooperation may be achieved through different means: setting joint mechanisms and commissions of which riparians are members, regular exchange of information and data, and notification of planned measures. Some of these provisions are more hotly debated than others.

Since the collection and exchange of data are key elements for preventing disputes, the establishment of joint mechanisms and commissions should be further strengthened to promote and establish adequate systems for the exchange of information (see Brown Weiss 1989:375). At present, the UN convention states this commitment in article 8(2):

> "In determining the manner of such cooperation, watercourse States may consider the establishment of joint mechanisms or commissions, as deemed necessary by them, to facilitate cooperation on relevant measures and procedures in the light of experience gained through cooperation in existing joint mechanisms and commissions in various regions."

This is a 'due diligence' obligation that does not limit states to any precise outcome. Similar language is encountered in the first paragraph of article 24 dealing with management (further defined in paragraph 2):

> "Watercourse States shall, at the request of any of them, enter into consultations concerning the management of an international watercourse, which may include the establishment of a joint management mechanism."

Joint mechanisms are thus expected to flow from the development of the regime. Yet, article 8(2) refers to the "experience gained through cooperation in existing joint mechanisms and commissions in various regions." Here, the experience drawn from past and existing agreements is seen as a way to induce states to strengthen cooperation through the establishment of institutional bodies. Although the UN convention is generally conceived – like other framework conventions – as a tool to initiate a process of cooperation among states, such a process seems reversed for joint mechanisms: it is the UN convention that would be nurtured by past practice. A certain timidity may be perceived, to say the least, in promoting cooperation.

Moreover, efforts should be made to open these institutional settings to all riparians. This might entail some flexibility in allowing all riparians of a particular international watercourse system – whether or not parties to a given watercourse agreement - to participate, as observers or in a similar capacity, in the activities of a joint mechanism established in such a context. As part of the confidence-building spirit that is crucial in promoting integrated water management, the granting of

observer status would constitute a first step towards the further involvement of 'outsider' states as parties to an eventual agreement encompassing all riparians.

The third pillar integrates the *protection of the environment* as a component of the regime applicable to international watercourses, and to prevent and control pollution. Phrased mostly in general terms, the environmental regime also needs to be strengthened to incorporate principles and rules of international environmental law, including the principles enunciated in the Rio Declaration on Environment and Development (UN 1992). The UNECE Convention on the Protection and Use of Transboundary Watercourses and International Lakes (Helsinki, 1992) is important in this respect (UNECE 1992). It contains a rather wide definition of pollution within the context of transboundary impact, including:

> "any significant adverse effect on the environment resulting from a change in the conditions of transboundary waters caused by a human activity, the physical origin of which is situated wholly or in part within an area under the jurisdiction of another Party. Such effects on the environment include effects on human health and safety, flora, fauna, soil, air, water, climate, landscape and historical monuments or other physical structures or the interaction among these factors; they also include effects on the cultural heritage or socio-economic conditions resulting from alterations to those factors" (article 1(2)).

The UNECE convention (1992) also provides for respect for certain environmental principles, such as:

> "the precautionary principle, by virtue of which action to avoid the potential transboundary impact of the release of hazardous substances shall not be postponed on the ground that scientific research has not fully proved a causal link between those substances, on the one hand, and the potential transboundary impact, on the other hand; the polluter-pays principle, by virtue of which costs of pollution prevention, control and reduction measures shall be borne by the polluter; water resources shall be managed so that needs of the present generation are met without compromising the ability of future generations to meet their own needs" (article 2(5)(a), (b) & (c)).

The *promotion of dispute settlement and avoidance mechanisms* is the fourth pillar. While the UN convention provides for the classical menu of diplomatic and judicial means of dispute settlement between states, a significant addition is the fact-finding commission that can be established at the request of a party. In this regard:

> "2. If the Parties concerned cannot reach agreement by negotiation requested by one of them, they may jointly seek the good offices of, or request mediation or conciliation by, a third party, or make use, as appropriate, of any joint watercourse institutions that may have been established by them or agree to submit the dispute to arbitration or to the International Court of Justice.

