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# The Frog That Wouldn't Leap: The International Law Commission and Its Work on International Watercourses

David D. Caron†

The draft articles contained in Part VI of the International Law Commission's Draft Rules on the Non-Navigational Uses of International Watercourses, ably considered in detail by Dr. Vinogradov elsewhere in this Colloquium issue,<sup>1</sup> are in my view quite lacking. To some extent, my concern over this Part stems from an appreciation for the articles proposed by the special rapporteur, but not adopted by the Commission. I must also admit, however, that the shortcomings I perceive in Part VI did not come as a surprise, given the framework in which the effort was undertaken. One should not expect too much from the International Law Commission (ILC), given its institutional place and view of itself.<sup>2</sup> Nonetheless, even beginning with modest expectations, I believe the ILC has been too timid in its efforts regarding Part VI. It can be argued with much force that it is not for the ILC to take leaps ahead. However, in my view the timidity of the ILC in Part VI suggests that if one entrusts the Commission with topics in rapidly changing areas of international law, such as the environment, the issue that arises is not that the Commission will refuse to leap ahead of practice, but rather that the Commission will not even leap so as to keep up with practice. These concerns are not a criticism of my advisor and friend, Professor McCaffrey, the special rapporteur on this topic. To the contrary, I have only the highest regard for him and have profited repeatedly from

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1. Sergei V. Vinogradov, *Observations on the International Law Commission's Draft Rules on the Non-Navigational Uses of International Watercourses: "Management and Domestic Remedies,"* 3 COLO. J. INT'L ENVTL. L. & POL'Y 235 (1992).

2. For an important recent study of the Commission, see I. SINCLAIR, *THE INTERNATIONAL LAW COMMISSION* (1987). See also B. RAMCHARAN, *THE INTERNATIONAL LAW COMMISSION* (1977); R. JENNINGS, *Recent Developments in the International Law Commission: Its Relation to the Sources of International Law*, 13 INT'L & COMP. L. Q. 385 (1964); S. ROSENNE, *The International Law Commission, 1949-59*, 36 BRIT. Y.B. INT'L L. 104 (1960); and J. STONE, *On the Vocation of the International Law Commission*, 57 COLUM. L. REV. 16 (1957).

his doctoral thesis and subsequent writings addressing the central issues in Part VI.<sup>3</sup>

In the following brief comments, I focus on two particular and related aspects of Part VI, joint management mechanisms (presently addressed by article 26) and dispute resolution mechanisms (presently addressed by article 32). My comments do this in two steps. First, I consider two objectives served by these aspects of Part VI and lay out a thought-experiment about drafting that suggests why the articles in Part VI are crucial and a central area in which leaps are taken in practice. Second, I examine and evaluate articles 26 and 32, as proposed and adopted, in terms of the observations made in the first section.

### I. CODIFICATION, LAWMAKING, AND LEAPFROGGING

If we ask what Part VI of the Draft Rules on Non-Navigational Uses of International Watercourses should provide, and why it should so provide, we are led to confront the mission of the ILC to codify and progressively develop international law, and the question posed by Carol Anne Petsonk in this Colloquium: "How are these draft articles affected by leapfrogging innovations such as tradeable emissions?"<sup>4</sup> The central observation ultimately required is that if one's task is limited to codifying the law in an area such as environmental protection, concurrent law-making efforts (whether formal or informal) likely will leapfrog that codification effort.<sup>5</sup>

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3. Professor McCaffrey's 1974 dissertation presented to the Faculty of Law at the University of Cologne was published as *Pollution Suits Between Citizens of the Republic of Mexico and the United States: A Comparative Study in Private International Law* (1976). See also STEPHEN C. McCAFFREY, *PRIVATE REMEDIES FOR TRANSFRONTIER ENVIRONMENTAL DISTURBANCES* (1975); Stephen C. McCaffrey, *Private Remedies for Transfrontier Pollution Damage in Canada and the United States: A Comparative Study*, 19 U. W. ONT. L. REV. 35 (1981); and Stephen C. McCaffrey, *Trans-Boundary Pollution Injuries; Jurisdictional Considerations in Private Litigation Between Canada and the United States*, 3 CAL. W. INT'L L.J. 191 (1973).

