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Entry into force of the UN Watercourses Convention: why should it matter?

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The United Nations Watercourses Convention entered into force on 17 August 2014, following a long and complex journey that dates back to 1970 when the UN referred the matter to its legal arm, the International Law Commission. This article follows the Convention through that long and turbulent road, examines its main provisions and analyses the reasons for the delay of its entry into force. It concludes by answering the question of why entry into force of the Convention should indeed matter.

Keywords: Helsinki rules; International Court of Justice; International Law Commission; United Nations; watercourses convention

Introduction

On 19 May 2014, the Socialist Republic of Vietnam became the 35th party to the United Nations (UN) Convention on the Law of the Non-Navigational Uses of International Watercourses (also known as the Watercourses Convention, or Convention). With that historical step, Vietnam completed the number of instruments of ratification/accession required for the Convention to enter into force and effect. Accordingly, the Convention entered into force on 17 August 2014, 90 days after submission of the 35th instrument of accession, as specified in Article 36 of the Convention.

Entry into force of the Convention has been the climax of a very long, difficult and complex process that dates back to the early 1970s, and which lasted for over 44 years. These difficulties and complexities are apparent in a number of facts and developments. Although the United Nations General Assembly (UNGA) addressed the issue of international rivers in 1959, it was only in 1970, eleven years later, that the UNGA decided to refer the task of preparing a watercourses convention to the International Law Commission (ILC). It took the ILC 23 years to agree on, and complete, the draft of the Convention in 1994. Thereafter, the UNGA needed three more years to discuss and adopt the Convention in 1997. Seventeen more years would elapse before the Convention entered into force in August 2014. This was clearly a very long and difficult process, lasting 44 years since the UNGA referred the matter to the ILC.

This article traces briefly the lengthy and complex preparatory work of the ILC on the Convention that started in 1971, and the contribution of two scholarly non-governmental organizations (NGOs) working in the field of international law. It then follows the process of approval of the Convention by the UNGA in 1997, and its long and turbulent road to entry into force in 2014. Thereafter, the article discusses the main provisions of the Convention, and analyses the major areas of controversies between the different riparians.

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over the Convention’s substantive and procedural rules that led to the long delay for its entry into force. The article concludes with a discussion of why entry into force of the Convention should really matter.

Involvement of the UNGA in international rivers

The problems of the sharing, management and protection of international rivers did not attract the attention of the UNGA until the late 1950s. This was due to the fact that until that time disputes over shared watercourses were rare. Apparently the two disputes of the Indus and the Nile that prevailed and were resolved in the 1950s prompted the UNGA to adopt on 21 November 1959 Resolution 1401 titled ‘Preliminary Studies on the Legal Problems Relating to the Utilization and Use of International Rivers’. The resolution called for initiation of studies with a view to determining whether the subject of international rivers was appropriate for codification. It requested the Secretary-General of the UN to prepare a report containing information provided by member states regarding their laws and legislation in force on the matter, as well as a summary of existing bilateral and multilateral treaties, and decisions of judicial and arbitral tribunals. The report was also to include a survey of studies carried out by NGOs concerned with international water law.

Four years later the report was completed and presented to the UNGA in April 1963 (United Nations, 1963). The report included information provided by member states regarding their legislation on international waters, and listed the bilateral and multilateral treaties in Africa, America and Asia on international waters in force at that time. It also included summaries of international judicial decisions, as well as studies carried out by national and international NGOs. Such studies summarized the early work carried out by the Institute of International Law (IIL) and the International Law Association (ILA), as discussed below.

The report was widely circulated and discussed inside and outside the UN agencies. However, it took seven more years before the UNGA would return to the issue of international watercourses. On 8 December 1970, the UNGA adopted Resolution 2669 titled ‘Progressive Development and Codification of the Rules of International Law Relating to International Watercourses’. The resolution noted the legal problems relating to the use of international watercourses, and the fact that such use was still based on rules of customary law. The resolution asked the ILC to ‘take up the study of the law of the non-navigational uses of international watercourses with a view to its progressive development and codification’.