3. Subject to the operation of paragraph 10, if after six months from the time of the request for negotiations referred to in paragraph 2, the Parties concerned have not been able to settle their dispute through negotiation or any other means referred to in paragraph 2, the dispute shall be submitted, at the request of any of the parties to the dispute, to impartial fact-finding in accordance with paragraphs 4 to 9, unless the Parties otherwise agree. A Fact-finding Commission shall be established, composed of one member nominated by each Party concerned and in addition a member not having the nationality of any of the Parties concerned chosen by the nominated members who shall serve as Chairman."

Nevertheless, some issues remain to be clarified. One is the role played by the scientific community in the dispute settlement process and the necessity for it to be fully incorporated into the decision-making process. Another issue relates to enforcement and to sanctions or compensatory measures to be decided upon for ensuring effective compliance with international watercourse agreements. This raises the question of incentives for countries to get involved in such legal processes. Strengthening the capacity of parties to comply with obligations under the UN convention or any related agreement should be considered in this context.

This concern is in fact addressed by the World Bank policy on international waterways: "The Bank recognizes that the cooperation and goodwill of riparians is essential for efficient utilization and protection of the waterway" (see Salman & Boisson de Chazournes 1998:194).

Great importance is placed on riparians to make appropriate agreements or arrangements for these purposes for any part of, or for the entire waterway. The financial institution stands ready to assist the states concerned in reaching this goal. In cases where differences remain unresolved between the state proposing the project (the beneficiary state) and the other riparians, prior to financing the project, the bank normally urges the beneficiary state to offer to negotiate in good faith with the other riparians to reach appropriate agreements or arrangements.

Diplomatic means, such as consultation, mediation and investigation, may also rely on incentives or the failing state to adjust its position. As a means of last resort, targeted sanctions could be exercised against such countries to put an end to their disputes with other riparians.

Lastly, a fifth, less-developed pillar concerns the *involvement of non-state actors*. The UN convention is a classical state-oriented instrument, with almost no provisions for the involvement of other stakeholders, such as local communities and non-governmental organisations (NGOs). Yet, it contains a provision that deals with individuals, ensuring access to justice and other procedures on a non-discriminatory basis, which reads as follows:

"Unless the watercourse States concerned have agreed otherwise for the protection of the interests of persons, natural or juridical, who have suffered or are under a serious threat of suffering significant transboundary harm as a

result of activities related to an international watercourse, a watercourse State shall not discriminate on the basis of nationality or residence or place where the injury occurred, in granting to such persons, in accordance with its legal systems, access to judicial or other procedures, or a right to claim compensation or other relief in respect of significant harm caused by such activities carried on in its territory" (article 32).

This possibility constitutes an important venue achievement. For example, in the context of pollution of the Rhine River, individuals were able to obtain redress and compensation through such means (see G.J. Bier vs. Mines de Potasse, Kiss & Shelton 1995:364-367).

It should be complemented, however, by other means to involve the public in the management of international watercourses. It is important in this respect to note the increasing role played by water associations (see Salman 1997). The public can also be involved through hearings, briefings and working groups. Public participation and access to information are means by which awareness can be raised and support increased for water management policies (see Bosnjakovic 1998:62). In addition, the growing body of human rights law provides for important governance parameters to ensure that an international watercourse is managed in the interests of all. Such parameters include, among others, the protection of minorities and indigenous peoples, as well as the right of access to information. The ever more vociferous affirmation of a human right to clean water is also worth noting in this respect (see McCaffrey 1992). The protocol on water and health (1999) to the UNECE convention (1992) refers to this when it states that "equitable access to water, adequate in terms both of quantity and of quality, should be provided for all members of the population, especially those who suffer a disadvantage or social exclusion" (article 5(1)).

To conclude, it should be stressed that the path for an integrated approach – as provided in the UN convention – is rather forward-looking when considering that several of its components are not part of the existing water agreements. In practice, quality and quantity issues are not always dealt with together (see, for example, Boisson de Chazournes 1998); fairness in apportionment of water resources remains a quest in many parts of the world; cooperation and exchange of information need to be strengthened as many countries still consider water data as not being part of the 'public domain'; and joint institutional mechanisms need to be established. Lastly, prevention and dispute avoidance mechanisms remain rather underdeveloped.

