J Convention on the Protection and Use of Transboundary
Watercourses and International Lakes
-L Task Force on Legal and Administrative Aspects

The Relationship between the 1992 UNECE Convention on the Protection and Use of Transboundary Watercourses and International Lakes and the 1997 UN Convention on the Law of the Non Navigational Uses of International Watercourses

Report of the UNECE Task Force on Legal and Administrative Aspects

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Geneva, February 2000

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1. Introductory Remarks

The **main purpose of the present report is to provide** a background text on the topic in hand that may be of support for the "advisory service on legal instruments" under Programme Area 2 of the Work Plan 1997-2000 adopted in the First Meeting of the Parties.

To that end, this report has been drafted with a view to meeting actual and prospective queries, especially those coming from Countries in transition, on the following issues:

a) the appropriateness, form a legal viewpoint, of becoming a party to both Conventions having regard to: primarily, i) the compatibility between the two instruments in point *inter se;* on a subsidiary basis, ii) the relation of those instruments to pre-existing watercourse agreements; iii) their relation to future watercourse agreements;

b) interpretative problems in the implementation of provisions of the two instruments under review bearing on the same issues.

The assessment of the compatibility, and, as we shall see in due course, of the complementary character of the relation between the two Conventions will be made with special regard to their respective scope *ratione materiae,* as well *ratione personarurn.* This assessment will be made within the framework of both treaty law and customary law with a view to maximising the appreciation of the practical guideline relevance of the two instruments, which appears to be of a two-pronged nature. For their guideline function addresses the adoption of national legislative and/or administrative measures on the use, protection and conservation of watercourses, on the one hand, and the negotiation of new watercourse agreements on specific international watercourses, on the other.

A comparative analysis will follow of the most salient material and procedural rules of the two Conventions. On that score, special attention will be given to their respective rules on the equitable utilisation principle and the no-harm rule, as well as to those providing for specific applications of the general obligation of co-operation. Finally, a brief comparison will be made of their respective approaches to dispute settlement with some considerations of a general character on this function in both Conventions with respect to that of dispute avoidance.

It might appear that the following analysis has been made dwelling more extensively on the provisions of the UN Convention of 1997. This may well be justified for two reasons. Firstly, because it is assumed that the ECE member countries, and more particularly those

who are Parties to the UN/ECE Convention of 1992, who are also the final addressees of the present report, are more knowledgeable about it. Secondly, because the documentation of the *travaux préparatoires* of the New York Convention of 1997 is much wider and more detailed, and also more accessible.

1.2. A Preliminary Assessment of the Approximate Coincidence of the Subject-Matter of the Two Conventions

A first glance at the subject matter of the two Conventions under review comfortably indicates a basic coincidence. This is confirmed by their respective titles. Namely, the *UNIEECE Convention on the Protection and Use* of *Transboundary Watercourses and International Lakes,* done at Helsinki, on 17 March 1992 (hereinafter "UN/ECE 92 Convention"), and *the UN Convention on the Law* of *the Non-Navigational Uses* of *International Watercourses,* adopted by the UN General Assembly on 21 May 1997 (hereinafter "UN 97 Convention"). On a closer scrutiny, one may detect language suggesting that the primary focus of the UN/ECE 92 Convention is water quality issues, while the UN 97 Convention would be more concerned with problems of apportionment of water. I Though, it would be wrong to assume that the difference between the two Conventions on the matter is more than just one of emphasis. Apart from the more detailed analysis that will be made below of the provisions relevant to the scope *ratione materiae* of the two Conventions, this is supported by the physical interdependence between water quantity and water quality issues. For it is self-evident that a utilisation that leads to a significant reduction in the water flow in parts of an international watercourse diminishes the capacity of the watercourse to absorb pollutants.

Furthermore, it is to be noted that art. 1, para.l, of the UN 97 Convention, in enunciating its scope, expressly indicates, further to the non-navigational uses, "measures of protection preservation and management related to the uses of [the] watercourses and their waters". Apart from the fact that the latter issues are addressed specifically in Part IV (arts. 20-26) of the UN 97 Convention, the language used in art. 1, para. l, is instrumental in placing

See E. Gentizon-Gawronski, Comparaison: Convention sur la Protection et l'Utilisation des Cours d'Eau Transfrontière et des Lacs Intemationaux (1992) et Convention sur l'Utilisation des Cours d'Eau Intemationaux, Hormis Navigation (1997), Internal Paper of the Regional Adviser on Environment Office, UN/Economic Commission for Europe 1 (1998).

on the same footing the provisions on issues pertaining to water quantity and those on water quality. This equalisation was very much called for, since at the time when the ILC had started studying the subject , more than twenty years before the actual completion of its work, the main focus in this field was on the equitable apportionment of freshwater, while problems of pollution entered the picture only at a later stage, and this reflected itself for a number of years in the elaboration of the New York Convention.

Art.l, para.l, of the UN 97 Convention, therefore, can be said to have provided the basis for the structural linkage between the core principles of equitable utilisation and no harm (arts. 5-7), on the one hand, and the water quality issues - also encompassed in arts. 5-7 and further specified in Part IV on protection, preservation and management - on the other. That is also to say, that the provisions contained in this part of the Convention cannot be deemed to address exclusively pollution, but are to be considered to extend their reach also to questions of water quantity. Conversely, the rules on equitable utilisation and no harm do not govern only questions of water apportionment, but also cover problems of pollution.

Another general difference between the two instruments under review concerns their approach to the substantive principles, on the one hand, and to the procedural rules, on the other. Here, again, the difference between the two texts appears to be one of emphasis and detail, rather than one leading to incompatibility. As already anticipated and as it will appear more clearly from the analysis that will follow, there is no need to look for the differences between the two Conventions in order to argue for their mutual compatibility.

2. A Comparative Analysis of the Most Relevant Provisions of the Two Conventions

2.1. Physical Scope.

In order to asses comparatively the physical scope of the two instruments under review, special attention will be devoted in the present section to the definitions of the terms "transboundary waters" in art. 1, para.l, of the UN/ECE 92 Convention and "international watercourse" in art. 2, lett. a), of the UN 97 Convention. This assessment will be made with a view to identifying the geographical areas falling within the reach of the Conventions on which activities are carried out that may cause transboundary impact, as well as those areas that may be adversely affected by activities carried out outside them.

Art. 2, lett. a), of the UN 97 Convention defines the hydrological and geographical scope of the rules of the Convention with the term "watercourse", intended 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". This may seem restrictive with respect to the ecosystemic approach adopted by the UN/ECE 92 Convention, which we shall see below, but also with respect to the drainage basin concept which has inspired the codification work on the topic of both the Institut de Droit International' and the International Law Association,' as well as the recent conventional practice in the field.'

On a closer scrutiny, an interpretation of the above definition contained in art. 2, lett. a), of the UN 97 Convention leading to less restrictive results, which would bring the latter closer to the UN/ECE 92 Convention, seems admissible. In the first place, there is no gainsaying that the watercourse system terminological approach set out in art. 2, lett. a), goes far beyond the traditional definition of watercourse limited to the main arm of the river as it encompasses "a number of different components through which water flows, both on and under the surface of the land [... including] rivers, lakes, aquifers, glaciers, reservoirs and canals".' More

2 Cf art. 1 of the Resolution on the subject adopted at the IDI Salzburg session of 1961 (49(2) *Annuaire de l'Institut de Droit International 371* (1961)).

' Art. II of the Helsinki Rules of 1966 reads as follows: "An international drainage basin is 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" (ILA, *Report of the Fifty-second Conference (Helsinki)* 485 (1966)). As much as the above provision focuses on the definition of the term drainage drainage basin, it is to be noted that, when we come to the material scope of the main principle in the 1966 Helsinki Rules, *i.e.,* that of equitable utilisation, art. IV refers to the right "to a reasonable and equitable share in the beneficial uses of the waters on an international drainage basin" and not to the beneficial uses of the drainage basin itself. Though, the ILA, in its subsequent efforts in the field, still ongoing, has unquestionably enhanced the drainage basin approach here advocated, going even beyond it, as far as to a nearly all round ecosystemic approach. *See,* in particular, art. 1 of the resolution on the "Relationship of International Water Resources with other Natural Resources and Environmental Elements", adopted at the ILA Belgrade Conference of 1980.

° *See,* among other relevant recent conventional provisions, art. 1 of the Agreement on Action Plan for Environmentally Sound Management of the Common Zambesi River System, May 28, 1987, Bots.-Mozam.-Tanz.-Zambia-Zimb. (27 I.L.M. 1109 (1988)); arts. 1 and 3 of the Agreements on the Rivers Meuse and Scheldt, Apr. 26, 1994, Belg.-Fr.-Neth. (34 I.L.M. 851 (1995)); art. 3 of the Convention on Cooperation for the Protection and Sustainable Use of the Danube River, June 29, 1994, Aus.-Bulg.-Croat.-Germany-Hung.-Mold.-Rom.Slovn.-Ukr. (Multilateral Treaties, 994:49); art. 3 of the Agreement on the Cooperation for the Sustainable Development of the Mekong River Basin, Apr. 5, 1995, Cambodia-Laos-Thail.-Vietnam (34 I.L.M. 864 (1995)); art. I of the Protocol on Shared Watercourses Systems in the Southern African Development Community (SADC) Region, Aug. 28, 1995 (text on file with the author).

5 *Report of the Int.l Law Commission on the Work of its Forty-Sixth Session,* U.N. G.A.O.R. 49th Sess., Suppl. No. 10, U.N. Doc. A/49/10 (1994) [hereinafter ILC Report 1994], at 200.

importantly, from a contextual interpretation of the term "watercourse" in conjunction with other relevant provisions of the UN 97 Convention, one may reach the conclusion that the drainage basin area can well fall under the purview of its rules,' also on account of an ecosystemic approach to the issue, in line with the UN/ECE 92 Convention.

On the one hand, the drainage basin area can come into play as the area on which the harm causing activity is carried out. Even if the equitable utilisation and the no-harm principles as set out in arts. 5, 6 and 7 of the UN 97 Convention apparently refer only to the utilisation of the watercourse without any reference to activities that may take place in the basin,' the above assumption finds its textual ground in its Part IV (arts. 20-26) on "protection, preservation and management" which is referred to by art. 5. In particular, art. 21, para. 2, provides for an obligation to "prevent, reduce and control the pollution of an international watercourse that may cause significant harm to the other watercourse States [...]". Despite the fact that this provision refers to the international watercourse as the hydrologic entity whose pollution should be prevented with no express reference to the geographic area constituted by the drainage basin, it does not confine the obligation of prevention only to pollution deriving from activities taking place on the very watercourse.' That is to say, that an activity carried out in the drainage basin which pollutes an international watercourse or alters

6 Before the adoption of the Convention under review, Nigel Bankes, besides complaining that the title of the work that the ILC had been asked by the General Assembly to study did not refer to international water basins, but only to international watercourses, stated that "[t]he law of the watercourse does indeed form the heart of the ILC's work, but the various special rapporteurs have sought to ensure that the ILC conceptualization of the watercourse is not isolated from hydrographic and ecological reality" (N. Bankes, *International Watercourse Law and Forests, in* Global Forests and International Law 144 (Canadian Council of International Law ed., 1996)). Criticisms against the apparently restrictive approach of the ILC on this issue, *see* D.M. McRae, *The International Law Commission: Codification and Progressive Development after Forty Years,* 25 Can. Y.B. Int'I L. 355 (1987) and D.D. Caron, *The Frog That Wouldn't Leap: The International Law Commission and Its Work on International Watercourses,* 3 Colo. J. Int'l Envtl. L. & Pol'y 269 (1992). For a specific and articulate treatment of the ILC attitude on the subject in hand, *see* J.L. Wescoat, *Beyond the River Basin: The Changing Geography of International Water Problems and International Water Law, 3* Colo. J. Int'1 Envtl. L. & Pol'y *301 et seq.* (1992).

' The three provisions in hand, respectively, confine their scope to the utilisation of watercourse in the following terms: "Watercourse States shall in their respective territories utilize an international watercourse [...]"(art. 5, para. 1); "[u]tilization of an international watercourse in an equitable and reasonable manner within the meaning of article 5 requires [...]"(art. 6, para. l); "[w]atercourse States shall, in utilizing an international watercourse in their territories [...]" (art. 7, para. 1).

8 The same consideration applies to the opening provision of Part IV, *i.e.* art. 20 which reads as follows: "Watercourse States shall individually and, where appropriate, jointly, protect and preserve the ecosystems of international watercourses".

it to the extent that it may cause significant harm to other riparians falls well under scope of application of the obligation of prevention in point.'

On the other hand, it can be argued that a use of an international watercourse that harms the drainage basin of a co-riparian falls within the purview of the reach of the UN 97 Convention, with special regard to the obligations of protection and prevention set forth in its Part IV. This holds true, not only in the great majority of cases, such as pollution, in which the harm to the drainage basin would obviously be the consequence of the harm caused to the watercourse, but also in the rare instances in which the former harm would occur irrespective of the latter. On this score, art. 20 introduces the concept of the "ecosystems of international watercourses" which does not appear in the language of the general principles set forth in Part II. The present writer has maintained" that, since the ILC had selected the term "ecosystem" as an alternative to "environment" with a view to avoiding the risk that the latter "might be construed to refer only to areas outside the watercourse"," one could infer by implication that the obligation of protection covers also land areas. '= At the same time, one cannot overlook the fact that the use by the ILC of the term "ecosystem" instead of "environment" unquestionably reflected a restrictive attitude with regard to the obligation of prevention

9 *See,* A.Tanzi, *La Conven_ione di New York sui corsi d'acqua interna=ionali, 80* Rivista di Diritto Intemazionale 66 (1997). This argument finds support in the "authentic interpretation" provided by the former Special Rapporteur, Stephen McCaffrey, of the ILC draft-rules that in the relevant parts for our purposes have not been changed by the Working Group. Referring to the rejection by governments of language that would incorporate in so many words the drainage basin concept in the text of the Convention, he showed the shear terminological relevance of such a rejection which does not impair in substance the retention of the drainage basin approach, stating that "[t]he decision was taken notwithstanding the fact that, as the articles adopted thus far demonstrate, it is almost impossible to exclude totally actions on land from the scope of the draft (except to the extent that they would have no effect, through an international watercourse, upon another watercourse State)", and adding that "[...] the draft articles would apply to, *e.g.,* harm caused to State A by a plant located not on the bank of the international watercourse in State B, but at a distance therefrom, where the plant discharged toxic waste onto the land, and the wase made its way into the watercourse, ultimately harming State A" (S. McCaffrey, *Seventh Report on the Law of the Non-navigational Uses of International Watercourses,* U.N. Doc. A/CN.4/436 (1991), *reprinted in [1991*] 2(I) Y.I.L.C. 59.

