

**Background Paper**

**Harmonisation of  
The Convention on the Law of the Non-  
Navigational Uses of International  
Watercourses  
And  
The Protocol on Shared Water Systems in the  
Southern African Development Community**

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## Background Paper

# Harmonisation of the Convention on the Law of the Non-Navigational Uses of International Watercourses And The Protocol on Shared Water Systems in the Southern African Development Community Region

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# 1. Introduction

## 1.1 Objectives for Harmonisation of Provisions of the Convention and the Protocol

The United Nations Convention on the Law of the Non-Navigational Use of International Watercourses (the Convention) urges all watercourse states to harmonise their existing interstate water management agreements with the basic principles of the Convention. But in terms of the Convention, it is not imperative for watercourse states to do so.

The Convention is intended as a framework agreement setting certain minimum standards which states may apply or adjust to the particular conditions and characteristics of a specific watercourse. Article 3(1) of the Convention explicitly provides that existing transboundary agreements such as the Protocol on Shared Water Systems in the Southern African Development Community (SADC) region (the Protocol) are not affected unless the parties decide otherwise. In the case of future watercourse agreements, watercourse states are not confined merely to implementing the provisions of the Convention; they are entitled to regulate the utilisation, protection, cooperation or management of a watercourse in consonance with the particular circumstances. In the Report of the Sixth Committee to the General Assembly on its work in elaborating a Convention, the chairman took note of the following statement in this regard: “the 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, unless such agreements provide otherwise.

However, a framework agreement is not merely a prototype document which a state may choose to apply or incorporate in future agreements as it wishes. Unless watercourse states which are parties to the Convention decide otherwise in future watercourse agreements, the provisions of the Convention, once in force, will be binding on them and their actions will be illegal if binding treaty obligations are not complied with.

Thus it is in the interests of the SADC members to consider harmonisation of their agreements with the Convention. *The three most compelling reasons for the Harmonisation process* are the following:

1. to avoid irreconcilable differences between obligations incumbent on watercourse states in terms of the Convention and the Protocol for those SADC states who are parties to both agreements, and for which both agreements have come into force, especially in those instances where it is not clearly indicated that the parties to the Protocol have decided to deviate from the obligations under the Convention. One possibility would be to overlook subtle disparities in obligations under the Convention and the Protocol as a result of differences in the wording of the two documents or differences in the terminology used;
2. to tap into the result of the invaluable work done by the International Law Commission (ILC) over almost two decades in establishing draft articles on this subject as well as the intense debate

among the representatives of a large number of states in the Working Group of the Whole of the Sixth Committee over a period of five weeks to elaborate the ILC draft articles into the Convention; and

3. to comply with the obligations under the Convention to harmonise future watercourse agreements with the basic principles of the Convention.

The harmonisation of the provisions of the Convention and the SADC Protocol is therefore not so much a matter of legal obligation but rather of legal prudence. Practical convenience and the avoidance of disparities in the expectations of parties with regard to their legal position as well as avoiding the possibility of disputes arising, are all advantages which could flow from such an undertaking.

*The objective of harmonisation is not to incorporate the Convention wholesale into the Protocol, but rather the approximation of the two documents.* The extent of approximation is governed by the need to achieve such a level of compatibility among, or coherence of, basic objectives, principles and practices that no irreconcilable differences with regard to such objectives, basic principles or practices prevail.

The idea is not to stifle innovative developments with regard to international watercourses in the SADC context, but to take account of the diverse characteristics and uses of the particular watercourses in the region. In this regard, during SADC meetings it has been contended time and time again that the SADC states should not be precluded from regulating their affairs in the manner they think best, and with a view to accommodating the particular circumstances prevailing in the region.

On the other hand, the incorporation of provisions of the Convention into the Protocol cannot be faulted. Because it is uncertain if or when the Convention may come into force, the incorporation of similar provisions into the Protocol has the effect of already establishing binding obligations with regard to those aspects of the Convention for states in the SADC region.