4. Panel Moderator Carol Anne Petsonk, in her introductory comments, said: The articles to be discussed in this panel, articles 5 through 19, raise difficult issues that will be referred to throughout the discussions today. As I thought about these issues and their ramifications for international law of watercourses, I kept encountering an animal that pops up more and more in international watercourses. That animal is the leapfrog. It seems to me that developments in international law generally and with respect to specific applications regarding international watercourses are leapfrogging the more regularized development of principles through the International Law Commission. This is the twenty-fifth anniversary of the Helsinki Rules. We have 17 years of development of the watercourse topic in the ILC, but events in other aspects of international law, and in particular, consideration of individual watercourses, are rapidly outpacing those.

5. It is, of course, also possible that a codification effort will channel or inhibit other law-making efforts. See, e.g., World Bank Operational Manual, Operational Directive 7.50: Projects on International Waterways (Sept. 18, 1989) (incorporating concepts from the ILC's

As regards what Part VI in particular should provide, two objectives may be said to be served by joint management mechanisms and dispute settlement procedures. The first is implementation of the substantive regime set forth in other articles; the second, alteration of the underlying social and political reality. The following section discusses these objectives, and in doing so seeks to demonstrate why the functions served by articles 26 and 32 are important, and consequently why the shortcomings perceived in these articles are particularly troubling.

### A. *The Objective of Implementation*

When thinking of implementation in environmental and natural-resource treaties, two sets of disputes settlement procedures are quite frequently employed.<sup>6</sup> First, there are procedures aimed at resolving disputes between the states party as to the proper interpretation, application and execution of the treaty. Second, there often is provision for private remedies, such as that undertaken only tentatively by article 32 in the Draft Rules.<sup>7</sup> The second set of dispute resolution procedures is very important in that it allows what are essentially private disputes to be handled at the lower municipal level of the courts of the contracting states. In essence,

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draft work on international watercourses). The author was made aware of the World Bank's practice by Professor McCaffrey in a Seminar on the Law of International Watercourses he presented on March 30, 1990 at the Annual Meeting of the American Society of International Law in Washington, D.C. See also David D. Caron, *Attribution Amidst Revolution: The Experience of the Iran-United States Claims Tribunal*, PROCEEDINGS, 84TH ANNUAL MEETING OF THE AMERICAN SOCIETY OF INTERNATIONAL LAW 64, 71 (1991) ("I thought the Tribunal might provide a rigorous test of the ILC's ambitious attempt to codify past precedents concerning attribution. . . . In a strange, yet not wholly unpredictable way, the ILC draft appears to have stifled the Tribunal's ability to elaborate upon and fashion new rules. . .").

In this regard, it is perhaps noteworthy that the Secretariat of the Preparatory Committee for the United Nations Conference on Environment and Development, when circulating the ILC's Draft Rules on International Watercourses, stated that the "Working Group may wish to take [the ILC work] into account when examining possible areas for the further development of international environmental law." Preparatory Committee for the United Nations Conference on Environment and Development, *Development of Legal Instruments for Transboundary Waters*, ¶ 9, U. N. Doc. A/Conf.151/PC/79 (1991).