'° A. Tanzi, *The UN Convention on International Watercourses as a Framework for the Avoidance and*

Settlement of Waterlaw Disputes, 1 Leiden J. Int'l L. 448 (1998).

" ILC Report 1994 at 280 (emphasis supplied). The ILC referred to the term "ecosystem" as to an "ecological unit consisting of living and non living components that are interdependent and function as a community" *(ibidem et seq.).*

" See contra, on the basis of a textual interpretation of arts. 1, para. 1 and 2, lett. (b), A. Nollkaemper, *The Contribution of the International Law Commission to International Water Law: Does it Reverse the Flight from Substance?,* 27 Neth. Y.B. Int'l L. 39, 63 (1996).

contained in **art.** 20 which is wider than that set out in art. 21, as the former operates irrespective of the occurrence of harm.

As to the obligation of prevention concerning harm resulting from pollution, the extensive interpretative approach put forward above can be easily maintained, without need for a contraries considerations, since art. 21, para. 2, clearly sets out an obligation of prevention, reduction and control of "the pollution of an international watercourse that may cause significant harm to other watercourse States or to their environment [...]".

Among the international instruments that are based on the ecosystem approach," to which interpretative reference can be grounded on the basis of paragraph 9 of the Preamble of the UN 97 Convention [14] in order to enhance the application of the ecosystemic approach with regard to the latter, special reference should be made to the very UN/ECE 92 Convention, which, besides spelling out that the promotion of "the application of the ecosystems approach" is a normative aim of the Convention,` provides an articulated series of obligations on the prevention of "transboundary impact", whereby

> "'Transboundary impact' means 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 a party, within an area under the jurisdiction of another party [...]".16

Such language corroborates the argument that both Conventions under review aim at preventing: a) harm to the water of a watercourse deriving also from activities that may take place outside the actual watercourse, provided a linkage of interdependence can be established

" For a synthetic inventory of such instruments, *see particularly J.* Brunnde & S. *J.* Toope, *Environmental Security and Freshwater Resources: Ecosystem Regime Building, 91 A.J.I.L. 50 et seq. (1997).*

~" It reads as follows: "Recalling also the existing bilateral and multilateral agreements regarding the non-navigational uses of international watercourses". It is submitted that, on account of this language, when a provision of this Convention lends itself to different possible interpretations, the one should be favoured which is closer to other treaties on the same subject-matter. This reasoning should be upheld all the more for the purposes of the present report with regard to the interpretative function of the UN/ECE *92* Convention vis-à-vis the UN *97* Convention, since any prospective problems of interpretation is to be considered from the standpoint of the Patties to the UN/ECE *92* Convention.

15 Art. 3, para. I, on "Protection, Control and Reduction" in the relevant part for our purposes reads as follows: "To prevent, control and reduce transboundary impact, the Parties shall develop, adopt, implement and, as far as possible, render compatible relevant legal, administrative, economic, financial and technical measures, in order to ensure, *inter alia,* that: [...] (i) Sustainable water-resources management, including the application of the ecosystems approach, is promoted [...]".

16 *Id.,* Art. 1, para *2.*

between the ecosystem of the water and the ecosystem of the environment which is primarily affected, or on which the activity has been carried out; and b) harm caused by uses of the watercourse to elements of the environment different from the water of the watercourse.

To that end, it is to be noted that the above quoted art. 1, para. 2, of the UN/ECE 92 Convention goes so far as to specify that:

> "Such effects on the environment include effects on human health and safety, flora, fauna, soil, air, water, climate, landscape and historical monuments or other physical structures or the interaction among these factors; they also include effects on the cultural heritage or socio-economic conditions resulting from alterations to those factors".

2.1.1. Groundwaters

The inclusion of groundwaters within the purport of the UN/ECE 92 Convention is beyond question. Under its art. 1, para. 1, on definitions, "'[t]ransboundary' waters" means any surface or groundwaters which mark, cross or are located on boundaries between two or more States".

As to the UN 97 Convention, from the definition of watercourse as "a system of surface waters and groundwaters", contained in art. 2, lett. (a), one can unquestionably derive that the scope of that Convention covers underground strata bearing water." Such a systemic approach seems to take duly into account the interconnections between surface and underground waters, in accordance with the aims to be pursued in order to achieve an integrated and rational management of fresh water resources, in line with the guidelines set out in Chapter 18 of Agenda 21.[18]

17 On groundwaters *see generally* D. Caponera & D. Alhéritière, *Principles for International Groundwater Law, in* International Groundwater Law 25 (L. Teclaff & A. Utton eds., 1981); A. E. Utton, *The Development of International Groundwater Law,* 22 Nat. Resources J. 95 (1982); L. Teclaff, *Principles for Transboundary Groundwater Pollution Control,* 22 Nat. Resources J. 1064 (1982); J. Barberis, *Le régime juridique des eaux souterraines,* 33 Annuaire Français de Droit International 129 (1987); R.D.Hayton & A. Utton, *Transboundary Groundwaters: The Bellagio Draft Treaty,* 29 Nat. Resources J. 663 (1987).

'8 Its para. 18.25.d., calls upon "all countries [to] establish the institutional arrangements needed to ensure the efficient collection, processing, storage, retrieval and dissemination to users of information about the quantity and quality of available water resources at the level of catchments and groundwaters aquifers in an integrated manner". Furthermore, in para. 18.39.a, it calls them to "[t]o identify the surface and groundwaters resources

2.1.2. Confined groundwaters

While there seems to be no doubts that even confined groundwaters fall within the reach of the UN/ECE 92 Convention, less clear is the picture that emerges from the UN 97 Convention.

Under art. 2, lett. (a) of the UN 97 Convention, groundwaters, in order to be considered within the purview of the Convention, have to be connected with surface waters so as to constitute a "unitary whole".'9 Insofar as, according to a strictly textual interpretation, "confined" groundwaters, even if intersected by a boundary, are considered beyond the reach of the rules of the Convention, the latter can be said to fall short of the emerging general standards on the subject aimed at a genuinely integrated use and management of all water resources.=° This would be all the more regrettable on account of the growing importance of confined groundwaters due to the increasing scarsity of water compared to growing needs of it, as well as on account of the improved scientific and technical capacity of exploitation.

Be that as it may, from the preparatory works of this Convention some indirect indications can be inferred that point towards the extension of its puview, so as to encompass confined groundwaters. It is true that the ILC did not include express consideration of confined groundwaters in its 1994 draft articles, but it had nonetheless adopted a resolution

that could be developed on a sustainable basis and other major developable water-dependent resources and, simultaneously, to initiate programmes for the protection, conservation, and rational use of these resources on a sustainable basis". (Report of the United Nations Conference on Environment and Development (Rio de Janeiro, 3-14 June 1992), U.N. Doc. A/CONF.151/26, vol. II (1992).

19 As clearly indicated by the ILC in its commentary to draft art. 2(b), "[i]t *[...]* follows from the unity of the system that the term 'watercourse' does not include 'confined' groundwater, i. *e.,* which is unrelated to any surface water" (ILC Report 1994 at 201).

'° *See,* for an overview of such emerging trends, R. Rosenstock, *Second Report on the Law of the Non-Navigational Uses of International Watercourses,* U.N. Doc. A/CN.4/462 (1994) at 29-33. *See,* most recently, in the same direction the Israeli-Palestinian Declaration of Principle on Interim Self Government Arrangements signed in Washington on 13 September 1993 (Annex III, para. I), 32 I.L.M. 1525; and the Interim Agreement on the West Bank and the Gaza Strip signed in Washington on 28 September 1995 (Annex III, art. 40), 36 I.L.M. 551 (1997). See on this point K. P. Scanlan, *The International Law Commission's First Ten Articles on the Law of the Non-Navigational Uses of International Watercourses: Do They Adequately Address All the Major Issues of Water Usage in the Middle East?,* 19 Fordham Int'l L. J. 2224 (1996).

inviting States to apply to such waters the same principles set forth therein.'-' One should not hastily derive any a contraries implications from the fact that the Working Group of the Sixth Committee of the U.N. G.A. for the elaboration of the UN 97 Convention did not reiterate the resolution in hand. The latter was never rejected in the Working Group and the fact that it was not even properly discussed, if not indirectly,'-'- rather than being intentional was due to the restricted time frame imposed on the Sixth Committee which affected considerably the workings for the elaboration of the text under consideration.-" Hence, the case can be made that the ILC resolution on the subject preserves all its hortatory authority.

'1 The text of the Resolution in point read as follows:

"The International Law Commission,

Having completed its consideration of the topic 'The Law of the non-navigational uses of international watercourses',

Having considered in that context ground water which is related to an international watercourse,

Recognizing that confined groundwater, that is groundwater not related to an international watercourse, is also a natural resource of vital importance for sustaining life, health and the integrity of ecosystems,

Recognizing also the need for continuing efforts to elaborate rules pertaining to confined transboundary groundwater,

Considering its view that the principles contained in its draft articles on the law of the non-navigational uses of international watercourses may be applied to transboundary confined groundwater,

1. Commends States to be guided by the principles contained in the draft articles on the law of the non navigational uses of international watercourses, where appropriate, in regulating transboundary groundwater;

2. Recommends States to consider entering into agreements with the other State or States in which the confined transboundary groundwater is located;

3. Recommends also that, in the event of any dispute involving transboundary confined groundwater, the States concerned should consider resolving such dispute in accordance with the provisions contained in article 33 of the draft articles, or in such other manner as may be agreed upon". (ILC Report 1994 at 326).

See on such a resolution K. Idris and M. Sinjela, *The Law of the Non-Navigational Uses of International Watercourses: The ILC's Draft Articles. An Overview,* 3 African Y. B. Int'l L. 183, 201-202 (1995); S. McCaffrey & R. Rosenstock, *The International Law Commission's Draft Articles on International Watercourses: An Overview and Commentary,* 5 Rev. Eur.Community and Int'I.Envtl. L. 89, 93 (1996).

2' From the debate it appeared that only a small minority among the delegations raised objections to a more comprehensive definition of international watercourse. While the proposal put forward by the Turkish delegation, to the effect that reference to groundwaters should be deleted from the provision in hand (U.N. Doc. A/C.6/51/SR.23 at 8) was discarded, the French and the Swiss delegations expressed their support on the text as finally adopted, expressing though their opposition to the inclusion of confined groundwaters in the definition of watercourse *(id.,* at 9 and 11).

'3 As the representative of Tanzania put it in his statement explaining his Government's vote on draft resolution A/51/L.72 on the adoption of the Convention in point, the latter is, to an appreciable extent, "the product of a deadline" (U.N. Doc. A/51/PV.99 at 3).

Furthermore, a complementary contextual interpretation of the UN 97 Convention on the point that takes appropriately into account the clear solutions adopted on the issue in the UN/ECE 92 Convention may support the view that the substantive and procedural rules of the UN 97 Convention also apply to confined groundwaters.

2.2. Substantive Principles.

The UN 97 Convention appears at first sight to devote more attention than the UN/ECE 92 Convention to the substantive principles governing the utilisation of international watercourses as opposed to the principle of co-operation. This impression may be supported by a comparative reading of the individual provisions of the two Conventions setting out the general principles of equitable utilisation and of no-harm. However, this should not be taken as an indication that within the UN ECE 92 Convention as a whole such principles are not regarded as relevant as in the UN 97 Convention. Nor should it suggest that among the ECE members there was less agreement on their contents than at the universal level. On a closer scrutiny - particularly looking at the overall picture of the two texts - one gathers quite different indications.

Arts. 5 to 7 of the UN 97 Convention are the precarious result of a compromise that has emerged from a mostly symbolic and rhetorical debate on whether the equitable utilisation principle has priority over the no-harm, or vice-versa. Indeed, it seems that the impassioned debate in the ILC, as well as in New York, over the two principles has focused more on their relationship, as if they were mutually incompatible, rather than on their respective normative contents. The UN/ECE 92 Convention seems to have followed the opposite approach.

It would seem sterile to claim that art. 2, para. 1, opening up the "General Provisions" of the ÜN/ECE 92 Convention with the general enunciation of the no-harm rule gives absolute priority to this rule. It reads as follows: "The Parties shall take all appropriate measures to prevent, control and reduce any transboundary impact". Likewise, it would serve little constructive purpose to maintain that this is further corroborated by the wording of art. 2, para. 2, lett. c, or that, on the contrary, the latter renders the no-harm rule subservient to the equitable and reasonable utilisation principle. The relevant parts for our purposes of art. 2, para. 2, lett. c, read as follows:

"The Parties shall, in particular, take all appropriate measures:
[...t]o ensure that transboundary waters are used in a reasonable and equitable way,
taking particularly into account their transboundary character, in the case of activities which cause or are likely to cause transboundary impact".

It is suggested that the above drafting approach, rather than being supportive of the priority of either of the two substantive rules over the other one, corroborates the idea of one complex substantive normative setting of which both rules are part and parcel, being totally entangled with each other.

This water law substantive normative setting appears to have been expressed in more concise and even more abstract terms in the provisions on "General Principles" of the UN/ECE 92 Convention than in those of the UN 97 Convention. However, this should be appreciated in consideration of the fact that the ECE Convention further provides a guidelines galore for States to adopt individually and to adapt concretely to a specific watercourse jointly, in co-operation with their co-riparians. It is as well to be noted that these guidelines are many more, and more detailed, than those set out in the New York Convention and give clearer substance to the general principles at issue. On account of the integration of the two principles into one normative setting, concrete guidelines for the prevention of transboundary impact can well be said to serve also for the determination of the equitable and reasonable utilisation of an international watercourse. Against this background, as it will be shown below, the two Conventions under review can well be said to complement each other.

