The International Watercourse: An Exploitable Resource For The Developing Nation Under International Law?

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Water. Most of it is found in the ocean as salt water. Only 2.7% is fresh water with over 77% of it found in the polar icecaps or glaciers. Twenty two percent of the fresh water is groundwater found in subterranean aquifers, while only .36% is surface water. The remaining .04% is atmospheric in a gaseous state. It is hard to imagine that .36% of 2.7% is the source of so much controversy between the developed world and the developing world.[1]

I. INTRODUCTION

International law does not forbid a developing country from exploiting an international watercourse, despite lofty commentary otherwise. Although it has been suggested that international law imposes a mandatory duty of reasonable and equitable use of a watercourse, this is not so. A developing nation must be allowed to exploit an international watercourse[2] to the utmost within the prescribed rules of international law. Grounded in the right of self-determination,[3] a developing nation has the undisputed right of

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1 Julio Barberis, *The Development of International Law of Transboundary Groundwater*, 31 NAT. RES. J. 167, 167-68 (1991).

2 As used herein, the terms "watercourse" and "river" are used synonymously.

3 U.N. CHARTER art. 55(a), 1 U.N.T.S. xvi, [1976] Y.B. U.N. 1043, 59 Stat. 1031, T.S. No. 993, 3 Bevans 1153; *see also* Rio Declaration on Environment and Development, Principle 2, June 13, 1992, U.N. Doc. A/CONF.151/5/Rev. 1 (vol. I 1992), *reprinted in* 31 I.L.M. 874, 876; Declaration of the United Nations Conference on the Human Environment, June 16, 1972, Principle 21, U.N. Doc. A/CONF. 48/14, *reprinted in* 11 I.L.M. 1416, 1420 (1972) ("States have, in accordance with the Charter of the United Nations and the principle of international law, the sovereign right to exploit their own resources pursuant to their own environmental policies, and the responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other States or of areas beyond the limits of national jurisdiction."). *See also* Art. 1(1), International Covenant on Eco-

permanent sovereignty over its natural resources, including international watercourses and,[4] as such, a right of exploitation. Respect for international environmental law is of little concern to a developing nation since the lesser developed nations will not abide by current ambiguous international law adverse to their own developmental and sovereignty policies. Taming a watercourse is a catalyst for evolutionary societal progression[5] and it behooves a developing nation to act consistently with development, not necessarily with respect for the international environment. The only constraint is that the development of the watercourse cannot significantly damage other nations.[6] Since under-development is the linchpin for developing nations, the development of watercourses supersedes environmental concerns.[7] Today, the most effective regulation of the use of an international watercourse will only oc-

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nomic, Social and Cultural Rights, *opened for signature* Dec. 16, 1966, 993 U.N.T.S. 3 (entered into force Jan. 3, 1976), *reprinted in* 6 I.L.M. 360 (1966) ("All peoples have the right of self-determination. By virtue of that right, they freely determine their political status and freely pursue their economic, social, and cultural development.").

[4] Art. 1(1), Declaration on the Right to Development, G.A. Res. 41/128, U.N. GAOR, 41st Sess., Annex, Supp. No. 53, at 186, U.N. Doc. A/41/53 (1987); *see also* Art. 28, Universal Declaration of Human Rights, G.A. Res. 217A (III), U.N. GAOR, 3d Sess., U.N. Doc. A/810 (1948); Phillip R. Trimble, *International Law, World Order, and Critical Legal Studies*, 42 STAN. L. REV. 811, 833 (1990) ("the basic rule of international law is that a state generally has the exclusive authority to regulate conduct within its territory.").

[5] Eyal Benvenisti, *Collective Action in the Utilization of Shared Freshwater: The Challenges of International Water Resource Law*, 90 AM. J. INT'L L. 384, 385 (1996) ("In all great ancient societies, Sumer and Assyria in Mesopotamia, Pharaonic Egypt, the Inca Empire of Peru, and China & India, the taming of rivers was the catalyst of their evolution.").

[6] Trail Smelter Arbitration (U.S. v. Can.) 3 R.I.A.A. 1905, 1938 (1949) *reprinted in* BASIC DOCUMENTS IN INTERNATIONAL LAW AND WORLD ORDER, 358-59 (Burns Weston et al., 2nd Ed. 1990); *see also* Declaration of the United Nations Conference on the Human Environment, *supra* note 4; Susan H. Bragdon, *National Sovereignty and Global Environmental Responsibility: Can the Tension be Reconciled for the Conservation of Biological Diversity?*, 33 HARV. INT'L L. J. 381-392 (1992).

[7] Rio Declaration on Environment and Development, June 13, 1992, Principle 3, U.N. Doc. A/CONF.151/5/Rev. 1 (vol. I 1992), *reprinted in* 31 I.L.M. 874, 877; Article 30, Charter of Economic Rights and Duties of States, G.A. Res. 3281, U.N. GAOR, 29th Sess., Supp. No. 31, at 50, U.N. Doc. A/9631 (1974), *reprinted in* 14 I.L.M. 251, 260 (1975); Art. 20(4), Convention of Biological Diversity, *reprinted in* 31 I.L.M. 818, 830-31 (1992)("The extent to which developing country Parties will effectively implement their commitments under this Convention will depend on the effective implementation by developed country Parties of their commitments under this Convention related to financial resources and transfer of technology and will take fully into account the fact that economic and social development and eradication of poverty are the first and overriding priorities of the developing country Parties."); *see also* Art. 4(7), Framework Convention on Climate Change, *reprinted in* 31 I.L.M. 849, 858 (1992).

cur through the creation of a joint commission between the nations affected or by an affirmative declaration that watercourse use is squarely within the scope of established international law.[8]

Any discussion must begin with a determination of the precise issue at stake. Intuitively, an international watercourse is one that either: (a) flows completely within one nation then traverses across the border to flow within a second nation; or (b) flows between two nations thereby having the watercourse form the international border between the two nations. The focus of this article will be on the former since it is more contentious today, and the applicability of any rules concerning the former also applies to the latter.[9]

Several examples of the international watercourse exist, such as the Oder, Danube, and Rhine in Europe; the Congo, Niger, Senegal, and Nile in Africa; the Columbia, St. Lawrence, and Niagara in North America; the Ganges, Indus, and Mekong in Asia; and the Amazon in South America. In all, there are approximately 200 large watercourse systems worldwide that two or more nations share.[10] The general uses of a watercourse include navigation, hydroelectric power, irrigation, agriculture, drinking, and recreation. Irrigation focuses on the volume of water distributed or drained from the watercourse, while navigation concerns the flow of water, namely speed, regularity, distance, smoothness, and direction, as well as the presence of obstructions such as rapids or waterfalls. It

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8 Another alternative, albeit not an attractive one, would be to encourage the interested nations to petition the International Court of Justice for intervention. The I.C.J. could then create an *ad hoc* special panel to resolve the dispute. Articles 92-96, Statute of International Court of Justice, 59 Stat. 1055 (1945), T.S. No. 993, 3 Bevans 1174-75. The I.C.J. recently affirmed its role in entertaining international environmental issues. Request for an Examination of the Situation in Accordance with Paragraph 63 of the Court's Judgment of 20 December 1974 in the Nuclear Tests (N. Z. v. Fr.), 1995 I.C.J. 288, 345 (Sept. 22) ("This Court, situated as it is at the apex of international tribunals, necessarily enjoys a position of special trust and responsibility in relation to the principles of environmental law, especially those relating to what is described in environmental law as the Global Commons. When a matter is brought before it which raises serious environmental issues of global importance, and a *prima facie* case is made out of the possibility of environmental damage, the Court is entitled to take into account the Environmental Impact Assessment principle in determining its preliminary approach.").