6. See generally David D. Caron, *Liability for Transnational Pollution Arising from Offshore Oil Development: A Methodological Approach*, 10 *ECOLOGY L.Q.* 641 (1984); and C. Cooper, *The Management of International Environmental Disputes in the Context of Canada-United States Relations: A Survey and Evaluation of Techniques and Mechanisms*, 25 *CAN. Y.B. INT'L L.* 247 (1987). As to rivers in particular, see B. R. CHAUHAN, *SETTLEMENT OF INTERNATIONAL WATER LAW DISPUTES IN INTERNATIONAL DRAINAGE BASINS* (1981); Charles B. Bourne, *Mediation, Conciliation and Adjudication in the Settlement of International Drainage Basin Disputes*, 9 *CAN. Y.B. INT'L L.* 114 (1971); Robert Stein, *The Settlement of Environmental Disputes: Towards a System of Flexible Dispute Settlement*, 12 *SYRACUSE J. INT'L L. & COMM.* 283 (1985); and Nina Glickman, Note, *Keep Your Pollution to Yourself: Institutions for Regulating Transboundary Pollution and the United States-Mexico Approach*, 25 *VIR. J. INT'L L.* 693 (1985).

7. See, e.g., International Convention on Civil Liability for Oil Pollution Damage, Nov. 29, 1969, 26 *U.S.T.* 765, T.I.A.S. No. 8068, reprinted in 9 *I.L.M.* 45 (1970).

implementation occurs through the public international law facilitation of private transnational dispute resolution.

The interstate dispute settlement procedures are nonetheless important both for those obligations that require States to establish such a regime of private facilitation and for those more fundamental obligations between the States party that may be difficult to push down to the more private level. For example, the obligations in article 5 to utilize the river "in an equitable and reasonable manner . . . with a view to attaining optimal utilization thereof" require interstate dispute resolution procedures if these obligations are to be taken seriously. As Professor McCaffrey noted earlier in the Colloquium, dispute resolution procedures for such obligations are particularly important because the obligations otherwise remain "soft" both in terms of what precisely is required and in the sense that compliance with the obligation is apparently not taken seriously.<sup>8</sup>

When this Colloquium broke for lunch, I overheard an economist remarking how the many "factors and circumstances" enumerated in article 6 are quite fuzzy, and he wondered by what process hard number values were to be placed on such considerations. A philosopher, of course, would have informed him (1) that even when values are placed on such circumstances, there will be an indeterminacy to any decision because article 6 requires a "taking into account [of] all relevant factors and circumstances;" (2) that such vagueness in the process of decision making creates a range of a "valid" judgments; and, as a consequence, (3) that the decision is both unpredictable and virtually unreviewable.<sup>9</sup> As Judge Schwebel, concurring in the Judgment of the Chamber in the Gulf of Maine case, stated:

Despite the extent of the difference between the line of delimitation which the Chamber has drawn and the line my analysis produces, I have voted for the Chamber's Judgment. I have done so not only because I am generally in agreement with its reasoning but because I recognize that the factors which have given rise to the difference between the lines are open to more than one legally - and certainly equitably - plausible interpretation. . . . On a question such as this, the law is more plastic than formed, and elements of judgment, of appreciation of competing legal and equitable consideration, are dominant. . . . While I am

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8. As to the dimensions of "softness," see W. Michael Reisman, *A Hard Look at Soft Law*, PROCEEDINGS 82ND ANNUAL MEETING AMER. SOC. INT'L L. 373 (1988).

9. Chief among these reasons [for draft articles regarding dispute settlement] is the general and flexible nature of some of the most fundamental provisions of the draft articles . . . . The very same flexibility of these provisions that makes them so well-suited to a framework instrument on international watercourses may also make them difficult to apply with precision in some cases.

Stephen C. McCaffrey, *Addendum to Sixth Report on the Law of the Non-Navigational Uses of International Watercourses*, ¶ 40, U.N. Doc. No. A/CN.4/427/Add.1 (1990) [hereinafter *Addendum*].

convinced of the equity of my conclusion, nevertheless I am not prepared to maintain that the Chamber is necessarily wrong and that the line which its position on the test of proportionality has produced is inequitable.<sup>10</sup>

The fact that the structure of article 6 would lead a judicial decision to be unpredictable suggests that there should be a range of interstate mechanisms designed to facilitate resolution of the dispute *prior to* adjudication.<sup>11</sup> It must be remembered that states seek to avoid loss of control over their affairs, and that such loss of control occurs if they consent to a decision-making process the results of which they cannot predict. In this sense, Professor McCaffrey was wise in proposing a range of interstate mechanisms, such as fact-finding and joint management mechanisms. The ultimate threat of unpredictable judicial decision might lead states to utilize these cooperative mechanisms more fully.