2.2. I. The obligation of *prevention of "transboundary impact" / "significant harm "*

Under both Conventions the no-harm rule is set out in terms of an obligation of due diligence. Though, while art. 7 of the UN 97 Convention does not expressly provide clues **for the identification** of "all the appropriate measures" of prevention, as we shall see in due course, the UN/ECE 92 Convention does so. This is one of the many cases in which the latter Convention complements the former. The preparatory works of the New York Convention offer some ground for this interpretative approach. Apart from the interpretative considerations that can be derived generally from para. 9 of its Preamble, 24 it is to be recalled that the ILC had indicated to

[4] See supra, footnote 14.

have deduced the due diligence obligation of prevention "as an objective standard [...] from treaties governing the utilization of international watercourses". 25 At the same time, the UN/ECE 92 Convention is the only multilateral treaty among those referred to by the Commission whose subject-matter is specifically international watercourses. Its special interpretative relevance on this point is enhanced by the fact that the wording of art. 7, para. 1, of the New York Convention largely coincides with the language used in art. 2, para. 1, of the UN/ECE 92 Convention. Accordingly, it is submitted that the concrete determination of "all appropriate measures" to be taken in a given case, i.e., the due diligence standards only abstractly announced by art. 7, para. 1, of the UN 97 Convention, should be made in the light of the more specific guiding principles contained in the UN/ECE Convention of 1992, with special regard to the ecostandards consisting of the "best available technology",Z6 the "best environmental practices", 27 as well as to the "previous environmental impact assessment 1928 and to the "precautionary principle". Z9

'5 See 1994 ILC Report 237.

'6 See art.3, para. 1, lett. (f) which includes "the application of the best available technology" among the "[a]ppropriate measures [...] to reduce nutrient inputs from industrial and municipal sources" as a specification of the obligation of prevention, control and reduction.. See also Annex I on the "Definition of `Best Available Technology"'.

"See art. 3(I, lett. g) which provides for the development and implementation of "appropriate measures and best environmental practices [...] for the reduction of inputs of nutrients and hazardous substances from diffuse sources, especially where the main sources are from agriculture [...]". See also Annex II on the "Guidelines for Developing Best Environmental Practices".

See generally on the requirement of the "previous environmental impact assessment", considered as instrumental in the adoption of the appropriate measures of prevention, control and reduction of transboundary harm, Birnie & Boyle, International Law and the Environment, at 93 (1995); P.N. Okowa, *Procedural Obligations in International Environmental Agreements,* 67 Brit. Yb. Int'1 L. 279-280, 332-330 (1996).

"9 See generally on the "precautionary principle", T. Scovazzi, Sul *Principio precauzionale nel diritto interna=ionale dell 'ambiente,* Rivista di Diritto Internazionale 699 (1992); Freestone, *The Precautionary Principle,* in Churchill & Freestone (eds.), International Law and Global Climate Change 21 (1991); Freestone and E. Hey, (eds.), The Precautionary Principle and International Law (1996). On the consolidation of the precautionary principle as a rule of general customary law, see Hohmann, Precautionary Legal Duties an d Principles of Modern International Law (1994); P. Sands, Principles of International Environmental Law 212213 (1995), and Cameron & Abouchar, *The Status of the Precautionary Principle in International Law,* in Freestone & E. Hey, The Precautionary Principle and International Law 30-31 (1996). A far more cautious stand has been taken by G. Handl, *Environmental Security and Global Change,* Yb. Int'1 Env. L. 22-24 (1990) and by P. Bymie and A. Boyle, supra, note 28, at 98.

2.?.Z. The hind of harm and the "significance threshold" covered by the obligation of' *prevention*

In the light of the considerations made at the beginning of the present report on the interconnections between water quantity and water quality issues and on the indivisibility of the international regulation thereof, the concept of transboundary impact, or harm, falling within the purview of the two Conventions can be considered to cover harm caused by the amount of water flow, as well as harm caused by pollution. The extension of the reach of the obligation of prevention as to encompass water quality issues emerges with clarity in the definition of "transboundary impact" in art. 1, para. 2, of the UN/ECE 92 Convention. The same conclusion can be reached with regard to the UN 97 Convention, through a contextual interpretation of its arts. 5 to 7 and Part IV on "Protection, Preservation and Management".

As far as the threshold of non permissible harm is concerned, in both Conventions this is not so low as to include any degree of perceptible harm, but only that of a «significant» nature. This is far from being a new way of expressing the no-harm rule. '° However, one cannot overlook that, whatever the adjective qualifying the harm falling within the purview of the obligation of prevention, this would provide little guidance for the assessment *in concreto* of the exact nature and extent of the harm to be prevented .'1 Any adjective, by its very nature, could only be general and abstract, while, the indications of concrete standards, such as percentages of permissible pollution per cubic meter of water with lists of allowed pollutants, or precise parameters for permissible water quantity alteration proportional to the average flow existing before a new use of the watercourse is carried forward, would not prove suitable for multilateral treaties of a general character like the ones at hand. Similar standards and parameters might suit the hydrological, economic and social circumstances of some watercourses, but not of others.

Be that as it may, one is far from maintaining that the term «significant» is irrelevant for the assessment of the acceptable harm threshold. In the first place, it aims at giving expression to the so-called *de minimis rule,* which, deriving from the general principle of

'° See generally on the question at issue K. Sachariew, *The Definition of Thresholds of Tolerance for Transboundary Environmental Injury Under International Law: Development and Present Status, 37* Neth. I. L.R. *193 (1990);* and A. Nollkaemper, The Legal Regime for Transboundary Water Pollution: Between Discretion and Constraint *35-39 (1993).*

'1 Much scepticism on the usefulness of adjectives qualifying the threshold of acceptable harm has been expressed by K. Zemanek, State Responsibility and Liability, in W. Lang, H. Neuhold, K. Zemanek (eds.), Environmental Protection and International Law *187* at *196 (1991).*

“good neighbourliness”, provides “the duty” to overlook small, insignificant inconveniencies».3Z Though, the qualification function of the term in point can be legitimately expected to go beyond that, since the determination of the acceptable harm would be instrumental in the actual operation of the obligations of **prevention under** both Conventions. With exclusive regard to the UN 97 Convention, such a determination would also be necessary for the operation the no-harm rule from an ex post perspective, i.e. after the occurrence of the harm. In this case, the concrete assessment of the “significant threshold” would be a precondition for the operation of art. 7, para. 2, as well as of the general rules of State responsibility, in the case significant harm resulted from the breach of the due diligence obligation of prevention set out in art. 7, para. 1.

From the preparatory works of the New York Convention it appears that there is significant harm where there is a "real impairment of use" of the watercourse for the harmed State .33 It seems fair to say that this expression - according to which it is intended "a detrimental impact of some consequence upon, for example, public health, industry, property, agriculture or environment in the affected State" 34 provides guidance on the matter in a way which is consistent with, and complementary to, the equitable utilisation principle and the factors for its assessment as set out in arts. 5 and 6 of the UN 97 Convention.

In the light of the rationale of both Conventions, geared towards the promotion of joint efforts among co-riparians, further specification of the "significant threshold" with regard to a specific watercourse should be reached through co-operation. Namely, through agreements setting out more precise parameters. Incidentally, one should not loose sight of the fact that the final purpose of the determination of the "acceptable threshold" would be that of providing guidance to States in the adoption, at the domestic level, of concrete legislative and administrative preventive measures that would be considered as "appropriate" internationally. That is to say that, such measures should be considered as appropriate by the interested coriparians,jointly.

3' E. Jiménez de Aréchaga, *International Law in the Past Third of the Century,* 159 Recueil des Cours 194 (1978-I). J. Lammers, besides maintaining that «neighbourship law or the principle of good neighbourship also involve a duty to tolerate to a certain extent harmful effects caused by activities not in themselves unlawful, undertaken in neighbouring States», illustrates the diversity of views in legal literature as to the exact contours of the contents of such a duty (Pollution of International Watercourses 568-569 (1984)).

" See the ILC commentary to its last version of draft-art. 3, which is the first provision of the Convention in which we find the term "significant", in ILC Report 1994 at 211.

'4 ILC Report 1991, at 52-53. See also ILC Report 1994, at 211, as well as, with regard to the topic of "international liability", ILC Report 1998, at 30.

Here, again, a complementary role with respect to the UN 97 Convention can be played by the UN/ECE 92 Convention. The latter, besides setting out in art. 9 an obligation for co-npanans to enter into "agreements or arrangements" for the establishment of joint bodies whose various tasks include "[t]hat to elaborate joint water-quality objectives and criteria", provides in Appendix III a number of guidelines to that end. Art. 21, para. 3, of the New York Convention provides for the obligation to:

> "[C]onsult with a view to arriving at mutually agreeable measures and methods to prevent, reduce and control pollution of an international watercourse, such as:
>
> (a) Setting joint water quality objectives and criteria;
>
> (b) Establishing techniques and practices to address pollution from point and non-point sources;
>
> (c) Establishing lists of substances the introduction of which into the waters of an international watercourse is to be prohibited, limited, investigated or monitored."

The case can well be made that the determination of water quality objectives and criteria concerning a specific watercourse would be definitely instrumental in the assessment of "significant threshold" applicable to the case. While under both Conventions, co-operation is meant to play a fundamental role on the matter, the Helsinki Convention provides more detailed guidelines that may complement the UN 97 Convention. The major differences between the two Conventions as to the forms in which co-operation is to take place is a different question and will be addressed in due course. [35]

2.2.3. The Régime of the legal consequences of the occurrence of a "transboundary impact" l "significant harm ", and/or inequitable use.

The question of the law governing the pathological situations arising out of the implementation of the two instruments under review is one of the few on which the UN 97 Convention provides more normative indications than the UN/ECE 92 Convention. This seems due to the fact that, according to the general rationale of the latter, being so much more detailed in its primary obligations, with special regard to those on compulsory institutional co-

[5] See *infra* sub-section 2.3.

operation, rules governing the legal consequence of the pathological situations deriving from the application of those obligations must have appeared less urgent, if not counterproductive in terms of law-making policy. The wish of the drafters of the ECE Convention to defer the issue - without excluding its relevance as a matter of principle - is confirmed by its art. 7, according to which "[t]he Parties shall support appropriate international efforts to elaborate rules, criteria and procedures in the field of responsibility and liability".

At the same time, the lack of rules in this area in the ÜN/ECE 92 Convention should not induce to take it as an example of those Conventions in which:

> "silence about responsibility and liability is related to the drafters' unwillingness to assume that the customary principle concerning responsibility for breach of treaty obligations might be applicable in respect of these Conventions". 36

Our contention is supported by the inclusion in the UN/ECE 92 Convention of a provision, i.e. art. 22, which provides - even though on an optional basis - for the arbitral or judicial settlement of disputes arising out of the application or interpretation of this Convention.

As to the UN 97 Convention, the fact that it provides more language referring to the consequences of the occurrence of harm seems linked to the fact that in this Convention, differently from the EC 92 Convention, there is no provision for compulsory institutional cooperation for the purpose of prevention, control and reduction of transboundary impact. Basically, art. 7, para. 2, of the UN 97 Convention, addresses explicitly the question of the consequences to be attached to the occurrence of harm with reference to a obligation of consultation. However, this provision lends itself to further by implication considerations which require some elaboration in the light of the interactions between the two instruments. This seems required in view of the fact that the UN 97 Convention may well be considered as a framework in which "efforts to elaborate rules, criteria and procedures in the field of responsibility and liability" have been made which require the support of the Parties to the ECE 92 Convention under its art. 7, quoted above. Especially against the background of this provision, the New York Convention may be considered to fulfil a complementary role with respect to the overall normative setting of the ECE 92 Convention.

Art. 7, para. 2, of the UN 97 Convention reads as follows:

> « 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».

The most important indication that emerges from the above provision is that a use that causes significant harm to other watercourse States is not *per se* prohibited, and, therefore, cannot be the source of international responsibility for wrongful act, unless the harm caused can be said to stem from a negligent conduct attributable to the origin State. 37 It is submitted that he same consideration holds true also for the ECE Convention insofar as the obligation of prevention under art. 2, para. 1, has been couched in exactly the same due diligence terms.

The above quoted provision of the New York Convention attaches some general legal consequences to the occurrence of the harm "diligently and equitably" caused, 38 that, if not met by the origin State, will involve the commission of an internationally wrongful act. On account of a systematic reading of arts. 5, 6 and 7 of this Convention, the case can be made that the abidance by the legal consequences in point should be considered as an ex post factor for the determination of the equitable character of a given use.

Basically, art. 7, para. 2, of the New York Convention sets out an additional obligation of due diligence, namely, a primary obligation which is triggered by the occurrence of harm despite the abidance by the due diligence requirements under par. 1.39 It is important to note that, by indicating that the object of the new obligation of due diligence is the "elimination or mitigation" of the harm caused, this provision does not leave the harm causing State with the choice as to which of the two courses of action to take. The obligation to take all appropriate measures to mitigate the harm caused will come into play only after elimination has proven impossible. In case this was not clear from the ordinary meaning of the language of the provision

'6 M. Koskenniemi, Peaceful Settlement of Environmental Disputes, in 61/62 Nordic Joum. Int.l' Law 73 at 80 (1992/3).

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See also McCaffrey, *The UN Convention on the Law of the Non-Navigational Uses of International Watercourses: Prospects and Pitfalls, in* S.M.A Salman & L. Boisson de Chazournes (eds.), International Watercourses. Enhancing Cooperation and Managing Conflict, World Bank Technical Paper No. 4 at 22 (1998). 'g The diligence in a use of an international watercourse is considered for the present purposes on the same footing as its equitable character on account of the assumption that, conversely, "it may be said that transboundary harm that results from a failure to exercise due diligence will in all likelyhood also amount to a failure to use the resource equitably" (Brunnée & Toope, *supra,* note 13, at 63; see also *id.* 64). '9 This conclusion derives from the word "nevertheless", which was introduced at a very advanced stage of the debate by the Chairman of the Working Group (UN Doc. A/C.6/51/NUW/CRP. 94) upon proposals by the UK and Italy (author's notes).

in point, it was rendered explicit, through the interpretative statement elaborated in the Working Group in New York, according to which "[i]n the event such steps as are required by article 7, para.2, do not eliminate the harm, such steps as are required by article 7 (2) shall be taken to mitigate the harm" .40

Article 7, para. 2, also provides that the measures for the elimination or mitigation of the harm be adopted "having due regard for the provisions of article 5 and 6". This wording ensues from one of the most heated debates during the discussion in the Working Group, since the issue was deemed to bear crucial importance on the *in abstracto* balance between the equitable utilisation and the no-harm principles. The above wording was eventually introduced to replace the expression "consistent with Articles 5 and 6".41 As much as it may seem that here we are just dealing with drafting niceties, it is to be noted that if the latter wording had been retained it could have deprived Article 7, prara.2, of most of its normative sense. It could have lent itself to ground the argument that, if the harm is caused by an activity which is in concordance with the most stringent parameters of due diligence set out in paragraph 1 and, consequently, with those of Articles 5 and 6, no further diligence would be required after the occurrence of the harm. On the contrary, the language finally adopted in New York can provide a basic term of reference for the consultations between the States concerned to agree on measures that may differ from those required from a preventive angle and that are appropriate for the elimination or mitigation of the harm.