9 For example, the Madrid Declaration states that when a stream forms the frontier of two States, neither State may, on its own territory, utilize or allow the utilization of water in such a way as to seriously interfere with the utilization of the other State. *See* Para. 1, Madrid Declaration, 20 April 1911, 24 ANNUAIRE DE L'INSTITUT DE DROIT INTERNATIONALE 367 (1911).

10 P. Rogers, International River Basins: Pervasive Unidirectional Externalities, Paper Presented at the Conference on the Economics of the Transnational Commons, Universita di Siena, Italy, 25-27 (April 1991).

is hydroelectric power, irrigation, and drinking uses that are of paramount importance to developing nations.

Parts I and II of this Article introduce the concepts of international watercourses and include a primer on international law as it applies to the international watercourse. In addition, part II discusses the theories of sovereignty and territoriality concerning natural resource exploitation. Part III examines the sparse international environmental case law and demonstrates that the international law is lacking and fails to justify the imposition of non-binding, non-customary international law on the developing nation. Part IV examines the economics behind watercourse development and the desire for capital infusion by lesser developed nations, including the role of the World Bank as the premier lending institution to developing nations. Part V discusses the ineffectiveness of mandating environmental impact surveys concerning watercourse use because standards could never be achieved nor are required under international law. Part VI proposes the most practical solution for the creation of joint commissions. Finally, this article will conclude that international environmental law relating to international watercourses is too premature to impose binding obligations on the developing nation in light of sovereignty and the plain economics of the matter. However, pollution of the international watercourse and navigational uses are specifically excluded because the focus of this article is on current and future uses of a watercourse in and of itself, while pollution and navigation implicate a separate body of substantive watercourse law beyond the scope of this paper. In general, the law of freedom of navigation and pollution is pretty well-settled in conventional and case law,[11] while the

[11] *See, e.g.*, Trail Smelter Arbitration (U.S. v. Can.) 3 R.I.A.A. 1905, 1911 (1949) *reprinted in* BASIC DOCUMENTS IN INTERNATIONAL LAW AND WORLD ORDER, 358-59 (Burns Weston et al., 2nd Ed. 1990). In Trail Smelter, the case concerned the transboundary migration of noxious fumes from the smelter in Canada into the U.S. The Tribunal held that, "under the principles of international law, as well as the law of the United States, no State has the right to use or permit the use of its territory in such a manner as to cause injury by fumes in or to the territory of another or the properties or persons therein, when the case is of serious consequence and the injury is established by clear and convincing evidence." *Id.* at 1965. It is noteworthy that, while Trail Smelter is cited *ad nauseum* for the lofty proposition of State responsibility for environmental concerns, the oft-stated passage is only dictum. Furthermore, the passage specifically speaks to injury by fumes. Nowhere in the decision does the Tribunal discuss that the passage represents a well-settled principle of international law and most likely, the decision appears to rest completely on U.S. law. Therefore, dry recitation of the passage as some sweeping or categorical pro-

law concerning developmental uses of the international watercourse is not.[12]

II. A Primer on Public International Law

Throughout this article, the reader must be cognizant of international environmental dispute resolution and its mechanisms. This article speaks of dispute resolution as if one State complains against another in proceedings before the International Court of Justice (I.C.J.), also known as the World Court.[13] States may proceed before the I.C.J. either because an underlying treaty or convention between the competing States requires it, and thus invokes the compulsory jurisdiction clause of the I.C.J. Statute;[14] or may proceed *ad hoc* accepting the compulsory jurisdiction of the Court for that case.[15] In this regard, States may sue in the I.C.J. because:

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nouncement of international law is highly suspect. It is nothing more than a vain attempt to inculcate the wrong law.

12 There are several documents concerning pollution, such as the Single European Act, Art. 25, O.J. 169/1 (1987); Convention on the Protection of the Environment between Denmark, Finland, Norway, and Sweden, 1092 U.N.T.S. 279, *reprinted in* 13 I.L.M. 591 (1974); Montreal Agreement on the International Law Association Rules on International Law Applicable to Transfrontier Pollution, 60 I.L.A. 158 (1983); World Charter for Nature, G.A. Res. 37/7, U.N. GAOR, 37th Sess., Supp. No. 51, U.N. Doc. a/37/51 (1982), *reprinted in* 22 I.L.M. 455 (1983); *see also* Ludwik A. Teclaff and Eileen Teclaff, *Transboundary Ground Water Pollution*, 19 Nat. Res. J. 629 (1979). For a comprehensive table of international agreements concerning pollution of international agreements, see J. Lammers, Pollution of International Watercourses 124 (1984). Documents concerning navigation include the Law of the Seas Convention, U.N. A/Conf.62/122 (1982), *reprinted in* 21 I.L.M. 1261 (1982); Barcelona Convention and Statute on the Regime of Navigable Waterways of International Concern, 7 L.N.T.S. 37 (1921); International Commission for the Navigation of the River Congo, Hertslett, 17 Commercial Treaties 62 (1885) (establishing principle of freedom of navigation to African Rivers). Cases on freedom of navigation include Corfu Channel, (U.K. v. Albania), 1949 I.C.J. Rep. 4 (April 9).

13 The International Court of Justice can entertain international environmental conflicts. Sir Robert Jennings, *The Role of the International Court of Justice in the Development of International Environmental Protection Law*, 1 Rev. of Europ. Comm. & Int'l Env. L., 240-44 (1992).

14 Article 36(1), Statute of the International Court of Justice, 59 Stat. 1055, T.S. No. 993, 3 Bevans 1179 ("The jurisdiction of the Court comprises all cases which the parties refer to it and all matters specially provided for in the Charter of the United Nations or in treaties and conventions in force.").

15 Article 36(2), Statute of the International Court of Justice, 59 Stat. 1055, T.S. No. 993, 3 Bevans 1179 ("The states parties to the present Statute may at any time declare that they recognize as compulsory *ipso facto*... the jurisdiction of the Court in all legal disputes concerning: (a) the interpretation of a treaty; (b) any question of international law; (c) the existence of any fact, which if established, would constitute a breach of an international obligation; (d) the nature or extent of the reparation to be made for the breach of an international obligation.").

(a) a treaty between the States requires it; (b) a treaty between the States does not require it but the States choose the I.C.J. as the forum; or (c) no treaty exists between the parties but the States choose the I.C.J. as the forum. Regardless of the vehicle in which the suit is brought to the I.C.J., to determine how the I.C.J. would adjudicate such an international law matter, the sources of international law for the I.C.J. must be examined. These sources are contained in Article 38 of the I.C.J. Statute, which states that the Court must look to:

> a. international conventions, whether general or particular, establishing rules expressly recognized by the contesting states;
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> b. international custom, as evidence of a general practice accepted as law;
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> c. the general principles of law recognized by civilized nations;
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> d. subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.[16]

III. Sovereignty and Territoriality Principles As Applied to Natural Resource Exploitation

Against this inchoate backdrop, the development of international environmental law must be examined to see if it reflects any precedential or binding norms. Many United Nations documents espouse the international law that a State has permanent sovereignty over natural resources (PSONR) within its borders.[17] The

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[16] Article 38, Statute of the International Court of Justice, 59 Stat. 1055, T.S. No. 993, 3 Bevans 1179. Interestingly, the teachings of publicists (authors or scholars) are recognized as a valid source of authority. In *The Paquette Habana*, 175 U.S. 677, 700-01 (1900), the U.S. Supreme Court stated that "resort must be had. . . to the works of jurists and commentators, who by years of labor, research, and experience, have made themselves peculiarly well-acquainted with the subjects of which they treat. Such works are resorted to by judicial tribunals, not for speculations of their authors concerning what the law ought to be, but for the trustworthy evidence of what the law really is."