## **1.2 The Development and Nature of the Convention and the SADC Protocol**

### **1.2.1 The Convention**

In 1970 the General Assembly of the United Nations recommended that the ILC “take up the study of the law of the non-navigational uses of international watercourses with a view to its progressive development and codification.” The work on this topic actually commenced in 1974 and, despite several changes in the position of special rapporteur on the subject, the work progressed steadily. Five special rapporteurs produced a large number of reports, each containing numerous draft articles on particular aspects of the topic. In 1991 the ILC adopted a set of articles on this topic on first reading. During its forty-sixth session in 1994 a set of 33 articles were adopted on second reading.

During a period of five weeks (7 to 25 October 1996 and 24 March to 4 April 1997) the Working Group of the Whole of the Sixth Committee of the General Assembly of the United Nations discussed

the draft articles with a view to elaborating them into a convention. On the last day allotted to the Working Group, 4 April 1997, it succeeded in adopting a final text of the Convention on the Law of the Non-Navigational Uses of International Watercourses. The following SADC states voted in favour of the text: Malawi, Mozambique, Namibia, South Africa, and Zimbabwe. Lesotho abstained, and the following states were absent: Angola, Botswana, Congo, Mauritius and Swaziland. Tanzania made its opposition to the draft Convention clear.

This text, and the report of the Working Group of the Whole, were transmitted to the General Assembly for its consideration. The General Assembly considered the matter on 21 May 1997, and the resolution on this matter was adopted with 103 votes in favour, three against and 27 abstentions. The Secretary-General was requested to act as depository of the Convention, and both states and regional economic organisations were invited to become parties to it. Of the SADC states, Tanzania abstained and Swaziland and Zimbabwe were absent. The remainder voted in favour of the formal resolution of the General Assembly on adopting the Convention.

### **1.2.2 The SADC Protocol**

The Protocol on Shared Watercourse Systems in the SADC Region was signed on 28 August 1995 by the Heads of State or Government and opened for signature by the SADC Member States. At Present, 10 of the 11 preambular Member States have signed the Protocol; Angola is the exception. The Protocol enters into force 30 days after the ratification by two thirds of the Member States. A sufficient number of the Member States have now ratified the Protocol with the result that it has come into force.

The SADC countries have taken note of the ILC draft Articles as well as the developments with regard to the adoption of the Convention. Large parts of the original Protocol on Shared Watercourse Systems have been premised on the text of the draft articles of the ILC. The SADC states have in the meantime become aware of the fact that it may be necessary to conduct an incisive investigation with regard to the relationship between these two documents. Furthermore, a number of SADC states have become dissatisfied with the manner in which some matters are addressed in the Protocol.

A first round of comments of Member States were discussed at a workshop in Manzini, Swaziland on 21 and 22 April 1998. A second round, focussing on the relationship between the Protocol and the Convention, was conducted during the SADC Shared Watercourse Protocol Amendments Workshop held in Ezulwini, Swaziland from 17 to 21 August 1998.

It appears that if the proposed amendments agreed to by the representatives at the Ezulwini Workshop should eventually be accepted by the SADC states, the original Protocol may undergo such a transformation that it would constitute almost a whole new document. Unfortunately, no consolidated text incorporating all the proposed amendments, appropriately re-numbered, exists at this stage.

For purposes of this study, the original Protocol will hereafter be referred to as “Protocol I,” and the Protocol which may result after the process of amendment, acceptance and eventual ratification, has taken its course, as “Protocol II.” As stated above, a complicating factor remains the numbering of

the provisions of this amended Protocol in the making and the manner in which they should be referred to.

## **2. A General Comparison Between the Convention and the Protocol**

The Convention is the outcome of nearly two decades of discussions in the ILC and the Sixth Committee of the General Assembly. The Convention is envisaged to apply globally as a framework agreement, the provisions of which may be applied and adjusted in accordance with the particular circumstances by states concluding “watercourse agreements” on a bilateral or multilateral basis.