Article 15 of the Statute of the ILC defines ‘progressive development of international law’ as meaning ‘the preparation of draft conventions on subjects which have not yet been regulated by international law, or in regard to which the law has not yet been sufficiently developed in the practice of States’. The same article defines ‘codification of international law’ as meaning ‘the more precise formulation and systematization of rules of international law in fields where there already has been extensive State practice, precedent and doctrine’. However, as will be discussed below, the work of the ILC in this field has been mainly codification of the existing principles of customary international water law.

At the time the ILC started working on the draft convention in early 1971, the IIL and the ILA had already been dealing with international watercourses. Both have adopted a number of resolutions and declarations on shared watercourses on which the work of the ILC would largely depend and be guided by.
Role and contribution of the IIL and the ILA

The IIL and the ILA are both scholarly NGOs established in 1873 and working on various fields of international law. The IIL is a smaller organization whose membership is by election and invitation. The ILA, on the other hand, is larger and its membership is open to all international lawyers through peer recommendation. Both institutions adopt resolutions and declarations that aim to codify international law as it exists.

However, it should be clarified that these resolutions and declarations do not have a formal standing, and are not legally binding *per se*. They differ from conventions and treaties that derive their binding effect from the fact that states sign and ratify. Yet, these rules and resolutions possess a considerable authority by virtue of the fact that they reflect established customary principles of international law, and from the expertise and respectability of the members of both institutions.

The resolutions of the IIL emphasize, and are largely centred on, the obligation not to cause significant harm to other riparians. Its first resolution, known as the Madrid Declaration, adopted in 1911, established absolute prohibition against activities that may result in injury to other riparians. This approach was elaborated, but curtailed, by the Salzburg Resolution which the IIL adopted in 1961. The Salzburg Resolution emphasized the obligation of the states not to cause harm to other states, but subjected this obligation to the right of use by other states. Thus, the absolute prohibition of the Madrid Declaration was somehow relaxed by the Salzburg Resolution.

On the other hand, the resolutions and rules adopted by the ILA differ from those of the IIL in that they emphasize the principle of equitable and reasonable utilization of shared watercourses. The first such resolution, known as the Dubrovnik Statement, was issued by the ILA in 1956. The statement confirmed the sovereign control each state has over the international river within its own boundaries, but required that state to exercise such control with due consideration of its effects on other riparian states.

The approach started by the Dubrovnik Statement was refined by the New York Resolution which was adopted by the ILA in 1958. The principle of equitable utilization was the essence of discussion by the ILA at the Tokyo meeting which was held in 1964. The statements and resolutions adopted by the ILA in the first 10 years in Dubrovnik and New York, and the discussion in Tokyo, paved the road for the comprehensive rules issued by the ILA in its meeting in Helsinki in 1966. Those rules are known as the ‘Helsinki Rules on the Uses of the Waters of International Rivers’ (ILA, 1966).

The Helsinki Rules embraced the principle of ‘equitable and reasonable utilization’ of the waters of an international drainage basin among the riparian states as the basic principle of international water law. For that purpose, the Helsinki Rules specified a number of factors for determining the equitable and reasonable utilization for each basin state. As will be discussed below, these factors were largely adopted by the ILC in the UN Convention.

The rules devote a separate chapter to each of pollution, navigation and timber floating, as well as procedures not only for settlement but also for the prevention of disputes. The latter chapter deals with notification of other riparians of proposed constructions or installations that would alter the regime of the basin or give rise to a dispute. As such, the Helsinki Rules cover a wide range of issues, including both navigational and non-navigational uses of international watercourses.

Like other IIL and ILA rules and resolutions, the Helsinki Rules have no formal standing or legally binding effect *per se*. Yet, until the adoption of the UN Convention 30 years later, they remained the single most authoritative and widely quoted set of rules for
regulating the use and protection of international watercourses. Indeed, these rules were the first general codification of the law of international watercourses. As noted by Charles Bourne, the Helsinki Rules were soon accepted by the international community as customary international law (Bourne, 1996).