[17] Resolution on the Permanent Sovereignty Over Natural Resources, G.A. Res. 1803, U.N. GAOR, 17th Sess., U.N. Doc. A/5217 (1962), *reprinted in* 16 U.N.Y.B. 503, 2 I.L.M. 223 (1963); *reaffirmed in* Resolution on Permanent Sovereignty Over Natural Resources, 17 December 1973, G.A. Res. 3171, U.N. GAOR, 28th Sess., U.N. Doc. A/9030 (1974), *reprinted in* 13 I.L.M. 238 (1974); *see also* World Charter for Nature, October 28, 1982, Principle 22, G.A. Res. 37/7, U.N. GAOR, 37th Sess., Supp. No. 51, U.N. Doc. A/37/51, *reprinted in* 22 I.L.M. 455 (1983); Rio Declaration on Environment and Development, June

Resolutions, Covenants, and Declarations of the UN General Assembly may be a source of international law,[18] even though these documents do not compartmentalize neatly into one of the categories of Article 38 of the I.C.J. .[19] The general definition of PSONR is the inalienable right of each nation to fully exercise authority over its natural wealth and the correlative right to dispose of its resources fully and freely.[20] Under PSONR, a State is precluded from divesting itself of its sovereign rights over natural resources but may, by agreement, accept a partial limitation in particular areas for a specified period of time.[21]

The principle of PSONR enjoys, at a minimum, the status of customary international law since it stems from the right of devel-

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13, 1992, Principle 2, U.N. Doc. A/CONF.151/5/Rev. 1 (vol. I 1992), *reprinted in* 31 I.L.M. 874, 877 (1992).

18 Arguably, U.N. Resolutions, Covenants, and Declarations may not adequately represent international law. These documents often contain merely hortatory and aspirational desires rather than enunciating clear rules of law. To this end, States may sign various aspirational documents for many reasons, including negating a perception that the State is uncooperative, or that the intent of the document is to generally state aspirational resolutions without having the force of law. Therefore, a State signing a Resolution or the like may never intend that the provisions have the force of law. In effect, an aspirational document signed in unanimity may not have any force of law as each signatory may intend that it does not have any force. *See* "A Hard Look at Soft Law," Proceedings of the 82nd Annual Meeting of the American Society of International Law at Washington D.C., on 20-23 April 1988, pg. 371-395; *see also* W. Burhenne & M. Jahnke, INTERNATIONAL ENVIRONMENTAL SOFT LAW: COLLECTION OF RELEVANT INSTRUMENTS 304 (Nijhoff Kluwer Academic Press 1994). On the other hand, a State refusing to sign such a document still may be bound if the document purports to codify existing international law. For example, while South Africa failed to sign the Universal Declaration of Human Rights, G.A. Res. 217(III), U.N. GAOR, 3d Sess., U.N. Doc. A/810 (1948), many of its provisions codified existing international law, especially with regard to apartheid. South Africa also refused to sign the International Covenant on Civil and Political Rights, Dec. 16, 1966, 999 U.N.T.S. 171. Yet many signatories to the Covenant on Civil and Political Rights, such as Iran, Haiti, and most recently Yugoslavia, have deplorable records of respect for such rights. Furthermore, the Convention on the Prevention and Punishment of the Crime of Genocide, Dec. 9, 1948, 78 U.N.T.S. 277, finds no force in signatory States like Rwanda and Yugoslavia, two nations practicing genocide.

19 ROSALYN HIGGINS, THE DEVELOPMENT OF INTERNATIONAL LAW THROUGH THE POLITICAL ORGANS OF THE UNITED NATIONS (1963); Gabriel M. Wilner, *Filartiga v. Pena-Irala: Comments on Sources of Human Rights Law and Means of Redress for Violations of Human Rights*, 11 GA. J. INT'L & COMP. L. 317 (1981); *see also* Christopher C. Joyner, *UN General Assembly Resolutions and International Law: Rethinking the Contemporary Dynamics of Norm-Creation*, 11 CAL. W. INT'L L.J. 445, 458-59 (1981).

20 Resolution on Permanent Sovereignty Over Natural Resources, G.A. Res. 1803(XVII), U.N. GAOR, 17th Sess., U.N. Doc. A/5217 (1962), *reprinted in* 2 I.L.M. 223; Resolution on Permanent Sovereignty Over Natural Resources, G.A. Res. 3171, U.N. GAOR, 28th Sess., U.N. Doc. A/9030 (1974), *reprinted in* 13 I.L.M. 238.

21 *See* Texaco v. Libya Arbitration, 53 I.L.R. 389, 481-82 (1979).

opment.[22] The criteria for creating customary international law are: (a) widespread, consistent general practice of States; and (b) acceptance of this practice from a sense of legal obligation (*opinio juris*).[23] To this end, customary international law creates a binding obligation on all States because a sheer number of States follow such a principle out of a sense of legal obligation. Therefore, even a State that categorically rejected a principle of customary international law may yet be bound.

The principle of resource sovereignty may possess an even stronger right. It is undisputed that the right of development is the right of people to freely use and exploit their own natural resources and that this is in accord with the principles of the UN Charter.[24] Furthermore, since the right of development enjoys the status of *jus cogens*[25] (a peremptory norm) it follows that since the PSONR

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22 MOHAMMED HOSSAIN & SUBRATA CHOWDHURY, PERMANENT SOVEREIGNTY OVER NATURAL RESOURCES xi (1984).

23 *See* Military and Paramilitary Activities in Nicaragua (Nicar. v. U.S.), 1986 I.C.J. Rep. 14, 97, para. 183 (June 27) ("In view of this conclusion, the Court has next to consider what are the rules of customary international law applicable to the present dispute. For this purpose, it has to direct its attention to the practice and *opinio juris* of States; as the Court recently observed, 'It is of course axiomatic that the material of customary international law is to be looked for primarily in the actual practice and *opinio juris* of States, even though multilateral conventions may have an important role to play in recording and defining rules deriving from custom, or indeed in developing them.'"), citing Continental Shelf (Libyan Arab Jamahiriya/Malta), 1985 I.C.J. Rep. 29-30, para. 27 (June 3).

24 Military and Paramilitary Activities in Nicaragua (Nicar. v. U.S.), 1986 I.C.J. Rep. 14, 111 (June 27)("The basic legal concept of State sovereignty in customary international law, expressed in, *inter alia*, Article 2, paragraph 1, of the United Nations Charter, extends to the internal waters and territorial sea of every State and to the air space above its territory."); *see also* G.A. Res. 626 (VII), U.N. GAOR 7th Sess., Supp. No. 20, at 18; U.N. Doc. A/2361 (1952); Article 1, Declaration on the Right of Development, G.A. Res. 41/128, U.N. GAOR, 41st Sess., Supp. No. 53, U.N. Doc. A/41/53 (1988); Article 2, Charter of Economic Rights and Duties of States, G.A. Res. 3281 (XXIX), U.N. GAOR, 29th Sess., Supp. No. 31, U.N. Doc. A/9631, *reprinted in* 14 I.L.M. 251, 254-55 (1975); Article 2, 3, Rio Declaration on Environment and Development, 13 June 1992, U.N. Doc. A/Conf.151/5/ Rev. 1 (vol.I, 13 June 1992), *reprinted in* 31 I.L.M. 874 (1992).

25 *Jus cogens* is the concept that the espoused principle is so ingrained in international law that it is superior to customary and general principles of law. Also, it supersedes treaty provisions that conflict with the *jus cogens* principle. Application of the Convention on the Prevention and Punishment of the Crime of Genocide, (Bosnia and Herzegovina v. Yugoslavia), 1993 I.C.J. Rep. 325, 400, Par. 100 (September 13) (separate opinion of Lauterpacht, J.: "The concept of *jus cogens* operates as a concept superior to both customary international law and treaty."). States cannot agree in a treaty to circumvent a peremptory norm and the treaty is void. Article 53, Vienna Convention on the Law of Treaties, May 23, 1969, U.N. Doc. A/CONF. 39/27 (1969)("A treaty is void if, at the time of its conclusion, it conflicts with a preemptory [sic] norm of general international law. For the purposes of the present Convention, a peremptory norm of general international law is a norm

right sprouts from that right of development, it too enjoys the status of *jus cogens*. Once the right of general exploitation of a resource is found, the developing nation can exploit the watercourse since a watercourse qualifies as a resource.