The above is absolutely in line with the rationale of the UN/ECE 92 Convention with regard to its obligation "of prevention, control and reduction of any transboundary impact .42 Though, it should be recalled that under the ECE Convention issues deriving from the occurrence of harm are normally to be dealt within the framework of joint institutions. Therefore, the above considerations, as well as those that are developed in the following subsections on the consequences that are legally attached to the occurrence of harm, can serve as complementary guidelines within such joint institutional framework. They can also serve as terms of reference for bilateral negotiations, when the joint institutions are not competent on the matter, or when co-operation within this kind of framework proves no longer viable.

y° See U.N. Doc. A/51/869, at 5.

" See Tanzi, *The Completion of the Preparatory Work for the UN Convention on the Law of International Watercourses, 21* Natural Resources Forum, at *241* (1997).

'2 See art. *2,* para 1.

2.?.3.1. Compensation

As much as compensation is an essential element of the obligation of reparation which stems from an internationally wrongful act, according to art. 7, para. 2, of the UN 97 Convention, compensation does not enter into play as a form of reparation for wrongful activity, 43 nor as the object of a primary obligation triggered automatically by the occurrence of the "lawful" harm, as if the provision in hand had followed a strict liability approach.

What differentiates compensation under the provision in point from the concept of reparation within the general State responsibility regime, is that it does not stem from a conduct regarded as internationally wrongful. At the same time, compensation under this provision, differently from the strict liability regime is not the object of a direct obligation. In fact, under art. 7, para. 2, the question of compensation arises in connection with the ancillary obligation of consultation with a view to balancing the equities of the States concerned44

It could seem that the above distinctions reflect a merely formalistic approach, or that they may have a purely theoretical relevance. Firstly, the above legal conceptual framework has, as we shall see below, a concrete impact on the determination of the actual amount of compensation to be agreed upon. Furthermore, one should not undervalue the symbolic importance that States may attach, as a matter of principle, to the language of international law in their interactions .4' In practical terms, that is to say that the harm causing State will be more easily available for negotiations with an open mind over compensation within the legal

4' Dealing with the topic of "international liability", in its commentary to draft-art. 5 on "liability", now provisionally set aside as a working method, stated that "where States carry out activities which are prone to cause and which cause significant transboundary harm - even if those activities or their effects are not unlawful - a question of compensation for the harm arises, and it is this element which is primarily reflected in the term `international liability'. It continued specifying that "[o]utside the realm of State responsibility the issue is not one of reparation [...]. But compensation or other relief (for example a modification in the operation of the activity so as to avoid or minimize future harm) ought in principle to be available. Otherwise States would be able to externalize the costs of their activities through inflicting some of those costs, uncompensated, on third parties who derive no benefit from those activities, who have no control over whether or not they are to occur but who suffer significant transboundary harm". (ILC Report 1996 at 270).

4°See to that effect the commentary of the ILC on Draft-Article 7 (2) in its 1994 version (ILC Report 1994 at 243), particularly in consideration that the latter on this point differs only marginally from the final text. Following the same rationale, the concept of compensation appears also in art. 16 of the Convention under review, according to which "[a]ny claim to compensation by a notified State which has failed to reply within the period applicable pursuant to article 13 may be offset by the costs incurred by the notifying State for action undertaken after the expiration of the time for a reply which would not have been undertaken if the notified State had objected within that period".

`~5 See particularly L. Henkin, How Nations Behave 52 (1997, 2"° ed.).

framework set out by the provision in point rather than with respect to a claim for full compensation on the basis of State responsibility or strict liability grounds.

The formula set out in art. 7, para. 2, of the UN 97 Convention provides the parties to a potential or actual **waterlaw dispute** with a **frame of reference for them** to reach a mutually agreeable settlement as to the extent and even the nature of the compensation required for balancing the equities at stake. It does so without setting pre-established rigid parameters, as it would be the case within the framework of a State responsibility regime. 46 According to the responsibility regime, the full value of the damage caused would represent the starting point of the negotiations, however dispensable with in the course of the dealings. 7 Much the same results would be reached through a "strict liability" approach, with the aggravating factor that such results would be reached without even the need of establishing the wrongfulness of the harm causing activity. 48

Considered as a means for balancing the equities at stake, compensation could stand out also retrospectively as a relevant factor for the assessment of the equitable character of a given utilisation. This was explicit under the Salzburg Rules of the Institute of International Law, 49 as well as in Article V(2, lett. j) of the Helsinki Rules of the International Law Association, which included among the relevant factors for the equitable utilisation "the practicability of compensation to one or more of the co-basin States as a means of adjusting conflicts among

'6 It is to be noted that, referring to the provisions contained in Chapter III of the 1996 draft-articles on "international liability", whose art. 21 referred to "the nature and extent of compensation or other relief' and art. 22 to the "factors for negotiations" aimed at arriving at a mutually agreeable determination of the nature and extent of compensation, the Commission underlined that "they are flexibly drafted and do not impose categorical obligations" (id).

'~' See art. 44 on "compensation" of the draft-articles on State responsibility adopted on first reading by the ILC in 1996. (ILC Report 1998 at 142).

°$ Commenting upon draft-art. 5 on "international liability", provisionally adopted by the ILC in 1966, the latter observed that "[...] a rule of strict liability for all and any losses covered by activities lawfully carried out on the territory of a State or under its jurisdiction or control would be difficult, if not impossible, to sustain. Of course, a treaty may incorporate such a rule, but that does not necessarily show apart from the treaty". Similarly to the comments made by the same ILC with regard to the exclusion from the realm of State responsibility of the legal consequences to be attached to the occurrence of transboundary ham caused by lawful activity, it also stated that "where significant harm occurs, even though aring from lawful activity and even though the risk of that harm was not appreciated before it occurred, none the less the question of compensation or other relief is not to be excluded. There is no rule that the affected third State must bear the loss." (ILC Report 1996, supra note *, at 271).

'`9 While art. 3 of the Salzburg Rules provided that differences between watercourse States over conflicts of uses are to be settled "[...] on the basis of equity taking account of their respective needs, as well as other pertinent circumstances", art. 4 goes so far as to indicate that for a State to legally make a new use of an international watercourse it has to provide to the affected co-riparians with a share of the benefits deriving from such a use, still on the basis of equity "[...] as well as adequate compensation for any loss or damage" (49 Annuaire 381, at 382 (1961-11).

uses".'° This, not only is not excluded from the text of the UN 97 Convention, since the list of factors for the determination the equitable utilisation of an international watercourse under art.6 is not **exhaustive, but it is very much in** line with a systematic interpretation of the Convention as a whole, which is geared towards distributive justice. In this respect, the New York Convention shows to have followed an approach that is in line with the overall rationale of the UN/ECE 92 Convention, which goes so far as to provide for compulsory institutional cooperation.

If that is so, even though the provision in point unquestionably operates ex post with respect to the occurrence of significant harm, the case can well be made that its express reference to the question of compensation may provide ground to the interpretative argument that compensation can be also considered under an *ex ante* angle with respect to a new use. This would apply to a situation envisaged by art. 17 of the New York Convention, which provides for the obligation of consultation and negotiation when a State considers that "implementation of planned measures would be inconsistent with the provisions of article 5 or 7". It would also apply to a situation of the kind under art. 11, i.e., when consultations and negotiations may take place simply over "the possible effects of planned measures on the condition of an international watercourse". Even more so, it would apply to the functions of joint bodies to be established under art. 9, para. 2, of UN/ECE 92 Convention.

This kind of prior compensation approach' 1 finds confirmation in international practice. By way of example, one may recall, among others, the Columbia River Treaty of 1961 providing for a distribution of benefits between the parties, including an indemnification in kind, to be paid in advance, for the flooding of the areas in Canada. '2 This example brings us to the consideration that, especially in the cases concerning the utilisation of international watercourses, compensation does not necessarily have to be only of a financial nature. '3 Hence, the concept of compensation merges with that of equitable apportionment of benefits, thereby establishing a further link between the operation of the no-harm rule and the equitable utilisation and participation principle. On this score, it seems appropriate to recall the *Donaversinkung* Case, in which the court stated:

so Report of the Fifty-second Conference of the International Law Association held at Helsinki, 1966 (1967).
5' The above construction is authoritatively corroborated by Professor Jiménez de Aréchaga's interpretation of the no-harm principle, according to whom `'[a]nother aspect of this principle is the duty to prevent the damage and to agree upon adequate measures before the damage is caused". *(supra* note *32,* at *195).*
52 ld

> "The interests of the States in question must be weighed in an equitable manner one against the other. One must consider not only the absolute injury caused to the neighbouring State, but also the relation of the advantage gained by the one to the injury caused to the other [..,]'° [Sa]

According to this reasoning, in situations such as those contemplated by art. 7, para. 2, namely, those in which harm is caused by activities which, before their realisation, appeared otherwise equitable and reasonable and in accordance with the most stringent due diligence standards, if the "diligent harm causing State" were to reject any request for compensation, even in the form of distribution of benefits in kind, it could well be held responsible for wrongful activity. In this a case, it could be claimed that one of the constituent factors of the equitable utilisation would be lacking ex post facto.

Following the same rationale, it could be argued that a State that refrained from carrying forward a certain project, otherwise equitable and reasonable, upon request by a co-riparian on the ground that it could cause significant harm, would be entitled to ask the start of consultations and negotiations on compensation. The latter should be determined on balance on the basis of the loss of prospective benefits for the abstaining State, on the one hand, and the corresponding potential harm to a co-riparian that would have derived from the abandoned project, on the other."

[13] W. Bush, *Compensation and the Utilization* of *International River and Lakes: The Role* of *Compensation in the Event of Permanent Injury to Existing Uses of Water, in* R. Zacklin & L. Caflish (Eds.), The Legal Regime of International Rivers and Lakes 309 (1981).

[5"] Donauversinkung Case (Wurttemburg and Prussia v. Baden, 1927), Annual Digest of Public International Law Cases 131 (1927-1928). The ILC in its commentary to art. 7, para. 2, in its 1994 version, indicated that consultations between the States concerned should take into account "such factors as the extent to which adjustments are economically viable, the extent to which the injured State would also derive benefits from the activity in question such as a share of hydroelectric power being generated, flood control, improved navigation, etc.", adding that "[i]n this connection the payment of compensation is expressly recognized as a means of balancing the equities in appropriate cases" (ILC Report 1994, at 243 (notes omitted). See also the conventional practice to that effect referred to by the Commission (id note 148).

[15] This is in line with the rationale behind the inclusion by the ILC, under the wider topic of "international liability", of the "degree to which the States of origin and, as appropriate, States likely to be affected are prepared to contribute to the costs of prevention" as one of the factors involved in an equitable balance of interests. See draft-art. 12, lett. (d), adopted on first reading in 1998, in ILC Report 1998 at 56-57. See also the commentary thereof in id. 58.

2.2.3.1.1. Compensation and the 'polluter pays "principle

The concept of compensation referred to in art. 7, para. 2, of the UN 97 Convention is not necessarily restricted to a direct State-to-State interaction. On the contrary, we are in a domain in which public international law merges with domestic legal orders. It is a matter of fact that the activities likely to cause transboundary harm are mostly carried out by private operators. It would be perfectly appropriate for inter-State negotiations to take into account, as one of the factors conducive to an equitable settlement of a given case, the payment of compensation to the actual victims of the harm caused by the operators of the harm causing activity. This would be in itself a way to pursue at the domestic level a policy of equitable burden sharing of the costs of prevention and of liability internationally provided for.

The above argument is closely related to the "polluter-pays" principle. '6 With regard to Principle 16 of the 1992 Rio Declaration, which states that "[n]ational authorities should endeavour to promote the internalization of environmental costs and the use of economic instruments, taking into account the approach that the polluter should, in principle, bear the costs of pollution [...]", among such costs one can well include compensation to the victims of the harm caused.'? One may recall that, in the dispute which arose in 1986 between Germany and Switzerland out of the pollution of the Rhine by Sandoz, while originally the Swiss Government acknowledged its international responsibility for breach of the obligation of due diligence in preventing the occurrence of the accident, the two Governments eventually considered the dispute satisfactorily settled on account of the compensation paid to victims directly by Sandoz. 'g The determination of the amount of the compensation due by the private operators according to

'6 See the OECD recommendation C(72) 128 of 26 May 1972, Annex, par. A.a4, in OECD and the Environment 24 (1986). The 1990 ECE Code of Conduct on accidental pollution of transboundary inland waters provides that "[r]iparian countries should implement, within the framework of their national legislation, the basic principle that responsibility lies with the polluter", further specifying that "[i]n accordance with the polluter-pays principle *[...]* countries should co-operate in the implementation and further development of appropriate rules and practices to ensure redress for the victims of accidental pollution of transboundary inland waters and necessary rehabilitation measures" (U.N. Doc. E/ECE/1125, sections II, par. 3 and XV, par. 3, at 4 and 17, respectively. See also the 1993 European Convention on the Civil Liability for Damage Resulting from Activities Dangerous to the Environment (see infra note 99). As to the contribution of legal literature, see S.E. Gaines, *The PolluterPays Principle. From Economic Equity to Environmental Ethos,* Texas Journ. Int' 1 L. 463 (1991); A. Boyle, *Making the Polluter Pays? Alternatives to State Responsibility in the Allocation of Transboundary Environmental Costs,* in Francioni & Scovazzi (Eds.), International Responsibility for Environmental Harm 363 (1991); Smets, *Le principe polluer-payer, un principe économique erigé en principe de droit de V environment?,* Revue Gdndrale de Droit International 340 (1993); see id, *infra,* footnote 57.