International Court of Justice: Its contribution to the promotion of joint management of international watercourses

Some of the necessary steps towards effective joint management have been delineated by the International Court of Justice in some of its recent decisions. Such

was the case with the dispute over the Gabcikovo-Nagymoros project (1997), concerning the erection of two dams on a portion of the Danube shared by Slovakia and Hungary.

One lesson to be drawn from the case is that the rule of law cannot be viewed in static terms. The 1977 treaty concluded between Hungary and the former Czechoslovakia on the construction and operation of the Gabcikovo-Nagymoros lock system was virtually silent on the subject of the environment, save for scattered references related to water quality preservation, as noted by the court:

> "In order to evaluate the environmental risks, current standards must be taken into consideration. This is not only allowed by the wording of Articles 15 and 19, but even prescribed, to the extent that these articles impose a continuing — and thus necessarily evolving — obligation on the parties to maintain the quality of the water of the Danube and to protect nature" (Gabcikovo-Nagymoros project 1998: paragraph 140).

The court, however, held that "the Treaty is not static, and is open to adapt to emerging norms of international law." It further stated that "the awareness of the vulnerability of the environment and the recognition that environmental risks have to be assessed on a continuous basis have become much stronger in the years since the Treaty's conclusion" (Gabcikovo-Nagymoros project 1998: paragraph 112). This statement raises an important challenge on the interpretation of existing treaties that do not include issues around the protection of the environment.

On water-sharing principles, the court stated that international watercourses should be considered as shared natural resources, and faulted Slovakia (formerly Czechoslovakia) in this respect. Quoting the 1929 decision of the Permanent Court of International Justice concerning navigation on the River Oder, the court said:

> "'[The] community of interest in a navigable river becomes the basis of a common legal right, the essential features of which are the perfect equality of all riparian States in the user of the whole course of the river and the exclusion of any preferential privilege of any one riparian State in relation to the others' (Territorial Jurisdiction of the International Commission of the River Oder, Judgment No. 16, 1929, P.C.I.J., Series A, No. 23, p. 27).
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> Modern development of international law has strengthened this principle for non-navigational uses of international watercourses as well, as evidenced by the adoption of the Convention of 21 May 1997 on the Law of the Non-Navigational Uses of International Watercourses by the United Nations General Assembly.
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> The Court considers that Czechoslovakia, by unilaterally assuming control of a shared resource, and thereby depriving Hungary of its right to an equitable and reasonable share of the natural resources of the Danube — with the continuing effects of the diversion of these waters on the ecology of the riparian area of the Szigetköz — failed to respect the proportionality which is required by international law" (Gabcikovo-Nagymoros project 1998: paragraph 85).

The court could have gone a step further and considered the principle of equitable utilisation in the broader context of sustainable development management. A derivative element not yet fully explored, but which deserves attention, is that the apportionment of waters is to be embedded in ecosystem thinking, taking into consideration the rights of present and future generations (UN 1992: principle 3). As for the definition of sustainable development, the court merely said:

> "Throughout the ages, mankind has, for economic and other reasons, constantly interfered with nature. In the past, this was often done without consideration of the effects upon the environment. Owing to new scientific insights and to a growing awareness of the risks for mankind — for present and future generations — of pursuit of such interventions at an unconsidered and unabated pace, new norms and standards have been developed, set forth in a great number of instruments during the last two decades. Such new norms have to be taken into consideration, and such new standards given proper weight, not only when States contemplate new activities but also when continuing with activities begun in the past. *This need to reconcile economic development with protection of the environment is aptly expressed in the concept of sustainable development.*
>
> For the purposes of the present case, this means that the Parties together should look afresh at the effects on the environment of the operation of the Gabcikovo power plant. In particular they must find a satisfactory solution for the volume of water to be released into the old bed of the Danube and into the side-arms on both sides of the river" (Gabcikovo-Nagymoros project 1998: paragraph 140; author's emphasis).