Commensurate with the above discussion, one can examine the several alternative sovereignty theories in watercourse exploitation. They are as follows:

1. *Absolute Territorial Sovereignty*. This theory states that a nation may exploit the watercourse to any degree, changing water quantity, quality, or composition, without regard to its effects.[26] During negotiations with Mexico, Attorney General Judson Harmon of the United States coined the term "Harmon Doctrine" to reflect absolute sovereignty over the use of the Rio Grande.[27] This theory has fallen by the wayside for the developed nations but still finds residence in the developing nations.[28] Professor Schacter observed that no normative principle has been more vigorously asserted by the developing states than that of PSONR.[29] Should the international community attempt to prescribe a general rule restricting watercourse development, the developing state will retreat on PSONR to justify its non-compliance with international standards or decisions of international tribunals.[30]

At first glance, it appears that PSONR is exactly this principle. However, this is not the case because of differences between absolute and permanent sovereignty. Absolute sovereignty holds that any use of the watercourse must be permitted and that no evolving customary international law can bind the nation. The right is im-

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accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character."). *See also* Article 64, stating, "If a new peremptory norm of general international law emerges, any existing treaty which is in conflict with that norm becomes void and terminates." In reality, very few principles of law achieve the ultimate status of *jus cogens*.

26 ALEXANDRE KISS & DINAH SHELTON, INTERNATIONAL ENVIRONMENTAL LAW 119 (1991).

27 *Id.* at 120; *see also* 21 Op. Att'y Gen. 274-83 (1898).

28 KISS & SHELTON, *supra* note 27.

29 OSCAR SCHACTER, SHARING THE WORLD'S RESOURCES 124 (1977).

30 Military and Paramilitary Activities (Nicar. v. U.S.), 1986 I.C.J. Rep. 14, 106-108, para. 202 (June 27) ("The principle of non-intervention involves the right of every sovereign State to conduct its affairs without outside interference; though examples of trespass against this principle are not infrequent, the Court considers that it is part and parcel of customary international law. As the Court has observed: 'Between independent States, respect for territorial sovereignty is an essential foundation of international relations' and international law requires political integrity also to be respected.").

mutable. Permanent sovereignty, on the other hand, lends a certain measure of absolute sovereignty but yields eventually to established customary international law or new peremptory norms. Liability, therefore, attaches to a nation asserting PSONR if the nation breaches its treaty obligations, or if the I.C.J. renders an unfavorable decision against it, predicated on established law. Therefore, PSONR, deeply rooted in *jus cogens*, customary, or conventional international law, creates a rebuttable and reviewable presumption that nations can exploit their resources to the fullest extent possible. Any conflict concerning the degree of PSONR exercised can only be determined on a case by case basis.

2. *Absolute Territorial Integrity*. The principle of absolute territorial integrity holds that a lower riparian nation is entitled to the full flow of water without change in its composition, quality, or quantity.[31] The lower riparian, therefore, seeks restoration of the natural flow. Changes in the watercourse are considered a breach of the nation's boundaries. This theory cannot create customary international law because watercourse development of any type will alter water flow to some extent and absolute territoriality strictly prohibits any changes to water flow. Therefore, absolute territoriality would effectively prohibit all watercourse development by placing a burden on the upper riparian without placing an equivalent duty on the lower riparian State.[32] Neither developing nor developed nations would tolerate such a law.[33] However, some authors believe that the doctrine of absolute territorial integrity is viewed as a binding obligation under international law.[34]

3. *Limited Territorial Sovereignty and Integrity*. This is an amalgamation of the above two theories. Though it rejects both of the absolute principles it is not yet the community or reasonable principle discussed below. This theory posits that whatever a nation does to the watercourse cannot be done in an absolutist man-

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[31] William Griffith, *The Use of Waters of International Drainage Basins Under Customary International Law*, 53 AM. J. INT'L L. 50, 70 (1959) (citing LAUTERPACHT, OPPENHEIM'S INTERNATIONAL LAW: A TREATISE (8th ed. 1955)).

[32] James Moermond & Erickson Shirley, *A Survey of the International Law of Rivers*, 16 DENV. J. INT'L L. & POL'Y 139, 143 (1988).

[33] *Id.*

[34] *See* B. GODANA, AFRICA'S SHARED WATER RESOURCES 38-39 (1985) (citing SCHENKEL, DAS BADISCHE WASSERRECHT). Of course, the question arises whether Godana's views qualify as a "teaching of the most highly qualified publicist" under Article 38(1)(d) of the Statute of the International Court of Justice, 59 Stat. 1055, T.S. No. 993, 3 Bevans 1179.

ner. However, the nation still retains rights of territoriality and sovereignty albeit to a slightly diminished extent. One such example is the principle of prior appropriation. This theory does not, *ipso facto*, favor one State over another; rather, the State that first puts the watercourse to use creates a protectable right superseding those uses that come later in time.[35] Therefore, if an upper riparian State puts the watercourse to use first, then that State has an interest in the watercourse that supersedes a later use by the downstream riparian. On the other hand, if the lower riparian State uses the watercourse first, then the upper riparian State may not interfere with the lower riparian's use. The self-evident problem with this theory is that it rewards the first user to the detriment of the later user. If the first user is a developed country and the later user is a less developed country, then the less developed country cannot use the watercourse to further develop. The theory also fails to consider whether the first user conducted a thorough plan for water allocation or pollution control. This is different from the reasonable and equitable use principle discussed below, which mandates that certain factors be considered, because there are no obligatory factors used in the consideration.

4. *Community Resource.* In the community resource theory, the watercourse, watershed, and basin are treated as a unit and all riparians or contributors to the watershed have an interest in the watercourse use.[36] The community resource principle dispenses with any political boundaries and considers the watercourse as a unit for all to share equally.[37] Any use must be approved by all those affected in unanimity.[38] In reality, this theory will never become customary international law nor a principle of international law recognized by civilized nations despite its supporters[39] as it relies completely on mutual cooperation, a misplaced sense of altruism and, most importantly, wholly disregards sovereignty and territoriality. In fact, this approach is diametrically opposed to well-established customary and conventional law, such as PSONR,

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35 J. LAMMERS, POLLUTION OF INTERNATIONAL WATERCOURSES 364 (1984).

36 Ved Nanda, *Emerging Trends in the Use of International Law and Institutions for the Management of International Water Resources*, 6 DENV. J. INT'L L. & POL'Y 239, 258 (1976).

37 *Id.*

38 *Id.*

39 Joseph Dellapenna, *Surface Water in the Iberian Peninsula: An Opportunity for Cooperation or a Source of Conflict*, 59 TENN. L. REV. 803, 816-17 (1992).

self-determination, and sovereign equality.[40] Further, the theory encompasses the entire watershed basin, rather than just the watercourse. As such, it seeks to regulate more territory than permitted.[41]

5. *Reasonable and Equitable Use.* By and large the most popular theory, the theory of reasonable and equitable use holds that a nation may exploit a resource pursuant to its own developmental needs insofar that any use must be reasonable and equitable. This theory is the emerging trend and perhaps might, but has not yet, become unequivocal customary international law.[42] Recall that a principle becomes customary international law once adherence to it among States is widespread, consistent, and is accompanied by *opinio juris sive necessitatis,*[43] which is the conviction by a State that the principle is law and creates a binding obligation.

If the reasonable and equitable use theory is not customary international law then it certainly has not achieved the status of *jus*

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[40] The concept of sharing is contrary to the dominant principle of PSONR. *Report of the International Law Commission on the Work of Its 36th Session.*, 39 U.N. GAOR Supp., 39th Sess., Supp. No. 14, at 222-25, *reprinted in* U.N. Doc. A/39/10 (1984).