This was the IIL and ILA contribution when the UNGA adopted its resolution on international watercourses in December 1970. The work of the two institutions continued, and other resolutions and declarations were adopted after that (Bogdanovic, 2001). Indeed, the work of the ILC on the Convention was based largely on the IIL and ILA resolutions, particularly the Helsinki Rules, as discussed below.

The ILC and the Convention

Pursuant to Resolution 2669 of 1970, the ILC started working on the topic of international watercourses in early 1971. The task was clearly a complex one. It took 23 years, five rapporteurs and 15 reports before the final draft articles of the Convention were agreed upon by the ILC. A number of issues proved controversial and complex even for the members of the ILC. Such issues included definition of the term ‘international watercourses;’ transboundary groundwater; the status of existing watercourses agreements vis-à-vis the Convention; the relationship between the principle of equitable and reasonable utilization and the obligation not to cause significant harm; and the procedures and mechanisms for dispute settlement. Differences between those issues were finally resolved, and a draft Convention was agreed upon by the ILC and submitted to the UNGA in 1994.

The draft was deliberated thereafter by the Sixth (Legal) Committee of the UNGA, convened as Working Group of the Whole (also known as the Working Group). Thereafter, on 21 May 1997, following lengthy discussion of the ILC draft, as amended by the Working Group, the UNGA passed Resolution 51/229 adopting the Convention. One hundred and three countries voted for the Convention, and three against (Burundi, China and Turkey), with 27 abstentions; while 52 countries did not participate in the voting. Subsequent to the vote, Nigeria and Fiji (which did not vote) and Belgium (which abstained) informed the Secretariat of the UN General Assembly that they had intended to vote for the Convention (United Nations, 1997). This would have brought the number of the countries voting for the Convention to 106, and decreased the abstentions to 26.

The Convention was opened for signature on 21 May 1997, and remained open for three years, until 20 May 2000. By that time only 16 states had signed the Convention. Although signature closed on 20 May 2000, states continued to accede to the Convention until it finally received the required number of instruments of ratification/accession that enabled it to enter into force and effect, as discussed above.

An overview of the provisions of the Convention

The Convention is based largely on the ILA work, particularly the Helsinki Rules, and to some extent on the work of the IIL. The Convention itself recognizes ‘the valuable contribution of international organizations, both governmental and non-governmental, to the codification and progressive development of international law in this field’. It also recalled the existing bilateral and multilateral agreements regarding the non-navigational uses of international watercourses.

The Convention is a framework convention that aims to ensure the utilization, development, conservation, management and protection of international watercourses, and
promote optimal and sustainable utilization thereof for present and future generations. As a framework convention, it addresses some basic procedural aspects and few substantive ones, and leaves the details for the riparian states to complement in agreements that would take into account the specific characteristics of the watercourse in question.

The Convention is divided into seven parts and consists of 37 articles. In addition, it includes an annex on arbitration that consists of 14 articles. The Convention underscores the concept of cooperation, and includes 15 references to the word and its derivatives. Indeed, the whole field of international water law is one of cooperation.

The main areas that the Convention addresses include the definition of the term ‘watercourse’; watercourses agreements; equitable and reasonable utilization and the obligation not to cause significant harm; notification for planned measures; environmental protection; and dispute settlement.

The Convention defines the term ‘international watercourse’ to mean ‘a watercourse, parts of which are situated in different states’. It defines the term ‘watercourse’ to include both ‘surface water and groundwaters constituting by virtue of their physical relationship a unitary whole and normally flowing into a common terminus’. This definition includes only groundwater connected to surface water. It does not include transboundary aquifers that do not contribute water to, or receive water from, surface waters. Fully aware of this lacuna, the ILC issued a separate resolution recommending that other types of groundwater be governed by the same rules laid down in the Convention (Eckstein, 2005).

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

The Convention embraces the principle of equitable and reasonable utilization, and lays down in Article 6 certain factors and circumstances that should be taken into account for determining such equitable and reasonable utilization. These factors are:

- Geographic, hydrographic, hydrological, climatic, ecological and other factors of a natural character.
- The social and economic needs of the watercourse states concerned.
- The population dependent on the watercourse in the watercourse state.
- The effects of the use or uses of the watercourse in one watercourse state on other watercourse states.
- The existing and potential uses of the watercourse.
- The conservation, protection, development and economy of the water resources of the watercourse and the cost of measures taken to that effect.
- The availability of alternatives, of comparable value, to a particular planned or existing use.