Also worthy of note is that the decision highlighted the fact that the law on international watercourses not only consists of the UN convention, important though it may be, but also of other sources of international law, such as "newly developed norms of environmental law" (see Gabcikovo-Nagymoros project 1998: paragraph 112). In order to give more effect to this vision of a more holistic regime for international watercourses, the court expressly stated that cooperation between riparians in the management of international watercourses is crucial. In this context, attention should be paid to the environmental conventions dealing with nature conservation – such as the Convention on Wetlands of International Importance especially as Waterfowl Habitat (also called the Ramsar convention, 1971) or the Convention on Biological Diversity (1992) – which contribute to the better protection of international watercourses as habitats and elements of larger ecosystems.

In the 1999 case concerning Kasikili/Sedudu Island (between Botswana and Namibia), the International Court of Justice also pointed to some interesting features of

the management of international watercourses. The main focus of the case revolved around the determination of the boundary between the two African states, the apportionment of the island in dispute and the method to be applied to resolve the matter, given the existence of a treaty between Great Britain and Germany concluded in 1890 and the rules and principles of international law (see Ashton 2000 for more details).

On the criteria to be favoured, the court found:

"that it cannot rely on one single criterion in order to identify the main channel of the Chobe around Kasikili/Sedudu Island, because the natural features of a river may vary markedly along its course and from one case to another. The scientific works which define the concept of 'main channel' frequently refer to various criteria: thus, in the Dictionnaire français d'hydrologie de surface avec équivalents en anglais, espagnol, allemand (Masson, 1986), the 'main channel' is 'the widest, deepest channel, in particular the one which carries the greatest flow of water' (p. 66); according to the Water and Wastewater Control Engineering Glossary (Joint Editorial Board Representing the American Public Health Association, American Society of Civil Engineers, American Water Works Association and Water Pollution Control Federation, 1969), the 'main channel' is 'the middle, deepest or most navigable channel' (p. 197). Similarly, in the Rio Palena Arbitration, the arbitral tribunal appointed by the Queen of England applied several criteria in determining the major channel of a boundary river (Argentina-Chile Frontier Case (1966), United Nations, Reports of International Arbitral Awards (RIAA), Vol. XVI, pp. 177-180; International Law Reports (ILR), Vol. 38, pp. 94-98). The Court notes that the Parties have expressed their views on one or another aspect of the criteria mentioned in paragraph 29 above, distinguishing between them or placing emphasis on their complementarity and their relationship with other criteria. It will take into account all of these criteria" (paragraph 30).

Hence, the court's decision was as follows:

"88. The foregoing interpretation of the relevant provisions of the 1890 Treaty leads the Court to conclude that the boundary between Botswana and Namibia around Kasikili/Sedudu Island provided for in this Treaty lies in the northern channel of the Chobe River.

89. According to the English text of the Treaty, this boundary follows the 'centre' of the main channel; the German text uses the word 'thalweg'. The Court has already indicated that the parties to the 1890 Treaty intended these terms to be synonymous and that Botswana and Namibia had not themselves expressed any real difference of opinion on this subject (see paragraph 25 above).

It is moreover clear from the travaux préparatoires of the Treaty (see paragraph 46 above) that there was an expectation of navigation on the Chobe by both contracting parties, and a common intention to exploit this possibility.

Although, as has been explained above, the parties in 1890 used the terms 'thalweg' and 'centre of the channel' interchangeably, the former reflects more accurately the common intention to exploit navigation than does the latter. Accordingly, this is the term that the Court will consider determinative in Article III, paragraph 2.

Inasmuch as Botswana and Namibia agreed, in their replies to a question put by a Member of the Court, that the thalweg was formed by the line of deepest soundings, the Court concludes that the boundary follows that line in the northern channel around Kasikili/Sedudu Island."