[41] The Convention on the Law of the Non-Navigational Uses Of International Watercourses of 1997 restricts itself to watercourses only. *See* Convention on the Law of the Non-Navigational Uses Of International Watercourses of 1997, G.A. Res. 51/229, U.N. GAOR, 51st Sess., U.N. Doc. A/51/869 (1997).

[42] The Permanent Court of International Justice (P.C.I.J.) recognized the community of interests theory in 1929. In particular, the Court stated, "[t]he community of interest in a navigable river becomes the basis of a common legal right, the essential features of which are the perfect equality of all riparian States in the user of the whole course of the river and the exclusion of [a] preferential privilege of any one riparian State in relation to the others." *See* Territorial Jurisdiction of the International Commission of the River Oder (Judgement No. 16), 1929 P.C.I.J. (ser. A) No. 23, at. 27. However, in the Gabcikovo-Nagymaros Dam case, the I.C.J. stated that the reasonable and equitable use theory has gained momentum in international law. The I.C.J. stated that "Czechoslovakia, by unilaterally assuming control of a shared resource, and thereby depriving Hungary of its right to an equitable and reasonable share of the natural resources of the Danube, with the continuing effects of the diversion of these waters on the ecology of the riparian area... failed to respect the proportionality which is required by international law." Case Concerning the Gabcikovo-Nagymaros Project (Hungary v. Slovak Republic), 25 Sept. 1997, *reprinted in* 37 I.L.M. 168, para. 85 (1998); *see also* Charles B. Bourne, *The Right to Utilize the Waters of International Rivers*, CAN. YB INT'L L. 187, 207 (1965); Lac Lanoux Arbitration (Spain v. France), 12 R.I.A.A. 281, 23 I.L.R. 101, 123 (1957); Trail Smelter Arbitration (U.S. v. Can.), 3 R.I.A.A. 1905 (1941); Corfu Channel (UK v. Albania), 1949 I.C.J. Rep. 4 (Dec. 15); Diversion of Water from the River Meuse (Neth. v. Belg.), 1937 P.C.I.J. (ser. A/B) No. 68.

[43] North Sea Continental Shelf (Germ. v. Den. & Neth.) 1969 I.C.J. 4, 251 (February 20); I. BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 4 (4th Ed. 1990).

cogens,[44] thereby supplanting the PSONR right. The right of PSONR and the reasonable and equitable use theories, however, are not mutually inconsistent. A nation can exercise full dominion over the watercourse yet consider its own use reasonable and equitable.[45] After all, what is perfectly reasonable to one may be wholly unreasonable to another.[46] Equitable utilization is an equality of rights, not an equality of shares in the water at issue.[47]

Many things must be considered in light of reasonable and equitable use. In 1966, the International Law Association completed the Helsinki Rules on the Uses of the Waters of International Rivers.[48] However, because the I.L.A. is an unofficial organization its resolutions are not legally binding unless adopted in conventions, treaties (either bilateral or multilateral), or unless the principles are followed as *opinio juris*.[49] Notwithstanding its non-binding character, the Helsinki Rules enumerate considerations such as:

> (1) the geography of the basin, extent of the drainage area in the territory of each basin State;

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[44] James T. McClymonds, Note, *The Human Right to a Healthy Environment: An International Legal Perspective*, 37 N.Y.L. SCH. L. REV. 583, 625 (1992).

[45] The degree of control in international river systems is largely determined by the location of the riparian states in relation to the watercourse, and the balance of power between the riparian states, whether this balance is military, economical or political. *See Guidelines for the Preparation of National Master Water Plans*, at 163, U.N. Pub. E.899.II.F.17, (ISBN 92-1-119549-7); *Institutional Issues in the Management of International River Basins: Financial and Contractual Considerations*, at 111, U.N. Pub. E.87.II.A.16, (ISBN 92-1-104210-0); *Water Resources Planning To Meet Long Term Demand Guidelines For Developing Countries*, at 117, U.N. Pub. E.88.II.A.17, (ISBN 92-1-104301-8).

[46] Arguably, however, this statement is tempered by the general maxim of *sic utere tuo ut alienum non laedas*, which obligates a State not to permit its activities to impact the rights of another State. *See* Case Concerning the Gabcikovo-Nagymaros Project (Hungary v. Slovak Republic), 25 Sept. 1997, *reprinted in* 37 I.L.M. 168 (Herczegh, J., dissenting) (stating the principle, "Selon la maxime bien connue *sic utere tuo ut alienum non laedas*, nul ne peut utiliser son bien d'une manièère qui inflige des dommages significatifs à l'autre"). *See also* Corfu Channel (U.S. v. Alb.), 1949 I.C.J. 4, 244 (Dec. 15); Declaration of the United Nations Conference on the Human Environment, June 16, 1972, Principle 21, U.N. Doc. A/CONF. 48/14/Rev.1 (1972), *reprinted in* 11 I.L.M. 1416; Rio Declaration on Environment and Development, June 13, 1992, Principle 2, U.N. Doc. A/CONF.151/5/Rev. 1 (vol. I 1992), *reprinted in* 31 I.L.M. 874, 876.

[47] Stephen McCaffrey, *Second Report on the Law of the Non-Navigational Uses of International Watercourses*, [1986] 2 YB INT'L L. COMM., pt. 1, 103-05, 110ff; *see also Report of the International Law Commission to the General Assembly*, U.N. GAOR, 42nd Sess., Supp. No. 10, U.N. Doc. A/42/10, at 70 (1987).

[48] INTERNATIONAL LAW ASSOCIATION, *Helsinki Rules on the Uses of International Waters of International Rivers*, *in* REPORT OF THE FIFTY-SECOND CONFERENCE: HELSINKI, at 486 (1967).

[49] BABU RAN CHAUHAN, SETTLEMENT OF INTERNATIONAL WATER LAW DISPUTES IN INTERNATIONAL DRAINAGE BASINS 426 (1981).

(2) the hydrology of the basin, and the particular contributions of water by each State;
(3) the climate affecting the basin;
(4) the past uses of the basin, and especially the existing uses;
(5) the economic and social needs of each State;
(6) the population dependent on the basin in each State;
(7) the comparative costs of alternate means of satisfying the economic and social needs;
(8) the availability of other resources;
(9) the avoidance of unnecessary waste in the use of the waters;
(10) the practicability of compensating basin States for harms; and
(11) the degree to which the needs of the basin State may be satisfied without causing substantial injury to a co-basin State.[50]

In 1970, the U.N. General Assembly charged the International Law Commission, a group of thirty-four legal scholars nominated by the Assembly, to draft a convention concerning the non-navigational uses of watercourses.[51] In rejecting the Helsinki Rules concept of a "drainage basin" regulation as overly broad, the I.L.C. concentrated on the watercourse.[52] Further, the I.L.C. changed the magnitude of the harm stating that the damage should rise to a certain magnitude, and not a mere inconvenience or *de minimus* damage.[53] The threshold of harm was raised from "appreciable" harm to "significant" harm.[54] Likewise, the I.L.C. proposed several additional factors to consider in determining whether a particular use is reasonable and equitable.[55] In the I.L.C. Watercourse Convention, these factors include:

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[50] *Article 5, Helsinki Rules on the Uses of Waters of International Rivers, reprinted in* 52 INTERNATIONAL LAW ASSOCIATION REPORT OF THE FIFTY-SECOND CONFERENCE 484 (1966).

[51] G.A. Res. 2669, U.N. GAOR, 25th Sess., Supp. No. 28, at 127, U.N. Doc. A/8202 (1970).

[52] S. McCaffrey, *Current Developments: The Thirty-Fifth Session of the International Law Commission*, 78 AM. J. INT'L L. 457, 476 (1984).

[53] Barberis, *supra* note 2, at 170.

[54] Joseph Dellapenna, *Treaties as Instruments for Managing Internationally Shared Water Resources: Restricted Sovereignty vs. Community of Property*, 26 CASE W. RES. J. INT'L L. 27, 38 n.53 (1994).