The Convention consists of 37 articles arranged in seven parts: Part I, Introduction (Articles 1-4); Part II, General Principles (Articles 5-10); Part III, Planned Measures (Articles 11-19); Part IV, Protection, Preservation and Management (Articles 20-26); Part V, Harmful Conditions and Emergency Situations (Articles 27-28); Part VI, Miscellaneous Provisions (including the settlement of disputes) (Articles 29-33); and Part VII, Final Clauses (Articles 34-37).

Part II, entitled “General Principles,” may be regarded as the substantive core of the draft. Four salient principles emerge: equitable and reasonable utilisation and apportionment of the available water among watercourse states (Article 5); the obligation of watercourse states not to cause significant harm (Article 7) or significant environmental harm (Article 21); the general obligation to cooperate (Article 8); and the obligation to exchange data and information on a regular basis (Article 9).

The Convention further sets a procedural framework for “planned measures” and the manner and time frame in which notice of such measures should be given by the watercourse state planning the measures to the other watercourse states concerned, as well as the manner and time frame for responses by the latter. The procedure is elaborated in a fairly detailed manner, with fixed time periods allotted for action and reaction of the watercourse states concerned. The Convention further provides for elaborate conflict resolution mechanisms.

Protocol I was clearly not intended to treat the equivalent range of matters covered in the Convention, and even where the same or similar issues were addressed, these were not dealt with in the same manner and detail as in the Convention. Some of the aspects addressed in the drafts of the ILC were included in Protocol I, but in a rather eclectic manner.

The one aspect which perhaps sets Protocol I apart from other watercourse instruments on this level is the way in which the management of watercourses is dealt with. Management of shared watercourse systems is given much more attention in Protocol I than in similar international instruments, and has been elevated to a level of commitment not easily attained elsewhere.

Protocol II is something different. Notice has been taken of the provisions of the Convention, and quite a number of these provisions have been incorporated. In some cases the provisions have even been expanded and, in the view of this author, strengthened. One may perhaps venture to claim that the Ezulwini Session has contributed largely to the process of harmonising the two documents.

The main bone of contention at this stage relates to the question as to whether or not the drainage basin or the international watercourse should be taken as the geographical unit of regulation. It is well known that for most of the twenty years the ILC worked on this subject, countries aligned themselves for or against the drainage basin approach. It appears that the solution arrived at by the ILC, after such a protracted period of time, and its eventual inclusion in the Convention, is still not acceptable to some of the SADC states, especially Mozambique and Angola. This has rekindled the debate among the SADC states on this subject. The matter could not be resolved at the Ezulwini meeting, and at this stage the proposed text reflects both terms in the alternative.

A number of SADC states argued that the Convention has taken us beyond the drainage basin approach, and that the style and terminology of the Convention should be followed in the Protocol with the result that the concurrent use of different terminology such as “basin” and “basin state,” “riparian state” and “watercourse” and “watercourse state” in a rather haphazard manner, should be avoided unless compelling circumstances dictate otherwise, and then only in specific provisions where such usage would be appropriate.

### **3. A Detailed Comparison Between the Provisions of the Convention and of the Protocol**

#### **3.1 Overview**

In order to assess the extent to which the Convention and the Protocol have already been harmonised, and the extent to which harmonisation is still required, a more detailed comparison of the provisions of the two instruments is necessary. The provisions of the Convention will be used as the point of departure, and the provisions of the Protocol will then be examined to establish the extent to which they differ or diverge from those of the Convention. For convenience, the provisions will be grouped under sub-headings dealing with various aspects.

#### **3.2 Introductory Provisions**

Article 1 of the Convention defines its scope by indicating that it deals with all uses with the exception of navigation. The articles are intended to apply to international watercourses, covering the use of their waters in the broadest sense as well as conservation measures and management. Navigational uses are, however, excluded except in so far as other uses affect navigation or are affected by navigation.

Protocol I does not contain a separate provision in this regard, but article 2(1) includes a provision on the utilisation of the resources of a watercourse. It takes a more positive route and provides that “the utilisation of the watercourse system shall include agricultural, domestic, industrial, and navigational uses.” Protocol II adds “environmental uses.”

Article 2 defines terms. In a few instances additional definitions are to be found in other articles dealing with specific matters. This article contains only definitions of four terms: “watercourse,” “international watercourse,” “watercourse state” and “regional economic organisation.”