In this connection, the Convention follows the same approach adopted 30 years earlier by the Helsinki Rules, which established the principle of equitable and reasonable utilization as the guiding principle for international water law, and reiterates, to a large extent, the factors laid down in the Helsinki Rules. In line with Article V of the Helsinki Rules,
Article 6 of the Convention states that the weight to be given to each factor is to be determined by its importance in comparison with that of other relevant factors (McCaffrey, 2007).

The Convention also deals in Article 7 with the obligation not to cause significant harm, and requires the watercourse states to take all appropriate measures to prevent the causing of significant harm to other watercourse states. Agreement on which principle (equitable and reasonable utilization, or the obligation not to cause harm) takes priority proved quite difficult, and the issue occupied the ILC throughout its work on the Convention. Each rapporteur dealt with the issue differently, equating the two principles, or subordinating one principle to the other. The issue was discussed in the Working Group where sharp differences between the riparian states on these two principles surfaced. It is worth clarifying in this connection that lower riparians tend to favour the no-harm rule, as it protects existing uses against impacts resulting from activities undertaken by upstream states. Conversely, upper riparians tend to favour the principle of equitable and reasonable utilization because it provides more scope for states to utilize their share of the watercourse for activities that may affect downstream riparians.

After a lengthy debate by the Working Group, a compromise regarding the relationship between the two principles was reached. The compromise addressed Articles 5 and 6 (equitable and reasonable utilization) and Article 7 (obligation not to cause significant harm). The agreed language of Article 7 requires the state that causes significant harm to take measures to eliminate or mitigate such harm ‘having due regard to articles 5 and 6’ (on equitable and reasonable utilization). As Lucius Caflisch noted:

The new formula was considered by a number of lower riparians to be sufficiently neutral not to suggest a subordination of the no-harm rule to the principle of equitable and reasonable utilization. A number of upper riparians thought just the contrary, namely that, that formula was strong enough to support the idea of such subordination. (Caflisch, 1998, p. 15)

Although the compromise facilitated adoption of the Convention by the UNGA, second thoughts about the relationship between the two principles started surfacing in the minds of many states, ensuing in the delays of the entry into force of the Convention, as will be discussed below.

However, notwithstanding this compromise language, the prevailing view is that the Convention has subordinated the obligation not to cause significant harm to the principle of equitable and reasonable utilization. This conclusion is based on a close reading of Articles 5–7 of the Convention. Article 6 enumerates a number of factors for determining equitable and reasonable utilization. These factors include (1) ‘the effects of the use or uses of the watercourse in one Watercourse State on other watercourse States’ and (2) ‘existing and potential uses of the watercourse’. These same factors will also need to be used, with other factors, to determine whether significant harm is caused to another riparian, because harm can be caused by depriving other riparians of the water flow, or decreasing such flow, and thereby affecting their existing uses. Moreover, Article 7 (1) of the Convention obliges watercourse states, when utilizing an international watercourse in their territory, to take all appropriate measures to prevent the causing of significant harm to other watercourse states. When significant harm nevertheless is caused to another watercourse state, then Article 7 (2) of the Convention requires the state causing the harm to ‘take all appropriate measures, having due regard to Articles 5 and 6, in consultation with the affected State, to eliminate or mitigate such harm, and where appropriate, to discuss the question of compensation’. As noted above, Articles 5 and 6 of the Convention deal with equitable and reasonable utilization. As such, Article 7 (2) requires giving due
regard to the principle of equitable and reasonable utilization when significant harm has nevertheless been caused to another watercourse state. The paragraph also indicates that the causing of harm may be tolerated in certain cases such as when the possibility of compensation may be considered. Accordingly, a careful reading of Articles 5–7 of the Convention should lead to the conclusion that the obligation not to cause harm has indeed been subordinated to the principle of equitable and reasonable utilization (Salman, 2007a).