[55] The U.N. General Assembly charged the I.L.C. under G.A. Res. 2669 (XXV) of Dec. 8, 1970. Throughout the course of its mandate, the I.L.C. published its reports, recommendations, and Special Rapporteur Reports. *See Special Rapporteur, Third Report on the Non-Navigational Uses of International Watercourses* U.N. Doc. A/CN.4/348 (1982) and Corr.1 (in YB of the I.L.C., 1982, v. II(1)); *see also* Report of the International Law Commission to the General Assembly, U.N. GAOR, 37th Sess., U.N. Doc A/37/10 (1982), chap. VII(A), para. 251 (discussing the general principles of equitable participation, equitable

(a) geographic, hydrographic, hydrological, climatic, ecological and other factors of a natural character;
(b) the social and economic needs of the watercourse States concerned;
(c) the population dependent on the watercourse in each watercourse State;
(d) the effects of the use or uses of the watercourses in one watercourse State on other watercourse States;
(e) existing and potential uses of the watercourse;
(f) conservation, protection, development and economy of use of the water resources of the watercourse and the costs of measures taken to that effect;
(g) the availability of alternatives, of comparable value, to a particular planned or existing use.[56]

Neither the Helsinki Rules nor the I.L.C. Convention provide adequate evidence of the existence of binding rules of international law since the rules themselves expressly respect the will of the parties.[57] This focus on subjectivity invites varying interpretations about the status of obligations, the binding or non-binding nature of the law, and in addition, the circumstances dictate what is unreasonable, harmful, and inequitable.[58] The Helsinki Rules have not reached the level of customary international law, nor do they pur-

use, appreciable harm, and responsibility); Report of the International Law Commission, A/8410/Rev.1 (A/26/10), 1971, chap. V(A), paras.119-122, YB of the I.L.C., 1971, v. II(1) (discussing the first report of the I.L.C.); Report of the International Law Commission to the General Assembly, U.N. GAOR, 37th Sess., Supp. No. 10, U.N. Doc. A/31/10 (1976), chap. V, paras.106-166, YB of the I.L.C., 1976, v. II(2) (discussing the formulation of general principles); Report of the International Law Commission to the General Assembly, U.N. GAOR, 49th Sess., Supp. No. 10, U.N. Doc. A/49/10 (1994), chap. III(B), par.219, YB of the I.L.C., 1994, v. II(2) (I.L.C. recommending adoption and transmittal to the General Assembly). The General Assembly adopted the Convention by General Assembly Resolution 51/229 on 21 May 1997. For an entire history of the Convention, see U.N. progress reports at <http://www.un.org/law/I.L.C./guide/8_3.htm.>.

[56] Convention on the Law of the Non-Navigational Uses Of International Watercourses of 1997, *adopted by* G.A. Res. 51/229, U.N. GAOR, 51st Sess., on 21 May 1997, U.N. Doc. A/51/869 (1997), *reprinted in* 36 I.L.M. 700 (1997); *see also Report of the International Law Commission: The Law of Non-Navigational Uses of International Watercourses*, U.N. GAOR, 49th Sess., at 231, U.N. Doc. A/49/10 Supp. No. 10 (1994).

[57] For discourse comparing the ILA Helsinki Rules with the I.L.C. Draft Rules, *see* Michelle Sargent, Note, *Comparison of the Helsinki Rules to the 1994 Draft Articles: Will The Progression of International Watercourse Law Be Dammed?*, 8 VILL. ENVTL. L. J. 435 (1997).

[58] Appreciable harm is harm that has some detrimental impact of some consequence upon the industry, the public health, property, agriculture, and the environment of another State. *See Report of the I.L.C. to the General Assembly on the Work of its Fortieth Session*, U.N. GAOR, 43rd Sess., Supp. No. 10, at 85, U.N. Doc. A/43/10 (1988).

port to.[59] Moreover, there is insufficient evidence to show widespread State practice, and no evidence indicating States feel bound to follow the Rules.[60] The Rules and the I.L.C. Convention, however, are a source of international law insofar as they are the teachings of highly publicized legal scholars and, therefore, under Article 38 of the I.C.J. Statute,[61] they indicate some international law.[62] Further, a negotiated but unratified treaty may be a potential source of international law.[63]

What is considered reasonable and equitable must be analyzed in light of the nation developing the watercourse. The reasonableness depends on the natural features of the watercourse whereas the equity depends on the circumstances surrounding the use of the watercourse.[64] These factors are best considered by the developing nation itself.[65] Since each watercourse has its own unique charac-

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59 Lisa M. Jacobs, Note, *Sharing the Gifts of the Nile*, 7 TEMP. INT'L & COMP. L.J. 95, 101 (1993). It should be noted that this author arguably may not be a highly publicized author within the meaning of Article 38 of the I.C.J. Statute.

60 *Id.*

61 Article 38, Statute of the International Court of Justice, 59 Stat. 1055, T.S. No. 993, 3 Bevans 1179.

62 Article 1, paragraph 1, of the Statute of the International Law Commission provides that the "[c]ommission shall have for its object the promotion of the progressive development of international law and its codification." Article 15 of the Statute makes a distinction "for convenience" between progressive development 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" and codification 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."

63 Restatement of Foreign Relations Law of the United States, section 102, comment f, states, "[a]n international agreement creates obligations binding between the parties under international law. . . Multilateral agreements, left open to all states, however, are increasingly used for general legislation, whether to make new law, as in human rights, or for codifying and developing customary law, as in the Vienna Convention on the Law of Treaties." *See also* D'Amato, *The Concept of Human Rights in International Law*, 82 COLUM. L. REV. 1110, 1138-39 (1982).

64 A. UTTON AND L. TECLAFF, TRANSBOUNDARY RESOURCES LAW 5 (Westview Special Studies Ed., 1987).

65 Domestic use of a river is a high priority since the community depends on it for survival. An expanding community increases its needs for water and thus its uses become even more higher in priority. In arid or semi-arid areas, water consumption becomes of paramount importance as no other viable means of sustenance may exist. *See Legal and Institutional Factors Affecting Implementation of the International Drinking Water Supply and Sanitation Decade* 54, U.N. Pub. E.87.A.3 (ISBN 92-1-104198-8); *Non-Conventional Water Resources Use in Developing Countries: Proceedings of the Interregional Seminar 515*, U.N. Pub. E.87.A.20 (ISBN 92-1-104214-3); *Use of Non-Conventional Water Resources*

teristics, it is unrealistic to proffer a coterie of rules that attempt to encompass the needs of all involved.[66]

To fully appreciate the interpretation of the I.L.C. Convention and whether it purports to represent customary law, it is necessary to examine the international law regarding convention and treaty interpretation.[67] In interpreting a treaty, the "intrinsic evidence," comprised of the treaty itself, any annexes, and any other relevant collateral treaty, must be examined[68] and the terms given their plain and ordinary meaning.[69] The only exception would be if the drafters were their own lexicographers and gave terms a special meaning, in which case fidelity is given to the defined term.[70] If the terms are clear and unambiguous, the interpretation process stops and the I.C.J. adjudicates the matter. Interestingly, despite a predilection to state in the preamble of the Convention the I.L.C.'s views of the existing customary law at the time, the plain language of the Convention's preamble does not purport to codify existing customary law.[71]

Generally, resort to the "legislative history" or *"travaux preparatoires"* of the treaty is impermissible under the Vienna Convention.[72] Only if the terms are ambiguous or lead to a manifestly absurd result should resort be made to the *travaux preparatoires*.[73] Furthermore, if the terms are ambiguous, the interpreter may resort to other supplemental materials such as the writings of scholars, customary international law, general principles of international law, testimony of experts, and other materials.[74] This text material is considered "extrinsic evidence," which is any material that is not intrinsic evidence as defined above. In inter-

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in Developing Countries, 278, Natural Resources/Water Series No. 14, U.N. Pub. E.84.II.A.14, (ISBN 92-1-104234-8).