Article 1 of Protocol I deals with the interpretation of terms, and the large number of terms defined immediately becomes apparent. No less than 14 definitions are included. Protocol II adds another four definitions. One detects a tendency to insist, perhaps too lightly, on the definition of terminology, which in some instances does not really assist in a better comprehension of the term used.

Instead of the consistent use of the terms “watercourse” and “watercourse state” as in the Convention, the Protocol includes definitions of “basin,” “basin state,” “drainage basin,” “riparian land,” “riparian state,” “shared watercourse system,” “watercourse state” and “watercourse system.” Some SADC states have contended that this potpourri of terms is confusing, and therefore undesirable. It was therefore proposed by these states that the style adopted in the Convention be followed. Mozambique, with the support of Angola, insisted on the use of the terms “basin” and “basin state.” As discussed above, the Ezulwini Meeting could not resolve the differences between these divergent views.

### **3.3 The Relationship Between the Convention and the Protocol Regarding Existing and Future Agreements Between the States Concerned**

The matter of watercourse states concluding future agreements among themselves with regard to a shared watercourse is addressed in Articles 13 and 14 of Protocol I. Without defining “existing agreements,” the first part of Article 13 appears to be similar to the provisions of Article 3(1) of the Convention: existing agreements are not derogated from, or agreements in force for a state are not affected by, the provisions of the Protocol or Convention respectively.

Article 3(2) of the Convention is more in the form of a recommendation to watercourse states to consider harmonising such agreements with the basic principles of the Convention. The second part of Article 13 of the Protocol appears to place a stronger obligation on such states: states should endeavour to give effect to such agreements in conformity with the general principles in Article 2 of the Protocol.

Article 3(3) of the Convention regulates the relationship between the provisions of the Convention and subsequent agreements between the watercourse states concerned: such watercourse agreements may “apply and adjust” the provisions of the convention to the characteristics and uses of the particular watercourse or part thereof. In the Report of the Sixth Committee to the General Assembly, the chairman took note of the following statement in this regard: “the present Convention will serve as a guideline for future agreements and, once such agreements are concluded, it will not alter the rights and obligations provided therein, unless such agreements provide otherwise.”

Article 14 of Protocol I, which deals with the relationship between the provisions of the Protocol and agreements afterwards concluded between watercourse states, was deleted at the Ezulwini session. General international law in this regard prescribes that unless the parties decide otherwise, the provisions of the most recent treaty will have priority. It would perhaps be advisable to leave it to the SADC Member States to structure their bilateral or multilateral watercourse agreements among themselves as they see fit, taking into account the circumstances of each case and the uses and characteristics of each watercourse. Two possible wordings are suggested:

State Parties may enter into one or more agreements, hereafter referred to as “watercourse agreements,” and the rights and obligations of the parties to such agreements shall not be affected by the provisions of the Protocol, unless such agreements provide otherwise.

or

State parties may enter into one or more agreements, hereafter referred to as “watercourse agreements,” which apply, adjust or modify the provisions of the Protocol to the characteristics and uses of a particular international watercourse or part thereof.

Articles 3(4) to (6) of the Convention deal with the effect of watercourse agreements on watercourse states which are not parties thereto. Whether the Protocol requires such detailed regulation may be a matter of speculation.

Article 4 of the Convention continues along the same line: the relationship of watercourse states with regard to watercourse agreements which they are not party to. Again, the Protocol does not contain provisions of a similar nature, and again one could speculate on the wisdom of including all this detail in the Protocol; after all, the intention can never be to have two almost identical documents.

## **3.4 General Principles**

### **3.4.1 Equitable and Reasonable Utilisation and Participation**

Article 5(1) of the Convention States what some regard as the basic maxim of the law relating to international watercourses: equitable and reasonable utilisation of an international watercourse. Article 2(7) of Protocol I contains a similar provision.

Article 5(2) of the Convention attempts to place the use, development and protection of international watercourses in the broader perspective of the commonality of interests of all the states involved. Article 2(1) of the Protocol includes this theme as well.