" See Smets, *The polluter Pay Principle in the Early 1990s,* in Campiglio, Pineschi, Siniscalco & Treves (eds.), The Environment after Rio. International Law and Economics 134 et seq. (1994).

'8 A. Kiss, "Tchernobale" ou la Pollution Accidentelle du Rhin par les produits chimiques, 33 Annuaire Français de Droit Int'1 719 (1987).

the polluter-pays principle is outside the scope of the obligation of prevention contained in the UN 97 Convention. [59] However, the actual amount of the compensation paid by private operators in any given case may be relevant for the assessment of whether compensation by the origin State, is due and, if so, to what extent. Suffice it to indicate that the trend of the polluter-pays principle points in the direction of strict liability. [6°] It may be recalled that the Preamble of the 1993 European Convention on the Civil Liability for Damage Resulting from Activities Dangerous to the Environment expresses "[...] the desirability of providing for strict liability in this field taking into account the `Polluter Pays' Principle", while art. 1 sets out that the aim of the Convention is that of "[...] ensuring adequate compensation for damage resulting from activities dangerous to the environment [...]".

In this respect, the access to judicial or other procedures, hence the right to claim compensation, that the origin State may grant to the victims of the transboundary harm caused [b1] becomes instrumental in the actual implementation of the "polluter-pays" principle when compensation is not paid spontaneously by the operators, or when there is no agreement between the latter and the transboundary victims on the extent of the compensation due.

This point is indirectly addressed by the UN 97 Convention in a way that seems to complement the UN/ECE Convention, with special regard to its art. 7 and the absence from this Convention of any express language on the matter. It will be briefly considered in the following section.

2.2.3.1.2. Compensation and the right of equal access to national remedies

Art. 32 of the UN 97 Convention provides for an obligation of non-discrimination in granting access to national remedies between national and foreign claimants and between claimants that have been injured within the territory of the State of origin and those who have suffered damage outside. This provision addresses the matter only indirectly, insofar as it does not affect the substantial right of redress for either the national or the foreign victims of environmental harm caused by the use of an international watercourse. It just sets out a

S9For a thorough study on the case-law, treaty and diplomatic practice on the matter, see *Survey of Liability Regimes Relevant to the Topic of International Liability for Injurious Consequences Arising out of Acts not Prohibited by International Law,* prepared by the U.N. Secretariat, U.N. Doc. A/CN.4/471 (1995).

eo See supra notes 56 and 57.

procedural right in favour of foreign claimants based on a national treatment standard. From a treaty law perspective, once the New York Convention has entered into force, its incorporation into the national legal system of a State party would imply an automatic adjustment of the latter providing a procedural right that could be directly invoked by private claimants.

It is also important to note that the non-discrimination rule under art. 32 of the UN 97 Convention does not only apply exclusively in an *ex post* perspective with respect to the occurrence of harm, but also to the benefit of those natural or juristic persons who "are under a serious threat of suffering significant transboundary harm". This would enable foreign potential victims of transboundary harm arising out of a planned use of an international watercourse to participate in the legislative and/or administrative prevention process no less than nationals or residents of a given State. It may be recalled that in a recommendation on the question in point adopted by the OECD 1976 it was stated that

> "[t]the application of the principle [of equal right of access] leads, in particular to [a] situation where two 'victims' of the same transfrontier pollution situated on opposite sides of a common frontier have the same opportunity to voice their opinions or defend their interests both at the preventive stage before the pollution has occurred and in the curative stage after damage has been suffered. The national and foreign 'victims' may thus participate on an equal footing at enquiries or public hearings organized, for example, to examine the environmental impact of a given polluting activity, they may take proceedings in relation to environmental decisions which they wish to challenge without discrimination before the appropriate administrative or legal authorities of the country where pollution originates [...]".62

2.2.3.2. State responsibility issues

Had art. 7, para. 2, of the New York Convention provided for the legal consequences of the occurrence of harm arising out of a use of an international watercourse *sic et simpliciter,* i.e., without further qualifications, the case could be made that the regulation contained therein,

61 See generally van Hoogstraten, P.M. Dupuy and Smets, Equal Right of Access: Transfrontier Pollution, 2 Environmental Policy and Law 77 (1976).

6' OECD, Environment Directive, Equal Right of Access in Relation to Transfrontier Pollution (1976), reprinted in the relevant parts for our purpose in *Survey of Liability Regimes Relevant to the Topic of International Liability for Injurious Consequences Arising out of Acts not Prohibited by International Law,* supra note 59, at 46.

however mild, would apply also in case the harm caused arose out of lack of due diligence. As a consequence, the provision in point would represent a special regime derogating from the general rules on the legal consequences of an international wrongful act of a State along the lines of art. 37 of the draft-articles on State **responsibility adopted on first reading by the ILC** in 1996.63

The above is clearly not the case, since the word "nevertheless", in the first line of art. 7, para. 2, of the UN 97 Convention indicates clearly enough that it addresses only the consequence of significant harm being caused despite of the adoption of all appropriate measures to prevent the causing of such harm. Consequently, this provision leaves unprejudiced the application of the general rules on State responsibility in case the harm caused is the result of a breach of the obligation of due diligence 64 provided for in para. 1 of art. 7, or which is at variance with the equitable utilisation principle, which would also amount to a case of lack of due diligence. As the ILC put it in its commentary to art. 7 adopted on second reading in 1994, "[t]he obligation of due diligence contained in article 7 sets the threshold for lawful State activity". 65

The international practice on the legal consequence of transboundary harm, including the case of harm caused by the use of international watercourses, on which the ILC based itself in its final elaboration of the provision in question, can be said to have consolidated at the level of general law the nature of the prevention obligation in point as one whose violation could only be claimed for lack of due diligence, rather than for the shear occurrence of the harm to be prevented .66

6' It reads as follows: "The provisions of this part do not apply where and to the extent that the legal consequences of an internationally wrongful act of a State have been determined by other rules of international law relating specifically to that act" (ILC Report 1996 at 138).

6'a This runs:' contrary to the consideration put forward by M. Koskenniemi that "the Conventions' silence about responsibility and liability is related to the drafters' unwillingness to assume that the customary principle concerning responsibility for breach of treaty obligations might be applicable in respect of these conventions" (see *supra* footnote 36). Even though this consideration could probably suit the attitude of a number of the delegations participating in the WG, it is on the whole denied by art. 33 on dispute settlement (see *infra,* subsection 2.4).

On the preconditions for State responsibility to arise out of pollution of an international watercourse, see G. Handl, *Balancing of Interests and International Liability for the Pollution of International Watercourses,* CYIL 156 *et seq.* (1975). On the general principles of State responsibility applicable to the uses of international watercourses, see also Lammers *supra* footnote 32, at 587 *et seq.*

6s ILC Report 1994 at 237. It may just be noted that we are not in the domain of the distinction between obligations of conduct and of result set out by the ILC in arts. 20 and 21 of the State responsibility draft-articles (ILC Report 1996, at 132). The latter distinction refers to whether the obligation whose violation is complained of simply sets the result to be achieved ,leaving the States free choice of means for its implementation, or whether such means are also set forth in the obligation in question.

66 See ILC Report 1994 at 237-240.

The point bears on the assessment of the actual breach of the obligation of prevention, as well as of the attribution of such a breach to a State. The question has been raised that it could be especially difficult for the claimant State to prove that there has been a breach of due diligence.67 Indeed, when the ICJ in the Corfu Channel Case enunciated "every State's obligation not to allow *knowingly its* territory to be used for acts contrary to the rights of other States" ,6g the word "knowingly" could fully justify such preoccupations. Yet, the Court itself had mitigated somewhat the burden of proof on the victim State in similar cases according to the following reasoning:

> "The fact of this exclusive territorial control exercised by a State within its frontiers has its bearing upon the methods of proof available to establish the knowledge of that State as to such events. By reason of this exclusive control, the other State, the victim of a breach of international law, is often unable to furnish direct proof of facts and circumstantial evidence. This indirect evidence is admitted in all systems of law, and its use is recognized by international decisions. It must be regarded as of special weight when it is based on a series of facts linked together and leading logically to a single conclusion".69

More recently, legal literature has further elaborated on the mitigation of the burden of proof of the victim State with regard to the special, but all too frequent, case in which the harm is caused by activities carried out by private operators under the jurisdiction of the State of origin. In such a case, Professor Luigi Condorelli contemplates a presumption of violation by the origin State of an international obligation of control over privates acting under its jurisdiction. 70 Starting from

6' Jimenez de Aréchaga, *supra* footnote 32, at 272. See also Pisillo Mazzeschi, *The Due Diligence Rule and the Nature* of *International Responsibility* of *States,* 35 German Yb. Int.l' Law at 50 (1992).

68 Corfu Cannel (U.K. v. Alb.), I.C.J. Reports 22 (1949).

69 *Id,* at 18.

'° This Author affirmed with regard to international obligations of prevention of the kind at issue that [e]n effet, il est encore vrai que la plupart desdits actes de particuliers continuent à ne pas e"tre imputables aux Etats [...] mais ils devient chaque jour plus vraisemblable que ces actes non imputables, du fait m^me de leur perétration, amènent à présumer que l'Etat concerné a violé une obligation internationale relative à la surveillance des individus soumis à sa juridiction ou à son contro^le: autrement dit, l'engagement de la responsabilité internationale des Etats dans ces cas ne représente plus une lointaine éventualité, mais une forte probabilité" (Condorelli, *L'imputation à l'Etat d'un Fait Internationalement Illicite: Solutions Classiques et Nouvelles Tendances,* 189 Recuel des Cours 165 *et seq.,* 174 *et seq.* (1984-VI). With specific reference to ultra-hazardous activities, Pisillo Mazzeschi reaches the same conclusion in consideration of the highly stringent standards of the diligence due in this field *(Forms* of *International Responsibility for Environmental Harm, in* F. Francioni & T. Scovazzi (Eds.), *supra* footnote 56 at 35). On this score, he stated that "[w]ith regard to these activities, the general rule on the flexibility of diligence regarding possible damage requires the State to exercise a particularly high degree of diligence in prevention. In this case, the due diligence obligation strongly tends to approach an obligation of result: that is, to create a situation of presumption of unfavourable to the damaging State. In other words, the high degree of due diligence required of the State leads to an inversion of the burden of proof, that is, unless there is proof to the contrary, the damaging State is considered as having breached its own due diligence obligations" (id). The expression "all appropriate measures"

the assumption that the due diligence requirement is inherent in the equitable character of a given use, the argument of the shift of the burden of proof onto the harm causing State is substantiated by the preparatory works of the ILC, which stated that "[t]he burden of proof for establishing that a particular use is equitable and reasonable lies with the State whose use of the watercourse is causing significant harm" .71

Finally, the case should be made that, on account of the principle of non-discrimination concerning the access to national remedies set forth in art. 32,2 where such domestic remedies for environmental damage are available in the origin State on a non-discriminatory basis, the State whose nationals or residents have been the victims of "negligent or inequitable" transboundary harm would be precluded from engaging the international responsibility of the former State until such remedies have been unsuccessfully resorted to.

2.3. Bilateral and Multilateral Co-operation.

Co-operation between co-riparians appears as an essential feature of virtually the whole text of the UN 97 Convention, besides its enunciation as a general principle of the Convention in art. 8. First and foremost, it is part and parcel of the normative setting which contains the equitable utilisation principle and the no-harm rule, set out in arts. 5, 6 and 7. Furthermore, co-operation is reflected and specified in art. 9 on exchange of data and information, in Part III on notification, consultation and negotiation concerning planned measures, in most of Part IV on "protection, preservation and management", as well as in Part V on "harmful conditions and emergency situations". Therefore, according to a contextual reading of the UN 97 Convention, co-operation expressly takes the form, *inter alia,* of exchange of data and information, notification, communication, consultations and negotiations."

The most significant rules specifying the general obligation of co-operation in both Conventions will be briefly considered below on a comparative basis. The individual

in art. 7 suggests a degree of due diligence high enough to substantiate the applicability of the above argument to our case. In the sense of the application to our field of the general principle that the burden of proofs lies with the claimant State, with specific regard to alleged breaches of the obligation of prevention and abatement of pollution of international watercourses, see Lammers, supra footnote 32, at 590 and 614 ff.

71 ILC Report 1994,at 241-242.

72 See supra, sub-section 2.2.3.1.2.

73 This is further confirmed by the wording of art. 30 of the UN 97 Convention.

differences between the two texts will have to be appreciated in the light of the fact that the whole set of provisions on co-operation in the UN/ECE 92 Convention are centered around institutional co-operation, which in that Convention is compulsory, while under the UN 97 Convention it is not.

2.3.1. Institutional co-operation

As already highlighted in passing, the fundamental difference between the two Conventions under review lies precisely in their different normative impact with regard to institutional cooperation. On the one hand, art. 8, para. 2, of the UN 97 Convention simply indicates that "watercourse States may consider the establishment of joint mechanisms or commissions" as a means of co-operation. It is beyond doubt that the provision in point has no normative force." The same applies to art. 24 of the same Convention, which also refers to the possibility of establishing joint mechanisms, for the management of an international watercourse.

On the contrary, under the UN/ECE 92 Convention, with special regard to arts. 9, para. 2, and 10, a clear-cut obligation is set out for co-riparians to enter into agreements establishing joint bodies. According to the interpretative argument based on preamble paragraph 9 of the New York Convention repeatedly put forward in the present report, it is suggested that also in this field the Helsinki Convention can play a complementary role with regard to the New York Convention. The former can not make up for the lack of a legally binding obligation of institutional co-operation for the future Parties to the New York Convention that were not Parties to the Helsinki Convention. But it could provide exemplary terms of reference for a constructive interpretation of arts. 8, para. 2, and 24 of the UN 97 Convention, with special regard to the scope of the tasks of joint bodies. To that end, it seems important to report the non-exhaustive list of functions of joint bodies set **out in art. 9, para.** 2, of the 1992 Helsinki Convention, which includes the following tasks:

[4] See also the statement of the German representative who introduced this proposal stressing that "[t]he sponsors of the proposal had no intention of burdening States parties to establish such mechanisms. Nor was the proposal intended to establish norms; on the contrary, the proposal recognized that conditions of cooperation and relevant needs could vary from one watercourse to another" (UN Doc. C.6/51/SR. 52, at 8).