This view has been endorsed by the International Court of Justice (ICJ) in the Danube case between Hungary and Slovakia (the Gabcikovo-Nagymaros case). The case was decided in September 1997, four months after the Convention was adopted by the UNGA. In that case the ICJ emphasized the principle of equitable and reasonable utilization when it directed that ‘the multi-purpose programme, in the form of a co-ordinated single unit, for the use, development and protection of the watercourse is implemented in an equitable and reasonable manner’ (ICJ, 1997, p. 79, para. 145). The ICJ did not refer to the obligation not to cause harm. It endorsed and underscored the principle again in 2010 in the Pulp Mills Case between Argentina and Uruguay (ICJ, 2010).

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

Environmental protection is dealt with under the title ‘Protection, Preservation and Management’ of international watercourses. The Convention establishes a number of obligations on the watercourse states, including protection and preservation of ecosystems; prevention, reduction and control of pollution; introduction of alien or new species; and protection and preservation of the marine environment. A Statement of Understanding issued by the Working Group clarified that these provisions impose a due diligence standard on watercourse states.

Article 33 and the Annex to the Convention deal with dispute settlement mechanisms and procedures. The article lays down a number of methods for settlement of disputes, including negotiations, jointly seeking the good offices of, or mediation and conciliation by, a third party, or use of joint watercourse institutions, or submission of the dispute to arbitration or to the ICJ. However, the method for settlement of a particular dispute should be agreed upon by both parties. The only obligatory method set forth in the Convention is impartial fact-finding. Article 33 lays down detailed procedures for such fact-finding, and requires the parties to consider the report of the fact-finding commission in good faith. Detailed rules for arbitration are laid down in the Annex to the Convention.

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

**Why have states been reluctant to become parties to the Convention?**

As indicated above, 17 years after adoption of the Convention by the UNGA, only 35 states have become parties to it, despite the fact that more than 100 states voted for it in
The geographical distribution of these states indicates they are concentrated in Europe, Africa and the Middle East. The parties to the Convention from Europe are: Finland, Norway, Hungary, Sweden, the Netherlands, Portugal, Germany, Spain, Greece, France, Denmark, Luxemburg, Italy, Monte Negro, the UK and Ireland. The parties to the Convention from Africa are: South Africa, Namibia, Guinea Bissau, Burkina Faso, Nigeria, Niger, Benin, Chad, Cote d’Ivoire, Libya, Tunisia and Morocco. The Arab states that are parties to the Convention, in addition to Libya, Tunisia and Morocco, are Syria, Lebanon, Jordan, Iraq and Qatar. Uzbekistan and Vietnam are the only Asian countries to join the Convention; while no state from the Americas is yet a party to the Convention.

An immediate question that arises is: why have the more than 100 states that voted for the Convention in May 1997 been reluctant to sign and ratify, or accede to, the Convention? A review of the various statements made by the different delegations during the discussion of the Convention by the Working Group and the UNGA (United Nations, 1997), and presentations made by, and discussion with, various government officials from different countries, reveal a number of different, and mostly inaccurate, perceptions and interpretations of the provisions of the Convention. These misconceptions and mistaken interpretations have no doubt contributed to the slow pace of the signing, ratification of and accession to the Convention (Salman, 2007b).

The first and most important area of contention is the relationship between the principle of equitable and reasonable utilization and the obligation not to cause harm. The compromise language regarding the relationship between the two principles reached by the Working Group and discussed above facilitated approval of the Convention by the UNGA. Nonetheless, some upper riparians still seem to consider the Convention as biased in favour of lower riparians because of its specific and separate mention of the obligation not to cause harm. It is to be noted that the three countries that voted against the Convention (Burundi, China and Turkey), and some of those that abstained, such as Bolivia, Ethiopia, Mali and Tanzania, are largely upper riparian states. On the other hand, a number of downstream states, such as Egypt, France, Pakistan and Peru, also abstained, concerned that the Convention favours upstream riparians because it subordinates the no-harm rule to the principle of equitable and reasonable utilization. This is basically the position that some states took at the Working Group before the compromise language of Article 7, discussed above, was reached. It seems that many of the states that accepted the compromise became concerned later that the compromise may not really serve their interests.