Article 6 of the Convention contains a non-exhaustive list of factors which could facilitate the determination of what constitutes “equitable and reasonable utilisation.” Article 2(8) of Protocol I contains identical wording except for the cross-reference to related provisions. Protocol II has taken over Article 6(3) of the Convention verbatim. The provisions of Article 6(2), of the Convention providing for consultations between the watercourse states concerned in the application of the principle of equitable and reasonable utilisation, as well as the factors determining such utilisation, have not been included in the Protocol.

### **3.4.2 The No-harm Principle**

Article 7 of the Convention lays down the obligation not to cause significant harm in utilising an international watercourse. The relationship between the principle of equitable utilisation and the obligation not to cause harm remained a contentious issue for quite some time during the gestation period of the draft articles, and it proved to be a hard nut to crack even during the deliberations and drafting process in the Working Group of the Sixth Committee. The provisions of Article 7, and the relationship between these provisions and those of Article 5 on equitable and reasonable utilisation, remained with up to the end of the work of the Committee of the Whole of the Sixth Committee one of the most contentious issues which eventually could not be resolved without resorting to voting on the issue.

The provisions of Article 2(11)(a) and (b) of Protocol II are now identical to those of Article 7 of the Convention, except for the cross-reference to related provisions. From the report of the Ezulwini

meeting it appears that it is accepted in the SADC context that the need exists “to maintain a proper balance between equitable utilisation and the obligation not to cause harm.” It was however decided that the concept of “significant harm” should be defined, and consequently the following definition was added in Article 1 of the Protocol on the “Interpretation of Terms”: “Significant harm” means non-trivial harm capable of being established by objective evidence without necessarily rising to the level of being substantial.” Whether such a definition really adds anything substantial to the understanding of the concept may be debatable. From the work of the ILC, it appears that the line of tolerance lies between these extremes: “significant harm” is that which is not insignificant, or barely detectable, but is not necessarily “serious.”<sup>1</sup>

### **3.4.3 The Obligation to Cooperate**

By the terms of Article 9(1) of the Convention, watercourse states have the general duty to exchange readily available data and information on the condition of the watercourse and in particular on a non-exhaustive list of matters. On request, a watercourse states have the duty to employ their best efforts to collect and process data and information in a manner which facilitates their utilisation by other watercourse states to which they are communicated (Article 9(3)).

The Protocol merely provides that watercourse states must exchange “available” information and data with regard to the specific matters also listed in Article 9(1) of the Convention with the omission of “related forecasts.” The matters provided for in Articles 9(2) and 9(3) of the Convention are not included in the Protocol.

### **3.5 Relationship Between Different Uses**

Article 10 of the Convention regulates the relationship between different kinds of uses to the effect that in principle no use enjoys inherent priority over other uses. A conflict between uses has to be resolved with reference to the principle of equitable and reasonable utilisation and the no-harm principle (Article 10(2)).

Protocol II in Article 2(2) merely lists the different uses: “The utilisation of resources of the watercourse system shall include agriculture [agricultural], domestic, industrial and environmental uses.” Domestic use is defined to mean “use of water for drinking, washing, cooking, bathing, sanitation and stock watering purposes.”

### **3.6 Planned Measures**

Part III of the Convention on Planned Measures comprises Articles 11 to 19. It was resolved at the Ezulwini meeting to incorporate Articles 11 to 18 of the Convention into the Protocol.

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<sup>1</sup> Report of the International Law Commission on the work of its Fortieth Session, *Yearbook of the International Law Commission*, 1988, Vol II Part Two, 36.

Article 19 of the Convention regulates the urgent implementation of planned measures; the Protocol contains an article of a similar import, although worded slightly differently. Article 19 of the Convention makes such implementation subject to the principles of equitable and reasonable utilisation and the no-harm principle. The requirement for prompt consultation and negotiation at the request of the other watercourse states, as provided for in Article 19(3), is omitted in the Protocol.