"[...] (a) To collect, compile and evaluate data in order to identify pollution sources likely to cause transboundary impact;

(b) To elaborate joint monitoring programmes concerning water quality and quantity;

© To draw up inventories and exchange information on the pollution sources mentioned in paragraph 2 (a) of this article;

(d) To elaborate emission limits for waste water and evaluate the effectiveness of control programmes;

(e) To elaborate joint water-quality objectives and criteria having regard to the provisions of art. 3, paragraph 3 of this Convention, and to propose relevant measures for maintaining and, where necessary, improving the existing water quality;

(f) To develop concerted action programmes for the reduction of pollution loads from both point sources (e.g. municipal and industrial sources) and diffuse sources (particularly from agriculture));

(g) To establish warning and alarm procedures;

(h) To serve as a forum for the exchange of information on existing and planned uses of water and related installations that are likely to cause transboundary impact;

(i) To promote cooperation and exchange of information on the best available technology in accordance with the provisions of article 13 of this Convention," as well as to encourage cooperation in scientific research programmes;

(j) To participate in the implementation of environmental impact assessment relating to transboundary water, in accordance with appropriate international regulations [...]".

Most importantly, art. 10 of the UN/ECE 92 Convention goes so far as to provide for the obligation that all consultations between its riparian parties "be conducted through a joint body established under article 9 [...]".[6] It should also be noted that within the framework of the UN/ECE 92 Convention and its follow up the question at issue has reached a top priority. So much so, that in the First Meeting of the Parties to the Convention of 1997" assistance in setting up joint river and lake commissions appears as the first of five "Programmes Area" within the "Work Plan 1997-2000" adopted by the Meeting."

[5] See art 13 of the UN/ECE 92 Convention.

[6] Such a rigid procedural requirement cannot be possibly considered anywhere near the state of general customary law. On this score, by way of example, it may noted that in art 9 of the 1996 India-Nepal Treaty on the Mahakali River, which provides for the Mahakali River Commission, paragraph 6 provides that "[b]oth Parties shall reserve their rights to deal directly with each other on matters which may be in the competence of the Commission"(36 I.L.M. 531 at 541 (1997)).

" Economic Commission for Europe, Meeting of the Parties to the Convention on the Protection and Use of Transboundary Watercourses and International Lakes, Report of the First Meeting (1997), cited by B. Bosnjakovic, *UNIEECE Strategies for Protecting the Environment with Respect to International Watercourses: The Helsinki and Espoo Conventions,* in International Watercourses: Enhancing Cooperation and Managing Conflict 47, 52 (S.M.A. Salman & L. Boisson de Chazournes eds. 1998).

[8] *Ibidem* at 53.

2. .3.?. The regular exchange of data and information

The regular exchange of data and information is the first step of co-operation between co-riparians, being a necessary precondition for the realisation of higher degrees of co-operation,"

Art. 9 of the UN 97 Convention sets forth the general minimum requirements in the field. To that end, para. 1 indicates a non-exhaustive list of factors relevant to the condition of the watercourse to be included among the data and information to be exchanged on a regular basis. Namely, those "of a hydrological, meteorological, hydro geological and ecological nature and related to the water quality as well as related forecasts". Against the background of this extremely general provision of the UN 97 Convention, art. 13 of the UN/ECE 92 Helsinki Convention, can come into play, complementing and enhancing the guideline function of art. 9 of the New York Convention. In the most relevant part for our purposes, art. 13 of the Helsinki Convention reads as follows:

> "1. The Riparian Parties shall, within the framework of relevant agreements or other arrangements
> according to article 9 of this Convention, exchange reasonably available data, inter alia, on:
> (a) Environmental conditions of transboundary waters;
> (b) Experience gained in the application and operation of best available technology and results of research and development;
> (c) Emission and monitoring data;
> (d) Measures taken and planned to be taken to prevent, control and reduce transboundary impact;
> (e) Permits or regulations for wastewater discharges issued by the competent authority or appropriate body.
> 2. In order to harmonize emissions limits, the Riparian Parties shall undertake the exchange of information on their national regulations".

During the debate in the Working Group in New York the term "readily available data and information" gave rise to some discussion as to its exact purport. This discussion was triggered by the preoccupation that, if the term in hand was intended to mean "what modern technology made possible" it would put an excessive burden on States technologically less

[9] C. B. Bourne, *Procedure in the Development* of *International Drainage Basins: Notice and Exchange of Information,* reproduced in International Waterlaw.Selected Writings of Professor Charles B. Bourne 143, 161 (P.K. Wouters ed. 1998).

developed." In response to such a preoccupation, the Expert Consultant stated that the function of the expression at issue was to tune the provision in point to the effect that "States should share the information they [have], and that information-rich countries, which [are] mostly the developed countries, should share their wealth of information with less fortunate countries".8"

Consequently, it appears that the term "readily available" in art. 9 of the New York Convention does not substantially differ from the term "reasonably available" as employed in art. 13, para. 1, of the UN/ECE 92 Convention.

Art. 9, para. 2, of the UN 97 Convention, as well as art. 13, para. 3, of the UN/ECE Convention, 82 set out an obligation of due diligence to provide requested information that is not readily available. The due diligence character of this obligation avoids imposing absolute standards that would not take into account the different degrees of technological and economic development of States. Again in line with the UN/ECE Convention, art. 9, para. 2, of the UN 97 Convention allows States to make the submission of not readily available requested information contingent upon the payment of the costs of collection and, "where necessary". This prevents abuses of the right to request, and obtain, data and information. At the same time, art. 9, para. 3, of the UN 97 Convention substantively reinforces the general obligation to exchange information under para. 1 by placing a due diligence obligation on States to collect and process data and information irrespective of specific requests, so that, when requested, the information would be readily available.

Here, again, the UN/ECE Convention of 1992 provides guidelines that are much more detailed than those contained in the UN 97 Convention, hence, lending itself to perform a complementary role with respect to the latter. To that end, it should be recalled that, in its art. 13, para. 4, the UN/ECE 92 Convention goes so far as to encourage exchange of information in the following terms:

> "For the purposes of the implementation of this Convention, the Riparian Parties shall facilitate the exchange of the best available technology, particularly through the promotion of: the commercial exchange of available technology; direct industrial contacts and co-operation, including joint

ao This preoccupation was expressed especially by the representative of Argentina (UN Doc. A/C.6/51/SR.17 at 8).

" ibidem.

8' Art. 13, para. 3, of the UN/ECE Convention reads as follows: "If a Riparian Party is requested by another Riparian Party to provide data or information that is not available, the former shall endeavour to comply with the request but may condition its compliance upon the payment, by the requesting Party, of reasonable charges for collecting and, where appropriate, processing such data or information".

ventures; the exchange of information and experience; and the provision of technical assistance. The Riparian Parties shall also undertake joint training programmes and the organization of relevant seminars and meetings."

2.3.3. Limitations to the obligation to exchange data and information

Art. 31 of the UN 97 Convention provides a limitation to the obligation to exchange data and information when these are "vital to [the] national defence or security" of a watercourse State. Similarly, art. 8 of the 1992 UN/ECE Convention reads as follows:

> "The provisions of this Convention shall not affect the rights or the obligations of the Parties in accordance with their national legal systems and applicable supranational regulations to protect information related to industrial and commercial secrecy, including intellectual property, or national security".

A major difference between the two Conventions emerges here that can hardly be reconciled by way of interpretation. Therefore, this is one of the few areas in which the compatibility between the two instruments under consideration will have to be solved under the rules on the relation between conflicting provisions contained in different treaties on the same subjectmatter, which will be considered below. 83

In fact, differently from art. 8 of the UN/ECE 92 Convention, art. 31 of the New York Convention does not include the right to withhold commercial or industrial information that is deemed confidential, usually pertaining to intellectual property rights. The fact that the extension of the limitation in point was not included in art. 31, in spite of a request to that effect by the US delegation," indicates that no such an exception can be invoked on the basis of the UN 97 Convention.

There is also a customary law dimension to the matter. For art. 31 of the New York Convention can well be said to weaken a claim to withhold commercial or industrial information that were to be based on an alleged customary rule of a general character shaped along the lines of art. 8 of the ECE Convention. This consideration may have a concrete relevance in the rare, but not impossible, case in which a dispute arises as to the extent of the

83 See infra, sub-section 3.1.2.
$' UN Doc. A/C.6/51/SR.23 at 5.

obligation to exchange data and information between co-riparians with considerably different levels of technological and industrial level of development. That is to say, that in such a case the common interest in the management and protection of the international watercourse as a shared natural resource has in the New York Convention an overriding relevance over unilateral interests of economic value.

2.3.4. The notification procedures concerning planned measures

While Part III of the UN 97 Convention on planned measures covers a considerable number of provisions - from art. 11 to 19 - on the notification procedure relating to those measures, no reference is made to the prior notification rule in the 1992 UN/ECE Helsinki Convention. This is so for the simple reason that the complex normative setting on the notification procedure contained in the New York Convention is absorbed by the far more stringent obligation set out in art. 9, para. 2, of the UN/ECE 92 Convention to enter into agreements establishing joint bodies. It is to be recalled that this provision also sets forth a non exhaustive list of tasks of such bodies encompassing that "[t]o serve as a forum for the exchange of information on existing and planned uses of water and related installations that are likely to cause transboundary impact",85 as well as that "[t]o participate in the implementation of environmental impact assessments relating to transboundary waters, in accordance with appropriate international regulations"."

2. 4. Dispute Settlement

From a comparison between art. 33 of the UN 97 Convention and art. 22 of the UN/ECE 92 Convention, the confirmation emerges of the close linkage between procedures on cooperation, on the one hand, with special regard to institutionalised co-operation, and dispute

85 Art. 9, para 2 (h). 86 Art. 9, para. 2 (j) (ibidem).

settlement mechanisms, on the other, and, consequently, between dispute avoidance and dispute resolution.

Art. 22 of the Helsinki Convention is characterised by its brevity. Further to an "opt in" formula for compulsory arbitration or adjudication of the kind set out in art. 33 of the New York Convention, it simply contains a most concise reference to the general obligation to first seek a settlement "by negotiation or by any other means [...] acceptable to the parties of the dispute".

The absence of any express reference in art. 22 of the Helsinki Convention to other forms of dispute settlement, such as good-offices, enquiry, mediation or conciliation, and the lack of, even, an encouragement to refer the dispute to joint watercourse institutions - as in art. 33, para. 2, of the New York Convention - should be appreciated against the background of the obligation under the Helsinki Convention to establish joint bodies for bilateral and multilateral co-operation, whose tasks under arts. 9 *et seq.* cover the widest range of prevention and joint management measures that have a direct impact on dispute avoidance. Were a dispute to arise nevertheless, there would be little room for other means than arbitration or adjudication, if not for the mere purpose of meeting an admissibility requirement.

Were a dispute to arise in future between two Parties to both Conventions under review, one can hardly see any conflict between the dispute settlement mechanisms provided for therein. It is true that art. 33 of the New York Convention provides for compulsory factfinding which is not contemplated in art. 22 of the Helsinki Convention; however, this procedure adds little, if anything at all, to the role of the joint bodies that the Parties to the UN/ECE 92 are to set up under its art. 9, para. 2. For the rest, there would be no conflicting overlap between arbitration or adjudication as contemplated under the two Conventions, since both refer to such mechanisms on an optional basis in absolutely compatible terms.

3. **The Differences Between the Two Conventions in the Context of the Sources of International Law**

3.1. A Treaty Law Perspective

3.1.1. A Constructive approach to the mutually complementary rules

Under the general régime of the law of treaties as codified in the UN Vienna Convention of 1969 expressly confirms the possibility that two or more treaties on the same subject-matter are applicable at the same time between the same parties to such treaties, provided there is mutual compatibility as to the contents of their provisions. [87] This is so under art. [30] on the "Application of Successive Treaties Relating to the Same Subject-matter", with special regard to para. [3,88] as well as under art. 59 on the "Termination or Suspension of the Operation of a Treaty Implied by the Conclusion of a Later Treaty", with special regard to para 1, lett. b.g9

From the comparative analysis conducted above one can in principle conclude in that there is compatibility between the two Conventions. What is more, in most cases the two texts appear complementary to each other. That is to say that, on account of the basic compatibility between their individual provisions on the same subject-matter, those providing for more detailed rules offer important elements complementing the guideline and the prescriptive function of those in the other Convention which are less stringent and/or detailed.

More often than not, it is the UN/ECE 92 Convention that can offer complementary guidelines for the application and implementation of the New York Convention. The admissibility of this approach is supported by preamble paragraph 9 of the latter, which expressly recalls "the existing bilateral and multilateral agreements regarding the non-navigational uses of international watercourses". This interpretative argument would be

[87] See in general, E. Rocounas, *Engagements Parallèles et Contradictoires, 206* Recueil ties Cours de l'Acaddmie de Droit International *9 (1987-VI); W.* Czaplinsky & G. Danilenko, Conflicts of Norms in International Law, *21* Neth.Yb.Intl' Law *29 ff. (1990); J.B. Mus, Conflicts between Treaties in International Law, 45* Neth. Intl' Law Rev. *208 (1998).*

[88] Art. 30, para. 3 reads as *follows:* "When all the parties to the earlier treaty are parties also to the later treaty but the earlier treaty is not terminated or suspended in operation under article *59,* the earlier treaty applies only to the extent that its provisions are compatible with those of the later treaty".

[g9] Para. 1, lett. b) reads as *follows:* "A treaty shall be considered as terminated if all the parties to it conclude a later treaty relating to the same subject-matter and: *[...]* the provisions of the later treaty are so far incompatible with those of the earlier one that the two treaties are not capable of being applied at the same time". While art. 30 *(supra,* footnote *89)* provides direct support to the contention here maintained of the possible complementary application of the two Conventions under review, the support from art *59* is to be inferred by implication.

further enhanced by art. 31, on interpretation, of the Vienna Convention on the Law of Treaties, with regard to the relations between States Parties to both Conventions. Art. 31, para. 3, lett. c), in the interpretation of a treaty, "[t]here shall be taken into account, together with the context [...] any relevant rules of international law applicable in the relations between the parties".