It is true, as argued above, that the Convention has subordinated the no-harm rule to the principle of equitable and reasonable utilization. Yet, this should in no way be viewed as favouring upstream riparians. The principle of equitable and reasonable utilization duly recognizes, and is based on, the equality of all riparians in the uses of the shared watercourse. It further lays down certain objective factors for determining the equitable and reasonable utilization for each riparian state, and these factors include existing uses, as discussed above.

Related to the view that the Convention is biased in favour of downstream riparians is the perception by upper riparians that the notification process under the Convention favours downstream riparians and provides them with a veto power over projects and programmes of upstream riparians. This is based on the widely believed, but inaccurate, notion that only upstream riparians can cause harm to downstream riparians by affecting the quantity and quality of water flows to such downstream riparians. This belief is actually one of the basic misconceptions about international water law in general, and the Convention in particular. It is a common mistaken belief among a large segment of
lawyers and non-lawyers that harm can only ‘travel’ downstream, and it is not recognized that upstream states can also be harmed by activities by downstream states.

It is obvious, and clearer, that the downstream riparians can be harmed by the physical impacts of water quality and quantity changes caused by use by upstream riparians. It is much less obvious, and generally not recognized, that the upstream riparians can be harmed by the potential foreclosure of their future use of water caused by the prior use and the claiming of rights by downstream riparians. This is an important, albeit not widely understood, principle of international water law that establishes a clear linkage between the principle of equitable and reasonable utilization, and the obligation not to cause harm (Salman, 2010).

For this reason, the World Bank Policy for Projects on International Waterways requires notification of all riparians, both downstream as well as upstream, underscoring the fact that harm is actually a two-way matter (Salman, 2009).

Similarly, the Convention, and before it the Helsinki Rules, do not limit notification to downstream riparians, or grant any state a veto power over the projects and programmes of other riparian states. The Convention requires notification in case a ‘project may have significant adverse effect upon other watercourse States’, and lays down detailed provisions on the process. Furthermore, it states that in case of an objection by one or more of the riparian states, the parties should enter into consultations and, if necessary, negotiations with a view to arriving at an equitable resolution of the situation. Thus, the Convention does not grant a veto power to any riparian over planned measures of another riparian, as mistakenly believed.

A third issue that has contributed to the reluctance of some states to become parties to the Convention is the manner in which the Convention has dealt with existing agreements. As indicated above, the Convention does not affect the rights or obligations of watercourse states arising from agreements that are in force. Nonetheless, it asks the parties to consider, where necessary, harmonizing such agreements with the basic principles of the Convention.

Riparian states that already have agreements in place believe that the Convention has not fully recognized those agreements because it suggests that the parties may consider harmonizing such agreements with the principles of the Convention. Conversely, riparian states that have been left out of existing agreements believe that the Convention should have subjected those agreements to the provisions of the Convention, and should have required inclusion of all riparians in the said agreement. However, a close reading of the provisions of the Convention reveals that the Convention recognizes both the validity of existing agreements as well as the right of the riparian states that are not parties to such agreements in the shared watercourse. The Convention could not have simply annulled those existing agreements, because such a provision would have been rejected by most members of the UNGA, and would have resulted in chaos in a number of basins. Equally important is the fact that the right of the riparian states that are not parties to such agreements is based on the established concept of equality of all the riparian states in the uses of the shared watercourse. It should be recalled that the Convention is a framework convention whose provisions are to be complemented by agreements between the parties, taking into account the characteristics of the specific watercourse.

A fourth area of contention is the belief by some riparians that the dispute settlement provisions of the Convention are too weak because they do not provide for any binding mechanism. In contrast, other riparians view the fact-finding procedures of the Convention as a compulsory method, and argue that such a fact-finding method interferes with their sovereign right of choosing the dispute settlement procedures. As discussed above, the
Convention suggests for the parties a number of methods for settlement of disputes. The only obligatory method set forth in the Convention is impartial fact-finding where the parties are required to consider the report of the fact-finding commission in good faith.