### *B. The Objective of Altering the Social and Political Reality*

The second objective furthered by the establishment of joint management mechanisms and the facilitation of private dispute resolution is the direct alteration of the underlying political reality. This second objective is often overlooked.

Two references made earlier in the Colloquium set the framework for understanding and discussing this objective. First, Charles Bourne's article<sup>12</sup> cites a statement by Jens Evensen that the international law of watercourses follows from custom, treaties, and "from the very nature of things." From a consensual view of the sources of international law, this is quite a provocative statement. In that view, the nature of things would not be a source of international law, but rather a motivation for consent. In other words, the nature of things would be an important indicator of what the law should be. Presumably, over time, states presented with the possible courses of action dictated by the nature of things would consent to a regime adopting one of those courses. "Nice customs curtsy to great kings"<sup>13</sup> and, ultimately, to the nature of things.

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10. Concerning Delimitation of the Maritime Boundary in the Gulf of Maine Area, (Can. v. U.S.) 1984 I.C.J. 353, 357 (separate opinion of Judge Schwebel to Judgment of Oct. 12).

11. "[T]he operation of many of the provisions of the draft articles depends upon certain key facts. To the extent that the watercourse States concerned do not know or agree upon these facts, their legal obligations will not be clear." *Addendum, supra* note 9.

12. Charles B. Bourne, *The International Law Commission's Draft Articles on the Law of International Watercourses: Principles and Planned Measures*, 3 COLO. J. INT'L ENVTL. L. & POL'Y 65, 74 (1992) (citing to the statement of Jens Evensen).

13. WILLIAM SHAKESPEARE, *THE LIFE OF KING HENRY THE FIFTH*, act 5, sc. ii, line 260 (Alfred Harbage ed., 1969).

The second reference to recall is Ms. Xue's noting of Professor Lammers' treatise where she pointed out that, in thinking about international watercourses, one must remember there are two realities involved.<sup>14</sup> There is not only the nature of things (the physical reality), but also the political and social reality.

The relevance of recalling these two references can be seen in the following thought-experiment. Let us envision two groups drafting rules concerning international watercourses. On the one hand, Group A attempts to draft a set of rules operating within the given existing social and political reality. This effort would essentially be the process of codification inasmuch as custom follows from that social and political reality. As a gloss on this codification, Group A might raise the nature of things as suggesting certain modifications to previous customary practice. Indeed, the accommodation of custom with increased understanding of the nature of things appears to me to be precisely what happened in the case of the ILC's treatment of the watercourses topic. Over the past twenty years, as Professor Okidi has urged the ILC should do now,<sup>15</sup> the Commission "moved forward an inch," progressively developing international law in light of the increased understanding of the nature of things that resulted from the work of people such as Charles Bourne and Robert Hayton.

On the other hand, Group B attempts to draft a set of rules in two steps. First, a set of preferred rules (preferred from the standpoint of the international community) is prepared, given the nature of things and an assumed social and political reality. For example, Group B might inquire into what the law of a watercourse system should be if a single state encompassed the watercourse system. Second, once Group B arrived at the preferred set of rules, it would analyze the existing social and political reality and ask: (1) How might that existing social and political reality be altered to anticipate the preferred rules? and (2) How might the rules be scaled back to accommodate the existing social and political reality?