The complementary relation between the two Conventions operates also the other way around. That is to say that also the New York Convention can provide complementary support to the ECE 92 Convention, but this is so only with regard to very few provisions. As we have seen, this is the case of the legal consequence of the occurrence of transboundary harm. In this case the operation of the complementary relation between the two texts finds two legal grounds in the ECE Convention. Firstly, in art. 9, para. 1, which for our purposes, reads as follows:

> "The Riparian Parties shall on the basis of equality and reciprocity enter into bilateral or multilateral agreements, where these do not yet exist, or adapt existing ones, where necessary to eliminate the contradictions with the basic principles of this Convention, in order to define their mutual relations and conduct regarding the prevention, control and reduction of transboundary impact".

Secondly, and exclusively with regard to the field of the legal consequences of the occurrence of harm, reference is to be made to art. 7, under which the Parties to the ECE Convention have undertaken the commitment to "support appropriate international efforts to elaborate rules, criteria and procedures in the field of responsibility and liability". Even if, as we have seen above, [90] the UN 97 Convention falls short of setting out an exhaustive regulation of subject, it certainly provides useful elements in that direction.

3.1.2. Safeguards in case of mutually conflicting rules

On the basis of the general treaty law régime on the relationships between treaties on the same subject-matter with partial or total coincidence of the parties thereto, and even more so under the specific rules of the two Conventions on the issue, there is no legal ground for suggesting

[90] See supra, sub-section 2.2.3. *et seq.*

the inappropriateness for the Parties of the ECE 92 Convention to ratify also the UN 97 Convention.

3.1.2. l. The relationship between the two Conventions inter se

It is submitted that the above holds true even if one where to disagree on the substantive compatibility between the two texts. Therefore, according to the conclusions reached above in the present report, the same consideration applies with regard to the few provisions of the two Conventions that are mutually conflicting, as is the case with regard to the issue of the existence, within the obligation on the exchange of data and information, of a right to withhold commercial or industrial information that is deemed confidential, usually pertaining to intellectual property rights.

Most importantly, there would be no legal grounds supporting the argument that the less stringent provisions of the later Convention would supersede those of the earlier one.

It is true that both arts. 30 and 59 of the 1969 Vienna Convention on the Law of Treaties uphold the principle of the *lex posterior derogat priori* with regard to conflicting provisions contained in two treaties on the same subject-matter as between the parties to both treaties. However, apart from the fact that the case-law of the International Court of Justice seems to give prevalence to the principle of the *lex specialis* over that of the *lex posterior,* the fact is that arts. 30 and 59 of the Vienna Convention leave the parties to international treaties free to rule on a case by case basis the legal effects of such treaties between the parties with respect to pre-existing or future treaties on the same subject matter.

This contractual freedom has been exercised by the drafters of both Conventions in a way that enhances the appropriateness for the parties to one to become parties also to the other.

Firstly, art. 9, para. 1, of the UN/ECE 92 Convention, as already referred to, provides not only for the possibility, but also for the obligation for the Parties to enter into bilateral or multilateral watercourse agreements setting out more specific rules. This provides for the applicability to the Parties of the UN/ECE 92 Convention that become parties also to the UN 97 Convention of the very few rules contained in the latter that provide for more detailed or stringent standards. At the same time, by implication, this provision rules out any derogatory effect on the rules of the ECE 92 Convention of the less stringent or detailed rules contained in the later Convention.

The above should be combined with the relevant rules on the issue contained in the New York Convention. While, on the interpretative plane reference has already been made to its preambular paragraph 9, the key provision for our purposes is to be found in art. 3, para 1. It reads as follows:

> " In the absence of an agreement to the contrary, nothing in the present Convention shall affect the rights or obligations of a watercourse State arising from agreements in force for it on the date on which it became a party to the present Convention".

This provisions clearly preserves the normative force of the ECE 92 Convention for those parties to it that were to ratify also the UN 97 Convention. At the same time, by its reference to the admissibility of "an agreement to the contrary", in combination with art. 9, para. 1, of the ECE 92 Convention, the provision quoted above also ensures the applicability to the Parties to the ECE Convention of those provisions of the New York Convention that happened to be more specific and in line with its basic principles.

3.1.3. The relationship between the two Conventions and other watercourse agreements

3.1.3.1. Pre-existing agreements

Both Conventions make specific reference to the case in which the Parties to them are also parties to pre-existing watercourse agreements. The question is governed somewhat differently in the two texts under consideration. After a brief examination of such differences, consideration will be given to their possible impact on the Parties to the UN/ECE 92 Convention that contemplate ratification, acceptance, approval or access to the UN 97 Convention, and *vice-versa.*

As we have already seen, art. 9, para. 1, of the UN/ECE 92 *Convention provides* for a clear-cut obligation for its Parties to adapt existing agreements to it "where necessary to eliminate the contradictions with the basic principles of this Convention [...]". In principle, one can infer from this obligation *de contrahendo* that a State Party to the Helsinki Convention, as well as to a pre-existing watercourse agreement, should disregard the obligations contained in the latter that were incompatible with the later Convention. This is in

conformity with the general principles on the application of successive treaties relating to the same subject-matter, as codified in art. 30 of the Vienna Convention on the Law of Treaties, which in its para. 4, lett. b, provides that "[...] as between a State party to [two treaties on the same subject-matter] and a State party to only one of the treaties, the treaty to which both States are parties governs their mutual rights and obligations".

It remains that art. 9, para. 1, of the UN/ECE 92 cannot operate as to preclude the wrongfulness of the conduct which, while in abidance by the Helsinki Convention, were to be in breach of the obligations deriving from the previous watercourse agreement vis-à-vis another State party to the latter but not to the Helsinki Convention. This is confirmed by art. 30, para. 5, of the 1969 Vienna Convention. It provides that para. 4, lett. b), of the same article, quoted above, "is without prejudice [...] to any question of responsibility which may arise for a State from the conclusion or application of a treaty the provisions of which are incompatible with its obligations towards another State under another treaty".

In the case in which incompatibility were to be assessed between the provisions of the UN/ECE 92 Convention and a pre-existing agreement, it seems most likely that in the relations between a State party only to this agreement and one which is a party to both treaties, the latter State would find itself as the addressee, under the former agreements, of rights, rather than obligations, that might be incompatible with the Helsinki Convention. In such circumstances it would be for the State party to both treaties to waive its rights under the pre-existing agreement and to start the negotiation of a new watercourse agreement with the States that are not parties to the Helsinki Convention that is in conformity with the latter in pursuance of its individual interests combined with the common interest in the development, protection and control of the shared watercourse.

As to the UN 97 Convention, painstaking negotiations took place in the Working Group between those delegations, on the one hand, that took the view that the Convention should supersede any pre-existing watercourse agreements to the extent that they would be in conflict with it, or at least, with its basic principles, and those, on the other, that intended to uphold previous agreements depriving the Convention of any derogatory effect whatsoever."

The formula that was finally reached undoubtedly gives the upper hand to those that favoured the idea that previous agreements would not be superseded by the Convention under

[9] For an account of such a debate, *see A.* Tanzi, *Coding the Minimum Standards of the Law* of *International Watercourses: Remarks on Part One and a Half, 21* Natural Resources Forum 110 *et seq.; Id., supra* footnote 41, at 239 *et seq.*

consideration.' While paragraph 1 of art. 3, quoted above, y' provides that the Convention will not affect the rights and obligations deriving for States parties from pre-existing agreements, paragraph 2 simply indicates that States parties that are also parties to any such agreements "may, where necessary, consider harmonizing such agreements with the basic principles of the present Convention". On the basis of the interpretative principle of effectiveness," this language cannot be considered devoid of any normative function, hence, inferring from it at least an hortatory effect. On a practical level, that is to say that this provision could ground a request by a watercourse State to a co-riparian to start negotiations, at least on the appropriateness of harmonising with the basic principles of the Convention a pre-existing agreement between themselves.

From the standpoint of a Party to the UN/ECE 92 Convention which is faced with the option of ratifying the UN 97 Convention, it should be appreciated that the latter Convention, on account of its permissive approach to the matter, would be far from interfering with the obligation of adjustment set out in art. 9, para. 1, of the Helsinki Convention. What is more, particularly in consideration of the mutual conformity of the rationale of the two instruments under consideration, by complying with the "adjustment obligations" contained in art. 9, para. 1, of the Helsinki Convention a State would meet at the same time the hortatory provision contained in art. 3, para. 2 of the New York Convention.

From the standpoint of a State that has already ratified the UN 97 Convention, becoming a party also to the UN/ECE 92 Convention would clearly involve taking up a more stringent obligation on the matter. Namely, one to enter into agreements that "eliminate contradictions with the basic principles of this Convention". Again, on the assumption of the mutual compatibility, if not perfect coincidence, of the basic principles of the two Conventions, one would see no legal impediments to do so. On the contrary, such a course of action would be perfectly in line with art. 3, para. 2, of the New York Convention.

[9'] This solution left unhappy those who strongly advocated the need for compulsory harmonisation. *See,* in particular, the statement of the Representative of Ethiopia explaining its vote on the Convention (U.N. Doc. A/51/PV.99 at 9-10).

[93] *See supra,* sub-section 3.1.2.1.

[94] According to this principle, between two possible interpretations, the one should be given prevalence which allows a given provision to perform some normative function over that precluding any such function *(magis valeat guam pereat).*

3.1.3.2. Future agreements

As to the relationship between the two instruments under consideration and future agreements, art. 9, para. 1, of the UN/ECE 92 Convention is absolutely clear. As we have seen, it provides for the obligation for the Parties to enter into agreements that: a) apply to the specific circumstance pertaining to a given watercourse the general obligations of prevention, control and reduction of transboundary impact; b) bring pre-existing agreements into line with the basic principles of the Convention. By implication, but with no interpretative efforts, this provision is to be taken to preclude the conclusion of future agreements that are incompatible with the basic principles of the Convention. This, obviously, applies to the prospect of future watercourse agreements to be entered into by certain of the Parties to the UN/ECE 92 Convention only. Until some principles enshrined in the Convention will be considered to have attained the status of *jus cogens,* nothing prevents the unanimous will of all its Parties to derogate from its provisions.

The argument made above finds express support in art. 41, para. 1, of the Vienna Convention on the Law of Treaties on "agreements to modify multilateral treaties between certain of the parties only". In its relevant part for our purposes, it provides that "Two or more parties to a multilateral treaty may conclude an agreement to modify the treaty as between themselves alone if: (a) the possibility of such a modification is provided for by the treaty [...]".

It should be noted that the legal consequences of the conclusion between some parties only to the multilateral treaty of a subsequent special agreement incompatible with the basic principles contained in the former treaty would not consist in the sanction of nullity, as it would be the case under arts. 53, 64 and 71 of the Vienna Convention with regard of a treaty at variance with a rule of *jus cogens,* but should be found in the rules of State responsibility applicable to the relation between States parties to the preceding multilateral treaty only and those which, being parties to both conventional instruments, enforced provisions of the subsequent agreement in breach of obligations arising under the preceding treaty. Indeed, no provision can be found in Part V or anywhere else in the Vienna Convention on the Law of Treaties that provides that the conclusion of an agreement in breach of a rule on the admissibility of the conclusion of subsequent treaties on the same subject matter is to be considered void, whereas art. 30(5) of the same Vienna Convention on successive treaties on the same subject-matter provides that the application of the pertinent rules contained therein

(at para. 4) "[...] is without prejudice [...] to any question of responsibility which may arise for a State from the conclusion or application the provisions of which are incompatible with its obligations towards another State under another treaty".

The question then becomes one of identification of the States parties who would be entitled to hold responsible another State party that, while applying provisions of the later agreement, has infringed a basic principle of the Convention. Under the general treaty law regime on the matter referred to above, there would be no doubts as to the recognition of such a standing to an injured co-riparian who is not a party to the later agreement. As to the position of States parties that are not co-riparians with respect to the watercourse to which the special agreements refers to, they can be entitled to become the active subjects of a relationship of international responsibility only to the extent that the provision of the Convention that has been infringed by a State party to it while such a State was applying an incompatible rule of a subsequent watercourse agreement can be deemed to protect an indivisible right of all States parties to the Convention and/or insofar as a material damage has occurred that can be established to have been the result of lack of due diligence in preventing such a harm or, anyhow, of an inequitable use of an international watercourse.

As to the UN 97 Convention, art. 3(3) provides that its parties may conclude agreements which "apply and adjust" its provisions to the specific features of a particular watercourse. The key point in order to understand whether this provision provides States parties with the freedom to conclude special agreements that modify the Convention without restrictions, or whether the modifications provided by such agreements should not be at variance with the general principles enshrined in the Convention, is to be found in the expression "apply and adjust". The matter has been of serious concern among scholars" and was the object of an impassioned debate in the Working Group during both sessions, for it bears directly on the normative function of the instrument under consideration. A consistent group of delegations, advocated a provision that would indicate expressly the inadmissibility of future special

95 See, especially, Hey, E. Hey, *Sustainable Use of Shared Water Resources: the Need for a Paradigmatic Shift in International Watercourses Law, in G.* Blake et al. (Eds The Peaceful Management of Transboundary Resources 127, 144 (1995); and L. Caflisch, *Regulation of the Use of International Watercourses, in* International Watercourses. Enhancing Cooperation and Managing Conflict 3, 11-12 (S. M. A. Salmon & L. Boisson de Chazournes Eds., 1998).

agreements incompatible with the basic principles of the Convention." On the other hand, other delegations, insisted on an explicit reference to the possibility for future watercourse agreements to "apply or depart from" the Convention."

The final text of art. 3, para. 3, in so far as it reproduces the language originally proposed by the ILC, seems to confirm the framework function of the Convention envisaged by the ILC itself, in the sense that future special agreements between States parties to the Convention can specify the general regulation provided for therein by applying and adjusting it to the particular characteristics of a given watercourse within the limits of the basic principles set out in the Convention. This interpretation cannot be gainsaid in the light of the interpretative statement elaborated by the Working group to the effect that "[t]he present Convention will serve as a guideline for future watercourse agreements and, once such agreements are concluded, it will not alter the rights and obligations provided therein".98 Assuming that one were to recognise some legal effects to this statement, it is to be taken into account that it addresses two different situations in time. Namely, the first one covers the period preceding the conclusion of a special agreement, during which span of time the framework, or guideline, function of the Convention is to be properly fulfilled, and there is nothing in the above statement that may in any way diminish such a normative function. The second situation referred to in the statement in hand is subsequent to the hypothetical conclusion of a special watercourse agreement, and with regard to it the same statement upholds the validity of the subsequent agreement, even if such an agreement were to be incompatible with the basic principles of the Convention. In this respect, it is to be noted that the statement in point simply confirms the general treaty law regime on the succession of treaties on the same subject matter. On this score, special mention should be made of art. 3, para.4, of the New York Convention, according to which the conclusion of a special watercourse agreement is not permissible which "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".