### **3.7 Protection and Preservation of Watercourses**

Articles 20 to 24 of the Convention provide for the protection and preservation of the environment. Most of these aspects are now incorporated in the Protocol, although the definition of “*pollution*” in Article 21(1) of the Convention has not been taken over.

The Protocol in fact enhances environmental protection by adding a provision requiring an environmental impact assessment before a watercourse state implements, or allows the implementation of, any significant water project, programme or plan.

The Protocol specifically addresses the balance between development and environmental protection: “Watercourse States shall maintain a proper balance between resource development for a higher standard of living for their people and conservation and enhancement of the environment to promote sustainable development.”

The Protocol also imposes an obligation on participating states to require persons intending to discharge any type of waste into the waters of a watercourse first to obtain a permit or other similar authorisation from the relevant authority within the state concerned. The state shall grant the permit only after it has determined that the discharge will not have a detrimental effect on the regime of the watercourse.

The provisions of Article 7(2) of the Convention, suitably amended, have been added to the provisions in Protocol II with regard to environmental protection: if significant environmental harm is caused, the state causing such harm is now specifically placed under the obligation to take all appropriate measures to eliminate or mitigate such harm and, where appropriate, to discuss the question of compensation.

### 3.8 Management

It has been stated above that the one thing which sets Protocol I apart from other similar watercourse instruments is perhaps the way in which the management of watercourses is dealt with. Management of shared watercourse systems is given much more attention in the Protocol than in similar international instruments, and it has been elevated to a level of commitment not easily attained elsewhere.

For example, the member states are placed under the obligation to establish appropriate institutions and, more specifically, to establish a SADC “Monitoring Unit,” River Basin Commissions between Basin States” and “River Authorities or Boards in respect of each drainage basin.”<sup>2</sup> Protocol I further sets out the objectives and functions of these management institutions in two separate articles.<sup>3</sup> Unfortunately these objectives and functions are stated in general terms for all of the institutions without differentiating between the distinctive elements which could be attributed to each of them. The objectives with regard to shared watercourse systems are stated as follows:<sup>4</sup>

- to develop a monitoring policy;
- to promote the equitable utilisation thereof;
- to formulate strategies for development; and
- to monitor the execution of integrated water resource development plans.

Having regard to present developments in the SADC context, the Protocol is perhaps even a bit overly optimistic with regard to the functions allocated to these management institutions. The salient aspects are:<sup>5</sup>

- harmonisation of national water resources policies and legislation and the monitoring of compliance therewith;
- collecting, reviewing and studying data and information
- recommending the regulation of flow and drainage of shared watercourse systems;
- monitoring the utilisation for agriculture, domestic, and industrial purposes, as well as the establishment of hydro-electric installations and the generation of such power;
- promoting measures for environmental protection and the prevention of environmental degradation;

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2 Article 3(a) and (b) of the Protocol.

3 Articles 4 and 5 of the Protocol.

4 Article 4 of the Protocol.

5 Article 5 of the Protocol.

- promoting environmental impact assessments of development projects;
- monitoring water quality; and
- promoting a hydrometeorological monitoring programme.

Management aspects received a great deal of attention at the Ezulwini meeting, and the provisions in this respect have been elaborated by incorporating the terms of reference which have recently been established for the Water Sector. Firstly, the objectives for cooperation with respect to shared watercourses are set out. Secondly, the different institutions constituting the Water Sector are listed:

- a) the Committee of Water Ministers;
- b) the Committee of Water Senior Officials;
- c) the Sector Coordinating Unit; and
- d) the Water Resources Technical Committee and Sub-Committees.

Thirdly, the functions which each of these institutions fulfil are spelled out in detail.

### **3.9 Regulation and Installations**

Articles 25 and 26 of the Convention contain provisions relating to water regulation and water installations respectively. The Protocol does not address these issues in any specific provision.

### **3.10 Harmful Conditions**

Article 27 of the Convention deals with the prevention and mitigation of harmful conditions. The Protocol does not contain a similar provision.