In essence, the distinction between Groups A and B becomes from where one starts the inquiry. One consequence of this difference lies at the heart of what Ms. Peterson referred to earlier as the leapfrogging problem.<sup>16</sup> If the ILC may be said to take the first approach, and nongovernmental organizations, for example, to take the second, the nongovernmental or-

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14. Xue Hanquin, *Relativity in International Water Law*, 3 COLO. J. INT'L ENVTL. L. & POL'Y 45, 46 (1992).

15. Charles Odidi Okidi, "Preservation and Protection" Under the 1991 ILC Draft Articles on the Law of International Watercourses, 3 COLO. J. INT'L ENVTL. L. & POL'Y 143 (1992).

16. See text, *supra* note 4.

ganization will think of developments that will leapfrog the ILC's work. Thus, in areas of change, the International Law Commission is fated to be seen as a frog that will not leap.

Having said this, it is important to return to the second task of Group B described above. Once Group B developed the preferred set of rules, given a single state, and then sought to adjust such rules back to a multistate basin by the insertion of boundaries, one must ask what is at the core of the change in the situation and therefore what is at the heart of the necessary adjustments.

Two essential changes occur in the single-state basin by the insertion of boundaries. First, authority becomes divided. Indeed, division of authority is what boundaries are all about. Second, but less necessary, the community of the basin becomes divided by such boundaries.<sup>17</sup> Given these changes, the question for Group B is: What can be done about the reality that boundaries divide both authority and community? My great disappointment over the shortcomings of the ILC draft articles on joint management and dispute settlement is that it is these articles, if any, that could work at altering the underlying political and social reality of division.

The dangers of division of authority, for example, are ameliorated by a joint management organization. Political decision making potentially becomes more of a shared process. How a community of interest may be attained despite a multiplicity of authority is a complex subject and, indeed, is exemplified by the history of Europe and is the hope and triumph of the European Community. In general, however, what is required is the low-level penetration and opening up of the divided communities. In particular, if boundaries are made permeable to all manner of cross-border relationships, in a sense, the perception of boundaries is reduced. Market innovations such as emissions tradings, referred to by Ms. Petsonk, can exist only if there is sufficient permeability of the border. An important first step in the process of low-level penetration of a border is not to distinguish between the citizen and the foreigner,<sup>18</sup> and to, as a consequence, provide non-discriminatory access to judicial and administrative procedures.

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17. It would seem to me that, although division of community could be, and often is, a policy of the authorities implicit around a boundary, this division need not be the policy of such authorities.

18. "Ye shall have one manner of law, as well for the stranger, as for one of your own country." Leviticus 24:22.



## II. PART VI AS ONE TOE IN THE WATER

### A. *Understanding Articles 26 and 32*

The objectives discussed in the first part of these comments are addressed by two articles in the Draft Rules. Article 26(1) addresses management of the international watercourse: "Watercourse States shall, at the request of any of them, enter into consultations concerning the management of an international watercourse, which may include the establishment of a joint management mechanism."<sup>19</sup>

Article 32 contains an obligation on state parties to grant non-discriminatory access:

Watercourse States shall not discriminate on the basis of nationality or residence in granting access to judicial and other procedures, in accordance with their legal system, to any natural or juridical person who has suffered appreciable harm as a result of an activity related to international watercourse or is exposed to a threat thereof.

Article 26 is discussed quite ably elsewhere in this Colloquium issue.<sup>20</sup> It can suffice here to reiterate that the obligation in article 26(1) is limited to entering into consultations regarding management.

The meaning of article 32 is more difficult to unravel. Uncovering this meaning perhaps can be best approached by assuming for a moment that these Draft Rules became a general framework treaty for international rivers and that this treaty included a general provision regarding the settlement of disputes. Let us further assume that a State party has alleged that another State party has violated article 32 by not granting non-discriminatory access. How would a judge decide whether the obligation had been breached?