96 *See* for example the written proposals submitted by Ethiopia (U.N. Doc. A/C.6/51/NUW/WG/CRP.9) and the Netherlands (id., CRP. 16). For more details *see* Tanzi (Coding), supra footnote 92, at I *1 1 et seg.*

9' *See* in particular the written proposals submitted by Israel (U.N. Doc. A/C.6/51/NUW/WG/CRP.8), Turkey *(id.,* CRP. 12), France *(id.,* CRP. 15).

98 Report of the WG, supra footnotenote 40, at 5.

Also in view of the fact that the New York Convention does not purport to provide rules of a *jus cogens* character," reference should be made to much the same considerations developed above with respect to the application of the general principles of the law of treaties to the UN/ECE 92 Convention, with special regard to the consequences to be attached to the conclusion of a later agreement incompatible with the basic principles of the New York Convention.

Summing up, the UN/ECE 92 Convention is more precise, also on the matter at issue, in the sense that its Parties are precluded from entering into later agreements that are in conflict with its basic principles. It is not beyond doubt whether the same applies to the relationship between the UN 97 Convention and future watercourse agreements. A clear limit to the admissibility of future watercourse agreements can be found in this Convention, in art 3, para 4, with regard to the case in which the future agreement were to adversely affect a coriparian who was not a party to it.

Be that as it may, it is to be emphasised that, in the case of a later agreement between certain of the Parties to either Conventions only that were to be in conflict with the limitations therein, would not be sanctioned by the invalidity of the later agreement. It is submitted that, with regard to the position of a State that becomes a party to both the UN/ECE 92 and the UN 97 Conventions, the unclear language of the New York Convention would not impeach the "incompatibility clause" contained in the Helsinki Convention. That is to say that a Party to the Helsinki Convention would not be entitled to enter into future watercourse agreements incompatible with its basic principles on account of its becoming a party to the New York Convention. However, *ex abundante cautela,* this point could be rendered explicit through an interpretative declaration to be made when ratifying, accepting, approving or acceding to the New York Convention.

99 Caflisch, *supra,* note 98, at 11; S.C. McCaffrey & M. Sinjela, *The 1997 United Nations Convention on*

3. 2. A Customary Law Process Perspective: **Implementation without Ratification**

The results of the comparative analysis carried out above in Section 2, may well be of relevance outside a purely treaty-law dimension of the issue under consideration.

In fact, the two Conventions under provide crucial building blocks of the general customary law process in the field. As authoritatively stated by the ICJ in 1969 in the North Sea Continental Shelf Case and reiterated in its subsequent case-law, a provision contained in an international treaty, particularly in one of codification, may correspond to a customary rule when, with regard to this rule, it can be ascertained that the treaty has performed an evidentiary or a crystallising role of the customary law making process up to the time of the Convention's adoption.'[°°] The Court has also indicated that, even if coincidence between the provisions of a codification convention and a customary rule may not exist at the time of adoption of the former, such a coincidence may produce itself at a later stage, so long as the conventional provisions in point have prompted a customary law-making process to that effect, hence, performing a sort of generative function with respect to custom.'[°']

It is to be noted that the ICJ has repeatedly stated that the same reasoning can likewise apply to a codification convention not yet in force. `[°']- Most importantly for our purposes it has

International lVatercourses, 92 A.J.I.L. 97, 98 (1998).

'[°°] North Sea Continental Shelf Cases (F.R.G. v. Den. and Neth.), I.C.J. Report 4 (1969), at 41. *See also* Case concerning the Continental Shelf (Tunis v. Lybia), I.C.J. Reports 18 (1982), at 38; Case Concerning Delimitation of The Maritime Boundary in the Gulf of Maine Area (Can. v. U.S.), I.C.J. Reports 246 (1984), at 294; Case Concerning Military and Paramilitary Activities in and against Nicaragua (Vicar. v. U.S.), I.C.J. 14 (1986), at 95. Among the literature galore on the subject at issue, *see* R.R. Baxter, *Multilateral Treaties As Evidence* of *Customary International Law,* 41 Brit. Y. B. Int'I L. 275 (1965-66); Id. *Treaties and Custom,* 129 Recueil des Cours 25 (1970 - I); A. D'Amato, *Manifest Intent and the Generation by Treaty* of *Customary Rules* of *International Law,* 64 A.J.I.L. 892 (1970); R. P. Dhokalia, The Codification of Public International Law (1970); C. Marek, *Le problème des sources du droit international dans l'arrêt sur le Plateau Continental de la Mer dit Nord,* 6 Revue Beige de Droit International 44 (1970); H.W.A. Thirlway, International Customary Law and Codification (1972); Jiménez de Aréchaga, *supra* note 32 at 9-34; *Id., Custom, in* Change and Stability in International Law Making 3-4 (A. Cassese and J.H.H. Weiler eds., 1988); R. Jennings, *Treaties as 'Legislation, in* Jus et Societas, Essays in Tribute to W. Friedmann, 159 *et seq. (G.* Wilner et al. eds., 1979); *Id., What Is International Lcnv and How Do We Tell It When We see It?,* 37 Annuaire Suisse de Droit International 59 *et seq.* (1981); M.E Villiger, Customary International Law and Treaties (2nd ed., 1997); H. Torrione, L'influence des conventions de codification sur la coutume en droit international public (1989); R. Pisillo Mazzeschi, *Trattati e consuetudine nella codifrca=lone del diritto internazionale, in* 2 Studi in ricordo di Antonio Filippo Panzera 663 (1995).

'[°'] North Sea Continental Shelf Cases, *supra* note 101, *id.*

'[°'] In its advisory opinion concerning the Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276, I.C.J. Reports 16

done so with special regard to the UN 97 Convention, making express reference to it, just two months after its adoption, hence, totally irrespective of its entry into force. Namely, in the *Gabcikovo-Nagimaros* Case, after recalling the passage of the *River Oder* decision in which the **PCIJ had upheld the principle** of the equality of rights between co-riparians within the context of the law of river navigation, the World Court has referred to the New York Convention review as evidentiary of the consolidation of this principle within the context of international law on non-navigational uses of international watercourses. [103]

Keeping in mind the above conceptual framework as it has been traced by the ICJ, the results of the mutually complementary nature of the two texts under review should also be appreciated as producing joint authoritative terms of reference for the construction of the state of customary law in the field. Without prejudice to the results of a rule-by-rule comparative analysis of the two Conventions and other authoritative elements of international practice evidentiary of the state of international custom in the field, one may venture to submit as a general statement that, whereas specific provisions of a procedural character in both texts are by their very nature unsuitable to coincide with a rule of a customary nature at the time of adoption of the Convention, their basic principles are to be presumed to be evidentiary of customary principles. Where, due to the lack of sufficiently consistent practice and opinio *juris,* such an equalisation between a particular provision of either of the Conventions, on one hand, and customary law, on the other, could not be ascertained at the time of their adoption, the presumptive reasoning in point should be in the sense that their very adoption can play a decisive role as a catalyst for the completion of the relevant customary rule making process in the field.

Concluding on this point, it seems that from a practical standpoint, even if one were to reject the evidentiary character of the two instruments in hand with respect to the customary

(1971), at 46, the World Court referred to provisions of the Vienna Convention on the Law of Treaties long before its entry into force as evidentiary of customary rules; a Chamber of the Court applied the same reasoning with respect to the Montego Bay Convention on the Law of the Sea in the Case Concerning Delimitation of The Maritime Boundary in the Gulf of Maine Area (I.C.J. Reports 246, *supra* footnote 101, at 294 (1984). In the Case concerning Continental Shelf (1982 I.C.J. Reports 18, *supra,* note 101, at 38 (1982), the Court referred in the same fashion to the draft articles that only later would be adopted in the form of a convention, viz., the Montego Bay Convention. *See* on this point C.Th. Eustathiades, *Conventions de Codification Non Ratifrées, in* 1 Mélanges Wengler 77 (1973); L.B. Sohn, *Unratified Treaties as a Source of Customary International Law, in* Realism in Law-Making: Essays on International Law in Honour of W. Riphagen, 231 (A. Bos & H. Siblesz eds., 1986); I. Sinclair, *The Impact of the Unratfed Codification Convention, in* Realism in Law-Making: Essays on International Law in Honour of W. Riphagen, 211 (A. Bos & H. Siblesz eds., 1986).

[103] See ICJ Reports 191 (1997).

law in the field, their authoritative guideline function cannot be gainsaid, as it has been corroborated by the ICJ in the *Gabcikovo-Nagimaros* Case with reference to the New York Convention. [104]

Especially with regard to the 1992 **Convention,** such a guideline function would be relevant in the elaboration of domestic legislation, [105] no less than in the negotiation of special watercourse agreements, either aimed at the prevention, or settlement of water law disputes. Hence, following a pragmatic approach, the two instruments in point can be regarded as representing an essential frame of reference also for States that are not (yet) parties to the 1992 Helsinki Convention, and irrespective of the entry into force of the 1997 New York Convention.

While with regard to the latter Convention, this approach has been supported by the ICJ in the terms already stressed, [106] with respect to the former, it has been expressly endorsed by its very Parties following its entry into force on 6 October 1996. In their *Helsinki Declaration as adopted by the meeting of the Parties to the Convention on the Protection and Use of Transboundarv Watercourses and International Lakes on 4* July 1997 they have emphasised the importance of the guideline function of the Convention vis-à-vis States that are not Parties to it to those that are ECE member countries, as well as to those that are not.

As regards the ECE member countries, para. 6 reads as follows:

> "We call on ECE member countries which have not yet become Parties to base their co-operation relating to transboundary waters on bilateral and multilateral agreements consistent with the Convention. At their request, we will support them with advice in drawing up or adapting such agreements".

As to States that are not ECE member, in the same Declaration the Parties "encourage [...] all other States to draw on [the Convention's] provisions when formulating and implementing

[104] *Ibidem.* [105] It is to be recalled that in the Helsinki Declaration as adopted by the meeting of the Parties to the Convention on the Protection and Use of Transboundary Watercourses and International Lakes on 4 July 1997, in para. 2 it is stated as follows: "The problems that we are facing are not unique to transboundary waters. They should be seen in the context of integrated water management. Thus, our co-operation on transboundary waters will also help to improve the management of internal waters and ensure consistency in the protection and use of both internal and transboundary waters. We will apply, as appropriate, the principles of the Convention when drawing up, revising, implementing and enforcing our national laws and regulations on water". [106] See supra text accompanying footnotes 104 and 105.

their water policies". 1°7 Furthermore, after indicating the "will to promote the regional implementation of Agenda 21 by protecting waters against pollution and unsustainable use in accordance with the results of the special session of the General Assembly (New York, June 1997)", the Parties have declared to "offer to share[their] experience with other regions in the world".108 Most importantly, "ECE member countries which have not become parties have associated themselves with this declaration". 109

4. Concluding Remarks

From the comparative analysis conducted above it appears that there is no denying that, basically, the two Conventions bear on the same subject-matter. It also appears that, where there is no coincidence between the contents of the rules of the two Conventions on the same issue, those of the ECE 92 Convention are generally more stringent than those of the UN 97 Convention. This applies to their material and, even more so, to their procedural rules. As to the substantive rules, the ECE 92 Convention sets out more precise guidelines and advanced standards of conduct for the prevention of transboundary impact, even though we have seen that from the New York Convention more guidance can be derived as to the consequence of the occurrence of harm. As to the procedural rules, special emphasis has been placed on the mandatory character of institutional co-operation between co-riparians under the ECE 92 Convention, while the UN 97 one does not go much farther than providing for a recommendation to that effect.

One could, therefore, wonder whether a State that became a party to both Conventions would make a retrograde step when ratifying, accepting, approving or acceding to the NY 97 Convention. The answer is no, both from a substantive and a formal point of view.

From a substantive point of view, we have seen that the differences between the two Conventions with regard to specific rules on the same subject-matter are hardly ever a matter of conflicting prescriptions, but one of more, or less, stringency or detailed character of such prescriptions. Therefore, it would not be appropriate to consider the relation between the two

107 Para. 5.
ios
Para. 12.
io9 Para. 14.

instruments as one of derogation of the later one from the former under the rule *lex posterior derogat priori.*

As a matter of policy, it is only natural that the law-making process at the universal level yields to lower common denominators than in the less heterogeneous context of the ECE. Though, since the aim is the same in both processes, namely, that of enhancing the common interest for the benefit of all parties involved, it would be inconsistent with the rationale of both instruments if the more detailed standards set out in a regional context were to be effaced from the rules governing the relations between States that are parties to that regional process just because they would take part in and promote a similar process at the universal level.

From a strictly legal standpoint, i.e., one of treaty law, it has been shown that on the basis of the crystal clear language of art. 3, para. 1, of the UN 97 Convention, whatever doubts were to arise as to the substantive compatibility between the two Conventions, the lex *posterior derogat priori* rule cannot operate invalidating the ECE 92 Convention due to subsequent ratification, acceptance, approval, or accession to the UN 97 Convention.

Most importantly, the above analysis has shown that the two instruments under consideration in their complementary mutual relationship provide an important contribution in the ongoing customary law process in the field of international water law. When their provisions cannot be proved to be evidentiary of a given consolidated customary rule, it remains that their authoritative guideline function in *de lege ferenda* terms can be instrumental in the generation of new customary law, by enhancing the spontaneous abidance by their standards also by States that are not parties to them. We have seen that this reasoning has been followed by the ICJ with the regard to the UN 97 Convention, [110] and, most importantly, by the ECE member countries with regard to the UN/ECE 92 Convention. [11]

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"° See reference to the Gabcicowo-Nagymaros Case, supra footnote 104.

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