### **3.11 Emergency Situations**

Article 28 of the Convention proceeds to regulate the prevention and mitigation of harmful conditions that take the form of emergency situations. The definition of “Emergency Situation” is contained in Article 1 of the Protocol on the interpretation of terms, and deviates only slightly from the definition in Article 28(1) of the Convention; “torrential rains” has been added as one of the causes of such situations and “the breaking of ice” has been excluded. “Industrial accidents” as an example of human conduct in this regard has also been excluded. Protocol II only contains the obligation to notify other potentially affected watercourse states and international organisations, adding in particular the SADC Water Sector Unit. The obligations to prevent, mitigate or eliminate the harmful effects of the

emergency as provided for in Article 28(3) of the Convention, and the obligation to develop contingency plans where appropriate with other watercourse states, are not included in the Protocol.

### **3.12 Armed Conflict**

Article 29 of the Convention regulates the position of international watercourses and installations in time of armed conflict. The wording of the Protocol may be slightly different, but the impact remains more or less the same: “Shared watercourses and related installations, facilities and other works shall be used exclusively for peaceful purposes consonant with the principles enshrined in the Treaty and in the charter of the United Nations and shall be inviolable in time of international as well as internal conflicts.”

### **3.13 Indirect Procedures**

The provisions of Article 30 of the Convention with regard to indirect procedures in the event of serious obstacles to direct contact between watercourse states are not included in the Protocol. The omission is perhaps obvious due to the fact that we are dealing with states within a regional development community.

### **3.14 Data and Information Vital to National Defense and Security**

Article 31 of the Convention provides for the non-disclosure of data and information vital to national defense or security. No such provision has been included in the Protocol.

### **3.15 Non-Discrimination**

The provisions of Article 32 of the Convention dealing with non-discrimination have now also been incorporated into Protocol II.

### **3.16 Settlement of Disputes**

Article 33 of the Convention provides for alternative means for resolving disputes between watercourse states, beginning with negotiation between the parties concerned and followed, where necessary, by non-binding third party procedures such as good offices, mediation or conciliation. The emphasis is on settlement by means of a compulsory, but non-binding, process involving a fact-finding commission. Participating states may, however, when ratifying, approving or acceding to the Convention, accept as compulsory a duty to submit disputes for binding decision either to the International Court of Justice (ICJ), or alternatively to arbitration.

This procedure is only applicable “in the absence of an applicable agreement between them [states].” The Protocol specifies that disputes which cannot be settled amicably shall be referred to the SADC Tribunal for adjudication under Article 16(1) of the Treaty of SADC. Decisions by this Tribunal are final and binding on the parties concerned. Unfortunately, the Tribunal has not yet been established. Provision is also made for an advisory opinion by the Tribunal if a dispute arises between SADC and a member state.

## **4. Conclusions and Recommendations**

If the amendments agreed to by the government representatives at the Ezulwini meeting are approved and eventually ratified by the SADC Member States, a strong case can be made that the Protocol has to a substantial degree been harmonised with the provisions of the Convention. Indeed, in some instances the provisions of the Convention which have been taken over have even been enhanced and strengthened.

Agreement on some aspects remain to be achieved, of which the debate on the basin/watercourse issue appears to be the most significant, and also of considerable relevance to the whole process of harmonisation. It may be necessary to prepare a separate document on this issue.

It is clear that at least one further meeting of government representatives of the SADC states would be required to bring the current amending process to conclusion. As stated above, no consolidated text of the Protocol incorporating the proposed amendments exists at this stage. In some instances the proposed amendments require editorial attention. The Ezulwini meeting produced such a large number of amendments and additions that the whole structure of the Protocol has become distorted. A wide range of issues has been added to Article 2, although they are clearly unsuitable for inclusion in an article dealing with “principles.” Incorporating the provisions of the Convention on “planned measures” would certainly require inserting a whole new section in the Protocol. All in all, a significant restructuring of the Protocol provisions is clearly indicated by the Protocol amendments discussed and agreed at Ezulwini.

**Appendix A**

**A Protocol on Shared Water Systems in the Southern  
African Development Community Region**

**Appendix B**

**United Nations Convention on the Law of the  
Non-Navigational Uses of International Watercourses**