Relying on the social and economic relationships prevailing between Namibia and Botswana, the Court added:

"102. The Court observes, however, that the Kasane Communiqué of 24 May 1992 records that the Presidents of Namibia and Botswana agreed and resolved that:

'(c) existing social interaction between the people of Namibia and Botswana should continue;

(d) the economic activities such as fishing shall continue on the understanding that fishing nets should not be laid across the river;

(e) navigation should remain unimpeded including free movement of tourists'.

The Court further observes that in explanation and in pursuance of the foregoing agreement, Botswana stated at the oral hearings:

'Botswana's policy is to allow free navigation, including unimpeded movement of tourist boats even in the southern channel. This policy applies to boats owned by Namibian tourist operators as well. The only requirement is that all tourist boats should be registered. This requirement is meant solely to prevent the danger of environmental pollution of the Chobe River. Experience has shown that some tourist boat operators tended to transport their boats from Okavango waters, infested with river weeds, down to the Chobe River, without applying for a trans-zonal permit. The Department of Water Affairs, and not the Botswana Defence Force, is responsible for enforcing the policy on anti-pollution of the river waters.

Botswana's policy on free navigation, including the free movement of tourist boats, was set out in paragraph (e) of the Kasane Communiqué … Since the Kasane Communiqué was agreed in May 1992, there has been no complaint from the Namibian Government that Botswana ever breached paragraph (e) of the Communiqué which guarantees unimpeded navigation.'

Subsequently, Botswana added that:

'Botswana also wishes to reiterate that tourist boats from Namibia are free to travel in the southern channel. The only requirement is that all such boats

should be registered, in order to control noxious aquatic weeds … this requirement is backed by proper legislation, namely, the Laws of Botswana Aquatic Weeds (Control) Act, which commenced in December 1971. The provisions of this Act were later discussed with, and endorsed by the Water Affairs Department of Namibia. Since then, Namibian tourist boat operators have registered as many as 53 boats, to travel in Botswanan waters of the Chobe River. These 53 Namibian boats are permitted to navigate in the southern channel, like any others that have been licensed.'

103. The Court, which by the terms of the Joint Agreement between the Parties is empowered to determine the legal status of Kasikili/Sedudu Island concludes, in the light of the above-mentioned provisions of the Kasane Communiqué, and in particular of its subparagraph (e) and the interpretation of that subparagraph given before it in this case, that the Parties have undertaken to one another that there shall be unimpeded navigation for craft of their nationals and flags in the channels of Kasikili/Sedudu Island. As a result, in the southern channel of Kasikili/Sedudu Island, the nationals of Namibia, and vessels flying its flag, are entitled to, and shall enjoy, a treatment equal to that accorded by Botswana to its own nationals and to vessels flying its own flag. Nationals of the two States, and vessels, whether flying the flag of Botswana or of Namibia, shall be subject to the same conditions as regards navigation and environmental protection. In the northern channel, each Party shall likewise accord the nationals of, and vessels flying the flag of, the other, equal national treatment."

Hence, although international watercourses can be used as boundaries, the decision emphasises the necessity to envision such watercourses also as spaces of cooperation, thus transcending the issue of boundary. The court reminded the two countries of the need to create mutually satisfactory conditions for their nationals through the establishment of a common regime.

Conclusion

The adoption of the UN convention constitutes an important step towards the joint management of watercourses. Even should the UN convention never enter into force, it is and will remain a reference document for negotiations. It also contains rules of a customary nature, as stated by the International Court of Justice in the Gabcikovo-Nagymoros case regarding the principle of equitable and reasonable share of natural resources (see paragraph 112).

However, cooperation still has to be developed further toward effective joint management of international watercourses, in line with the concept of integrated water resource management, as delineated in the ministerial declaration of The Hague on water security in the 21st century (paragraph 5):

"The actions advocated here are based on *integrated water resources management*, that includes the planning and management of water resources, both conventional and non-conventional, and land. This takes account of social, economic and environmental factors and integrates surface water, groundwater and the ecosystems through which they flow. It recognises the importance of water quality issues. In this, special attention should be paid to the poor, to the role, skills and needs of women and to vulnerable areas such as small island states, landlocked countries and desertified areas."