66 BONAYA A. GODANA, AFRICA'S SHARED WATER RESOURCES 66 (1985).

67 *See* Vienna Convention on the Law of Treaties, May 23, 1969, U.N. Doc. A/CONF. 39/27 (1969).

68 Article 31(2), Vienna Convention on the Law of Treaties.

69 Article 31(1), Vienna Convention on the Law of Treaties ("1. A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of the object and purpose.").

70 Article 31(4), Vienna Convention on the Law of Treaties ("4. A special meaning shall be given to a term if it is established that the parties so intended.").

71 *Convention on the Law of the Non-Navigational Uses Of International Watercourses of 1997*, G.A. Res. 51/229, U.N. GAOR, 51st Sess., U.N. Doc. A/51/869 (1997), *reprinted in* 36 I.L.M. 700 (1997).

72 Article 31, Vienna Convention on the Law of Treaties.

73 Article 32, Vienna Convention on the Law of Treaties.

74 *Id.*

preting a treaty, one must examine the intrinsic evidence alone unless ambiguity exists,[75] in which case extrinsic evidence may be used.[76] Most of the I.L.C. reports to the General Assembly that speak to the I.L.C. Watercourse Convention progress may be of limited value since the Convention is now adopted and such reports would necessarily constitute excludable *travaux preparatoires*.

Therefore, a paradox exists. To this day, with few signatories to the Convention, non-signatory States obviously are not bound. However, in the event a dispute arises between non-signatory States, the I.C.J. may declare some international law binding on the non-signatory States. Since there is no common treaty between or among the States, the tribunal may look to the Convention, its history, and general international law for sources of law under Article 38 of the I.C.J. Statute. The I.C.J. therefore can use the *travaux preparatoires* to interpret the international law.

On the other hand, if the dispute arises between signatory countries, the I.C.J. must first look to the text of the treaty for interpretation, without recourse to the *travaux preparatoires* unless some patent ambiguity exists. Therefore, it is to the benefit of the State to not sign the Convention so many sources of international law can be consulted during dispute resolution. After all, if a State signs onto the Convention, it forfeits the *travaux preparatoires* as a viable source of interpretive jurisprudence. If it does not sign onto the Convention, the tribunal may, but is not obligated to, look to other sources, including the *travaux preparatoires*. Thus, no matter how examined, a non-signing State has more jurisprudence available to it. It becomes an intransigent position.

The only saving grace for treaty interpretation to rely on the *travaux preparatoires* is if the treaty codifies currently existing in-

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[75] *But see* Frankowska, *The Vienna Convention on the Law of Treaties Before United States Courts*, 28 VA. J. INT'L L. 281, 335 (1988) (stating that even though the Vienna Convention discourages resort to *travaux preparatoires*, American jurisprudence resorts to legislative history).

[76] Contrast the hostility to using *travaux preparatoires* with United States practice of examining the legislative history of a statute to understand the scope of the terms. *See* Shashank Upadhye, *Trademark Surveys: Identifying the Relevant Universe of Confused Consumers*, 8 FORDHAM INTELL. PROP. MEDIA & ENT. L. J. 549, 579 (1998) (criticizing courts that "fail to examine the legislative history to determine the scope and content of the words of the statute and fail to examine the legislative history to understand the policy and purpose of the statute"). *See also* Vincent Tassinari, *Patent Compensation Under §284*, 5, J. INTELL. PROP. L. 59 (1998) (providing an in-depth analysis of statutory construction, legislative history, and statutory term analysis).

ternational law. If the I.L.C. Convention purports to codify currently existing customary international law, then treaty and customary law can coexist according to the I.C.J.'s holding in the Nicaragua case.[77] The I.C.J. will apply both and the parties may therefore use the I.L.C. reports, even though it is *travaux preparatoires*, to color the interpretation of the plain meaning of the terms of the Convention if the I.L.C. reports represents relevant and existing customary international law. The crux of the use of *travaux preparatoires*, therefore, requires that the *travaux preparatoires* represent customary international law and that the customary law is clear. As will be shown throughout this article, the law is not clear and thus resort to the *travaux preparatoires* is misplaced.

Furthermore, while the I.C.J. on one occasion proclaimed that States must act with some modicum of respect to the environment,[78] the statement was made in the context of nuclear fallout from weapons testing rather than an unequivocal proclamation of customary international law regarding watercourse law. Despite the existence of watercourse controversies and opportunities to declare some customary international law, the closest the I.C.J. came to interpreting the I.L.C. Watercourse Convention was the recent case concerning the Gabcikovo-Nagymaros[79] in which the I.C.J. confused three different theories of watercourse use as defined above, and pronounced one theory as required by international law.[80] In full, the I.C.J. stated:

> In 1929, the Permanent Court of International Justice, with regard to navigation on the River Oder, stated as follows: '[the]

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[77] Military and Paramilitary Activities in Nicaragua (Nicar. v. U.S.), 1986 I.C.J. 14, 93-94, para. 175 (June 27) ("But in addition, even if a treaty norm and a customary norm relevant to the present dispute were to have exactly the same content, this would not be a reason for the Court to take the view that the operation of the treaty process must necessarily deprive the customary norm of its separate applicability.").

[78] "The environment is not an abstraction but represents the living space, the quality of life and the very health of human beings, including generations unborn. The existence of the general obligation of States of to ensure that activities within their jurisdiction and control respect the environment of other States or of areas beyond national control is now part of the corpus of international law relating to the environment." Legality of the Threat or Use of Nuclear Weapons, 1996 I.C.J. 227, 241-242, para. 29 (July 8).

[79] For a history of the case, *see* G. Eckstein, *Application of International Water Law to Transboundary Groundwater Resources, and the Slovak-Hungarian Dispute Over Gabcikovo-Nagymaros*, SUFFOLK TRANSNAT'L L. REV. 67 (1995).

[80] Case Concerning the Gabcikovo-Nagymaros Project (Hungary v. Slovak Republic), 25 Sept. 1997, *reprinted in* 37 I.L.M. 168, para. 85.

> community of interest in a navigable river becomes the basis of a common legal right, the essential features of which are the perfect equality of all riparian States in the user of the whole course of the river and the exclusion of any preferential privilege of any one riparian State in relation to the others.'
>
> Modern development of international law has strengthened this principle for non-navigational uses of international watercourses as well, as evidenced by the adoption of the Convention of 21 May 1997 on the Law of the Non-Navigational Uses of International Watercourses by the United Nations General Assembly.
>
> The Court considers that Czechoslovakia, by unilaterally assuming control of a shared resource, and thereby depriving Hungary of its right to an equitable and reasonable share of the natural resources of the Danube, with the continuing effects of the diversion of these waters on the ecology of the riparian area... failed to respect the proportionality which is required by international law.

In closely examining the reproduced text, the P.C.I.J.[81] adopted a community interest theory in the River Oder case. The I.C.J. characterized that right as more primitive to the trend identified in the Watercourse Convention, which is the reasonable and equitable use theory. The I.C.J. then stated that despite Hungary's deprivation of a reasonable and equitable use, the rule of law pronounced was one of simple proportionality. But in the next paragraph, the I.C.J. stated that Czechoslovakia's unilateral diversion was even more unauthorized as it failed to obtain Hungary's consent for the magnitude of the diversion.[82] It is anomalous to imply that the proportionality theory requires consent as the international delict occurs when a disproportionate use exists, regardless of whether consent was requested or not. This implies that the reasonable and equitable use theory requires consent. However, none of the factors in the Helsinki Rules nor in the I.L.C.'s Watercourse Convention speak to consent. Finally, the I.C.J. used the terms "reasonable" and "equitable" in interpreting the 1977 Treaty between Hungary and the then Czechoslovakian Republics. That is, the I.C.J. did not pronounce this theory in declaring some custom-

[81] The P.C.I.J. was the predecessor court to the I.C.J. The P.C.I.J. was the world court of the League of Nations, and lasted from 1922-1946. *See* http://www.icj-cij.org/icjwww/igeneralinformation/ibbook/Bbookframepage.htm.