First, it would be necessary to decide whether the person in question was someone entitled to non-discriminatory treatment under the article. In this vein, it is interesting to note that article 32 obliges the watercourse States to extend access to all persons regardless of their nationality or residence. Indeed, the person seeking access need not be a resident of a State in the watercourse system. The Commentary to the draft report thus

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19. *Draft Articles on the Non-Navigational Uses of International Watercourses: Draft Report of the International Law Commission*, U.N. GAOR, 43d Sess., at 1, U.N. Doc. A/CN.4/L.463/Add.4 (1991) [hereinafter *Draft Articles*]. Article 26(2) defines the term *management*.

20. See Vinogradov, *supra* note 1; see also Constance D. Hunt, *Implementation: Joint Institutional Management and Remedies in Domestic Tribunals (Articles 26-28 and 30-32)*, 3 COLO. J. INT'L ENVTL. L. & POL'Y 281, 284 (1992)

states that the obligation "would cover cases such as that of a foreign national who has suffered harm in the territory of the watercourse State in which the source of the harm was situated."<sup>21</sup> The all-encompassing scope of the obligation is important not only for the hypothetical case posited in the Commentary, but also in the sense of Professor James Wescoat's concerns.<sup>22</sup> In particular, the ability of persons outside of the watercourse system to gain access would help to accommodate broader ecosystemic concerns related to global climatic change or regional marine pollution, neither of which are formally within the treaty definition of the watercourse.<sup>23</sup> However, not every person is entitled to access. Rather, only those natural or juridical persons "who [have] suffered appreciable harm as a result of an activity related to an international watercourse or [are] exposed to a threat thereof" will be entitled to access.<sup>24</sup> Indeed, it is this harm or threat of harm that identifies the category of persons entitled to non-discriminatory access. Thus, it is important to see that this phrase, seemingly expansive, is in fact a limitation on those potentially entitled to access under the article.

Assuming that the person in question was entitled to non-discriminatory access, the second issue for the judge would be whether that person was or was not granted such access. This inquiry makes clear that article 32 contains what Professor Magraw has termed a "contextual obligation."<sup>25</sup> Gertrude Stein said of my home town, Oakland, "there is no there there." Article 32 is contextual in the sense that there is no guarantee that there is a there there. Thus, if the courts of the state to which the person is granted non-discriminatory access do not offer any relief, for example, for actual or potential injury suffered abroad, the obligation of article 32 nonetheless is fulfilled.

Equally curious is the observation that, as a matter of drafting, article 32 appears to oblige the state involved to grant non-discriminatory access *generally* for those persons injured or threatened with injury. Simul-

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21. *Draft Articles on the Non-Navigational Uses of International Watercourses and Commentaries Thereto, Provisionally Adopted on First Reading by the International Law Commission at its Forty-Third Session* (Sept. 1991) [hereinafter *Commentary*], art. 32, ¶ 3 at 180.

22. James L. Wescoat, Jr., *Beyond the River Basin: The Changing Geography of International Water Problems and International Watercourse Law*, 3 *COLO. J. INT'L ENVTL. L. & POL'Y* 301 (concerning extra-basin interests).

23. As to these broader concerns, see Preparatory Committee for the United Nations Conference on Environment and Development, *Protection of Oceans, All Kinds of Seas Including Enclosed and Semi-Enclosed Seas, Coastal Areas and the Protection, Rational Use and Development of their Living Resources*, U.N. Doc. A/Conf.151/PC/69 (1991).

24. *Draft Articles, supra* note 19, art. 32.