Accordingly, the Convention provides a basic mechanism for ascertaining the facts of the dispute, and leaves it for the parties to agree on the method for resolving it from a wide menu of choice. This is quite reasonable given that the Convention is a framework treaty whose provisions are to be complemented by agreements between the riparian parties, taking into account the characteristics of the specific watercourse. Yet again this compromise does not seem to satisfy a number of states.

Thus, these misinterpretations of, and misconceptions about, some of the basic principles of the Convention have been some major reasons that resulted in the reluctance of some states to join the Convention, and delays on the part of others. Accordingly, it took 17 years for these misinterpretations and misconceptions to be clarified in the minds of the decision-makers of some of these states, and consequently for the Convention to enter into force.

**Impact and relevance of the Convention**

Although the Convention has travelled along a long and turbulent road before it entered into force, it has been receiving support and endorsement from different international entities since the early months following its adoption by the UNGA in May 1997.

As discussed above, the ICJ endorsed the Convention in September 1997, in the Gabcikovo-Nagymaros case, only four months after it was adopted by the UNGA. In addition to buttressing and elaborating the principle of equitable and reasonable utilization, the ICJ confirmed the perfect equality of all riparian states in the uses of the whole course of the river, and the exclusion of any preferential privilege of one riparian state in relation to the others. The ICJ noted that modern development of international law has strengthened this principle for non-navigational uses of international watercourses ‘as evidenced by the adoption of the Convention of 21 May 1997 on the Law of the Non-Navigational Uses of International Watercourses by the United Nations General Assembly’ (ICJ, 1997, p. 56, para. 85). The ICJ reconfirmed its endorsement of the Convention in 2010 in the Pulp Mills case (ICJ, 2010).

The 14 Southern African Development Community (SADC) member countries revised their 1995 Protocol on Shared Watercourse Systems in 2000 to make it consistent with the provisions of the Convention. Indeed, most of the articles of the Revised Protocol are a reiteration of the articles of the Convention (Salman, 2001). The protocol refers in its Preamble to ‘the progress with the development and codification of international water law initiated by the Helsinki Rules and followed by the adoption […] of the UN Watercourses Convention’. Similarly, the Protocol for Sustainable Development of Lake Victoria Basin 2003, and the Agreement on the Establishment of the Zambezi Watercourse Commission 2004, both include the same factors for determining equitable and reasonable utilization, as well as provisions for notification regarding planned measures, similar to those of the Convention. Furthermore, the Nile Basin Cooperative Framework Agreement 2010 incorporates the provisions of the Convention on equitable and reasonable utilization, the obligation not to cause significant harm, as well as on cooperation and exchange of data and information. It should also be added that detailed provisions for notification, similar to those under the Convention, have been adopted by the Mekong Commission. Thus, the persuasive power of the Convention has been quite pervasive.
Moreover, the Convention was endorsed by a number of international entities. The World Commission on Dams indicated that ‘the principles embodied in the 1997 UN Convention on the Law of the Non-Navigational Uses of International Watercourses’ warrant support. States should make every effort to ratify the Convention and bring it into force’ (World Commission on Dams, 2000, pp. 252–253). The World Water Council described the provisions of the Convention as sensible, and urged the states to become parties to it (Cosgrove & Rijsberman, 2000). The World Commission for Water in the 21st Century proclaimed that the Convention ‘deserves to be approved if only as a first step towards a greater appreciation of the international character of water’ (World Commission for Water in the 21st Century, 2000, p. 32). The ILA, in its Helsinki Conference held in August 1996, adopted a resolution on the then draft UN Watercourses Convention. The resolution took note ‘with satisfaction of the completion of the work of the United Nations International Law Commission on the topic of the non-navigational uses of international watercourses’. It also noted with satisfaction of the General Assembly resolution convening the Sixth Committee as a Working Group of the Whole to elaborate a convention on the basis of the ILC draft (ILA, 1996).