A more optimal regime for international watercourses should aim at including all water, as well as land that is part of a drainage system. An institutional framework providing for an adequate and regular exchange of information would allow riparians to manage the watercourse in the interests of all. Such management should involve the different stakeholders and be embedded in an ecosystem perspective. Metaphorically speaking, in such a context, the sharing and allocation of waters would find its place as a natural part of such a regime and no longer as a predominant pattern from which the joint management system derives. In other words, the sharing of water should not obviate the need to look at a watercourse from an holistic perspective, with the allocation of water components being one of its elements.

References

Ashton, P. 2000. Southern African water conflicts: Are they inevitable or preventable? In Solomon, H & Turton, A R (eds). *Water wars: Enduring myth or impending reality?* African Dialogue Monograph Series 2. Durban: ACCORD.

Boisson de Chazournes, L.1998. Elements of a legal strategy for managing international watercourses: The Aral Sea basin. In Salman, S & Boisson de Chazournes, L (eds). *International watercourses: Enhancing cooperation and managing conflict – Proceedings of a World Bank seminar.* World Bank technical paper 414. Washington DC: World Bank.

Bosnjakovic, B. 1998. UN/ECE strategies for protecting the environment with respect to international watercourses: The Helsinki and Espoo conventions. In Salman, S & Boisson de Chazournes, L (eds). *International watercourses: Enhancing cooperation and managing conflict – Proceedings of a World Bank seminar.* World Bank technical paper 414. Washington DC: World Bank.

Brown Weiss, E. 1989. New directions for the Great Lakes water quality agreement – A commentary. *Chicago-Kent Law Review* 65(375).

Brunnee, J & Toope, S. 2002. The changing Nile basin regime: Does law matter? *Harvard International Law Journal* 43(1).

Gabcikovo-Nagymoros project decision. 1998. Decision rendered on 25 September 1997. Reprinted in *International Law Materials* 37(162).

G.J. Bier vs. Mines de Potasse, Judgement No 21 176, 1976 Com. Mkt. Rep. 7816.

Kiss, A & Shelton, D. 1995. *International environmental law*. Ardsley, New York: Transnational Publishers.

ILA. 1966. Helsinki Rules on the Uses of the Waters of International Rivers. *Report of the Fifty-Second Conference.* Helsinki: International Law Association.

McCaffrey, S & Rosenstock, S. 1996. International Law Commission's draft articles on international watercourses: An overview and commentary. *RECIEL* 15.

McCaffrey, S C. 1992. A human right to water: Domestic and international implications. *Georgetown International Environmental Law Review* 5(1).

McCaffrey, S C. 2001. *The law of international watercourses: Non-navigational uses*. New York: Oxford University Press.

Salman, S & Boisson de Chazournes, L (eds). 1998. *International watercourses: Enhancing cooperation and managing conflict – Proceedings of a World Bank seminar.* World Bank technical paper 414. Washington DC: World Bank.

Salman, S. 2001. Legal regime for use and protection of international watercourses in the Southern African region: Evolution and context. *Natural Resources Journal* 41(4).

Salman, S. 1997. *The legal framework for water users' associations.* World Bank technical paper 360. Washington DC: World Bank.

Sands, P & Klein, P. 2001. *Bowett's law of international institutions.* London: Sweet & Maxwell.

Teclaff, L A. 1991. The river basin concept and global climate change. *Pace Environmental Law Review* 8.

UN. 1982. UN Convention on the Law of the Sea. Reprinted in *International Law Materials* 21(1261).

UN. 1992. Rio Declaration on Environment and Development. Reprinted in *International Law Materials* 31(874).

UN. 1997. UN Convention on the Law of Non-Navigational Uses of International Watercourses. Reprinted in *International Law Materials* 36 (700).

UNECE. 1992. UNECE Convention on the Protection and Use of Transboundary Watercourses and International Lakes. Reprinted in *International Law Magazine* 31(1312).

UNECE. 2000. *Protocol on water and health to the 1992 Convention on the Protection and Use of Transboundary Watercourses and International Lakes*. London, 17 June 1999. United Nations Economic and Social Council, Economic Commission for Europe, MP.WAT/2000/1.