25. Daniel B. Magraw, *International Pollution, Economic Development, and Human Rights*, in *INTERNATIONAL LAW AND POLLUTION* 30, 40-43 (Daniel B. Magraw ed., 1991).

taneously, however, it appears clear that general access was not intended. For example, one would think that a person entitled to non-discriminatory access because the article 32 trigger of appreciable harm is satisfied does not thereby gain access by virtue of article 32 to judicial or administrative proceedings *unrelated* to the watercourse system. Indeed, the Commentary suggests that the phrase that identifies those persons entitled to non-discriminatory access also defines the scope of judicial and administrative proceedings to which access will be granted.<sup>26</sup> Importantly, the use of the appreciable harm phrase to define the scope of access results in quite broad access. Article 32 provides that access shall be granted to judicial and other procedures that bear on claims relating to the suffering of appreciable harm “as a result of an activity related to an international watercourse” or to interests that are exposed to a threat of such harm. The judicial question consequently becomes what is an activity related to an international watercourse. To my mind, this would be an expansive class including not only the operation of installations such as floodgates, but also questions of effluents from cities and factories, or pesticide runoff from farms. Thus, the scope of what one is granted non-discriminatory access to (in theory) potentially reaches the outer limits of the definitional debate surrounding the watercourse system.

*B. Evaluating Articles 26 & 32 in Light of the Objectives of Implementation and Alteration of the Underlying Social and Political Reality*

Articles 26 and 32 bring to mind for me the image of a swimmer putting one toe in the water for fear of its being cold. Crucial to the strength of these rules, the articles unfortunately represent a timid and modest step. This is particularly so given the well-reasoned articles proposed by the special rapporteur.

The softness and thinness of articles 26 and 32 do little to ensure either implementation or alteration of the underlying social and political reality. The indeterminacy of the obligations in articles 5 and 6 is not addressed by fact-finding, joint management, or interstate dispute settlement procedures. As a consequence, the Draft Rules are “soft,” and of reduced utility. Similarly, article 26 is only a tentative first step in ameliorating the division of authority implicit in a boundary. Certainly, Professor McCaffrey’s recommendations in this vein would have constituted a much more significant step.<sup>27</sup>

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26. *Commentary*, *supra* note 21, art. 32, ¶ 2 at 179.

27. Stephen C. McCaffrey, *Sixth Report on the Law of the Non-Navigational Uses of International Watercourses*, U.N. GAOR, 42d Sess., U.N. Doc. No. A/CN.4/427 Pt. I (1990).

As for article 32, it must be remembered that access is a necessary but not sufficient step. There should also be agreement as to the remedies a right of access makes available. In the case of the Group B style of drafting, article 32 would have not been contextual, but rather would have substantively identified what non-discriminatory access entails. Echoing article 235(2) of the 1982 Law of the Sea Convention, Professor McCaffrey's recommendation that each state is under an obligation to provide "a remedy" would be the minimally intrusive step required.<sup>28</sup>

To the degree that the contextual aspect of the obligation in article 32 reflected an appreciation of the wide gulf in contexts regarding rule of law around the world, I would suggest the Draft Rules allow alternative means of providing low-level penetration of boundaries, through either (1) non-discriminatory access to specified rights; or (2) the establishment of an ancillary facility associated with the joint management organization, open to all natural or juridical persons who have suffered appreciable harm as a result of an activity related to an international watercourse, or have been exposed to a threat thereof. Ultimately, although there are positive aspects to article 32 and ambiguities that potentially mediate its timidity, the contextual nature of the obligation remains very troubling.

### III. CONCLUSION

It cannot be easy for the International Law Commission to persuade states, never mind satisfy environmentalists, when working on a topic such as international watercourses, caught as it is between roles of codification and of progressive development. The answer perhaps, to paraphrase Aquinas, is that the Commission's task in its work "is to lead men to virtue not suddenly, but gradually."<sup>29</sup> Thus, our expectations must be limited. Unfortunately, even modest expectations are in my opinion unsatisfied by Part VI of the Draft Rules. I do not push against the ceiling of the Commission's role, but pull at the floor of its efforts.

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28. *Id.* at Part III (proposed art. 3 "Recourse Under Domestic Law").

29. THOMAS AQUINAS, *SUMMA THEOLOGICAL*, I-II, 96, 2.