It should be pointed out that the main principles laid down in the Convention are basically codification of customary international law. Customary international law is defined as consisting ‘of rules of law derived from the consistent conduct of States acting out of the belief that the law required them to act that way’ (Rosenne, 1984, p. 55). Article 38 of the Statute of the ICJ defines the sources of international law to include ‘international custom, as evidence of a general practice accepted as law’. Although only 35 states are thus far parties to the Convention, the principles of the Convention are binding on other states as well because of the fact that these principles reflect customary international water law.

By virtue of this fact, judicial and arbitral tribunals will use the Convention as their reference point, as did the ICJ in the Danube case in 1997, as well as in the Pulp Mills case in 2010, even before its entry into force. It is worth noting that none of the four states involved in these two disputes was a party to the Convention at the time the ICJ ruled on their respective dispute.6

Now that the Convention has entered into force and effect, more states are expected to join and become parties, as has happened with other treaties. Actually, the snowball effect may turn out to be more relevant in the case of the Convention, given the continuous proclamations by states of their willingness to cooperate over shared water resources, and the increasing awareness about the misinterpretations and misconceptions regarding some of the provisions of the Convention in the minds of the decision-makers in a number of states. The decisions of the ICJ in the two cases involving international watercourses should assist in clarifying and correcting some of these misconceptions, and thus should facilitate the process for more states to join the Convention.

Conversely, the longer the Convention remained in that state of uncertainty prior to its entry into force, the less credibility and integrity it would have maintained.

Conclusions

Entry into force of the UN Watercourses Convention on 17 August 2014 is no doubt a landmark in the history of international watercourses. Shared water resources are no longer the only major area without a treaty regulating their uses, sharing, management and protection. For the first time in history, international watercourses are now regulated by a global framework Convention that aims at promoting their optimal and sustainable utilization for present and future generations. The Convention addresses such utilization
through some basic procedural and substantive rules, and underscores the specific characteristics of each watercourse by leaving the details of the agreement to the riparian states concerned. More importantly, the Convention enshrines the principle of equitable and reasonable utilization under which each riparian state has a basic right on the shared watercourse.

Furthermore, entry into force of the Convention has no doubt brought international water law a long way. The fact that only 35 states are at present parties to the Convention, 17 years after its adoption by the UNGA, should not be a concern, nor should it belittle or dilute the importance and relevance of the Convention. The Convention codifies and reflects customary international law principles through restatement of these existing rules. All states are bound by such customary international law principles, regardless of their being parties to the Convention or not. The ICJ confirmed in the two cases on international watercourses it has adjudicated thus far the codification by the Convention of the existing principles of customary international water law, as well as the binding effect of such principles on all states.

With these two decisions the ICJ has paved the way for other international and regional judicial and arbitral tribunals to rely on, and be guided by, the principles of the Convention. Likewise, international financial institutions also now have a credible reference treaty for the projects on international waterways they plan to finance, especially with regards to notification of other riparians of such projects. This is particularly important because, aside from the World Bank, none of the other international financial institutions has policies governing the processing of projects on international waterways. The World Bank policy is totally consistent with the provisions of the Convention on notification, underscoring the fact that the provisions of the Convention in this regard are codification of customary international law (Salman, 2009).

Thus, it can be concluded that entry into force of the UN Convention on the Law of the Non-Navigational Uses of International Watercourses should, and will, indeed matter.

Notes
1. The ILC is a UN body composed of legal experts, nominated by states and appointed by the UNGA, and tasked with the codification and progressive development of international law.
2. The Sixth Committee is the legal and one of the main committees of the UNGA. All member states are entitled to representation therein.
3. Ratification refers to the process through which the state that signed the treaty approves it. Accession is the process whereby a state can become a party to the treaty without signing it.
4. Finland was the first state to become a party to the Convention (January 1998). That step indicated Finland’s welcome of the Convention as a reiteration of the Helsinki Rules.
5. Both Venezuela and Paraguay signed the Convention (in September 1997 and August 1998, respectively), but neither has yet ratified it. Yemen falls into the same category.
6. Hungary became a party to the Convention on 26 January 2000. Slovakia, Argentina and Uruguay are not yet parties to the Convention.

References