[82] Case Concerning the Gabcikovo-Nagymaros Project (Hung v. Slovak Republic), 25 Sept. 1997, *reprinted in* 37 I.L.M. 168, para. 86.

ary international law, rather the Court interpreted the provisions of the Treaty. In essence, when faced with the opportunity to unravel the imbroglio, the Court failed to do so. But what is clear is that the I.C.J. did not declare the reasonable and equitable use theory to be customary international law, for it stated that the requirement of international law was proportionality. Therefore, the I.C.J. determined that proportionality was the key and did not refer to the I.L.C. Watercourse Convention as mandating the reasonable and equitable use theory.

In addition, other arguments exist to vitiate the factors stated in the I.L.C. Convention and the Helsinki Rules. In the situation where the two States at different levels of development share the watercourse, scrutiny must be given to the interests of the lesser developed State.[83] Although one factor of the equitable use theory may entail an integrated utilization approach, this approach may not be applicable where the States vary on the development levels.[84] In developing countries, a watercourse may have multiple uses, such as irrigation, hydroelectricity, and sustenance, and thus requires more deference to its uses before another State labels those uses as illegal under international law.[85] The multiple benefits may also spill over into the neighboring riparian States and thus the developing country's use becomes more acceptable as it furthers the goals of sustainable development.[86]

Another argument involves the geography of the developing nation. If the nation is land-locked, then its only source of utilizable water is the international watercourse. To this end, unitary use of the watercourse becomes highly favorable to the developing nation and international law supports its use.[87]

The importance and problems of pronouncing a statement of international law becomes evident in relation to the I.L.A. Helsinki Rules and the I.L.C. Watercourse Convention. First, when these documents were in the draft stage, the opinions of the legal schol-

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[83] Barberis, *supra* note 2, at 169-72, 175-78, 186 (arguing that shared water distribution amongst States is not a mathematical formula equating equal distribution of benefits, but rather requires an equitable distribution according to the needs of each State).

[84] J. BRUHACS, THE LAW OF NON-NAVIGATIONAL USES OF INTERNATIONAL WATERCOURSES 168 (1992).

[85] Ch. 2.5, Agenda 21, U.N. Doc. A/CONF. 151/26 (vols. I, II, III) (1992), *reprinted in* 31 I.L.M. 874 (1992).

[86] *Id.*

[87] Art. V(2)(h), Helsinki Rules on the Uses of the Waters of International Rivers, 52 I.L.A. 484 (1967).

ars working on the drafts could have represented persuasive opinions for the I.C.J. to consider under Article 38(1)(d).[88] While giving fidelity to the work of the scholars, they I.C.J. may be investigating the law as it should be (*lex ferenda*) as opposed to what the law is (*lex lata*).[89]

Second, the mere creation of a treaty does not, *ipso facto,* demonstrate any customary international law as there may be many countries that choose not to adopt the treaty, thus indicating anti-*opinio juris*.[90] Therefore, an attempt to codify customary international law is severely undermined by the lack of States' adopting those laws.[91]

Third, as States sign on to a treaty, litigants will likely argue that after some numerical threshold is reached, the treaty provisions squarely represent *opinio juris*. However, the issue of whether the numerical threshold is empirically acceptable and adequately represents the international community arises.[92] Further, the nature of State conduct must be examined to determine if it parallels the treaty provisions; if it does not, the widespread, consistent treaty practice that is necessary to establish customary international law will be undermined.[93] In essence, the mere presence

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[88] Article 38(1)(d), Statute of the International Court of Justice, 59 Stat. 1055, T.S. No. 993, 3 Bevans 1179.

[89] South West Africa, (Eth. v. S. Africa; Liber. v. S. Africa), 1966 I.C.J. 3, 34 (July 18) (demonstrating the distinction between law and morality). *See also* Marbury v. Madison, 5 U.S. (Cranch) 137, 177 (1803)("It is, emphatically . . . the duty of the judicial department to say what the law is."); Tassinari, *supra* note 77, *at* 123 (summarizing statutory and common law construction regarding restraint in creating law de novo rather than following the Courts' mandate of finding what the law is).

[90] Oscar Schachter, *The Emergence of International Environmental Law*, 44 J. INT'L AFF. 457, 462-63 (1991) (arguing that only fragmentary evidence exists of international environmental State practice: "Environmental treaties, though numerous, are limited in scope and in participation. On the whole, they are not accepted as expressions of customary law and are regarded as binding for the parties alone.").

[91] The I.L.C. Watercourse Convention was adopted by the U.N. General Assembly by a vote of 103 in favor, 3 (Turkey, China, and Burundi) against, and 27 abstentions. U.N.G.A. Press Release, G.A. GA/9248 (May 21, 1997). This shows that over 30 States (or 22.5% of the participating States) did not fully agree with the Convention and thus it is fair to say that *opinio juris* of its principles is lacking. In addition, comments in the Press Release demonstrate that even those States that voted in favor of the Convention had serious misgivings about its contents.

[92] Stephen Zamora, *Is There Customary International Economic Law?* 32 GERM. Y.B. INT'L LAW 9, 38 (1989) (noting that only the I.L.C., with its permanent session of armies of researchers could gather and sift through all the relevant evidence of customary international law to collect data sufficient to satisfy empiricists).

[93] Military and Paramilitary Activities in Nicaragua (Nicar. v. U.S.), 1986 I.C.J. 4, 98, para. 186 (June 27) ("The Court does not consider that, for a rule to be established as

of a treaty that is not yet in force clouds the issue of whether the treaty's provisions truly represent an attempted codification of customary international law as presented by legal scholars, or whether the provisions represent scholarly views that are predicated on inconsistent State practice.[94] Even Sir Robert Jennings, former Excellency of the I.C.J., commented that most of what is called customary international law is not only not customary, but does not even faintly resemble a customary law.[95] This is clear, for instance, in the Gabcikovo-Nagymaros Dam case, where the treaty between Hungary and the then Czechoslovakian Republic did not *ipso facto* displace any existing customary international law relating to watercourse use. The same applies to the I.L.C. Watercourse Convention since its codification does not purport to represent customary international law.

One final consideration in the I.L.C. Watercourse Convention concerns the standard applied to the equitable use. The central question becomes: is equity measured against whether the State's use is equitable in relation to the underlying activity; or measured in relation to the rights of the other riparian States? The Convention fails to answer this question, except that the terms of the Convention may require further explication by the international community.

In sum, the I.L.C. Watercourse Convention has yet to enter into force and its provisions do not clearly evidence a representation of customary international law. In a case squarely addressing the Convention, the I.C.J. did not declare the Convention's provisions to be binding principles of law and resorted to the 1977 Treaty for resolution. Since there is no express statement by high authorities that customary international environmental law exists, and express teachings indicate customary international environmental law does not exist, it likely does not. Only time will tell whether States will sign on to the treaty and then engage in conduct consistent with the proposed treaty provisions.

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customary, the corresponding practice must [be] in absolutely rigorous conformity with the rule.").

[94] Daniel Partan, *The Duty to Inform in International Environmental Law*, 6 B.U. INT'L L. J. 43, 51 (1988) (stating that the ILA determined a duty to inform as a matter of customary international law predicated only on seven examples of State practice).

[95] Robert Jennings, *The Identification of International Law*, *in* INTERNATIONAL LAW: TEACHING AND PRACTICE 3, 5 (Bin Cheng ed. 1982).

IV. Some International Environmental Case Law

Since the I.L.C. Watercourse Convention does not codify clear principles of international law, the I.C.J. can resort to international case law. If international case law mandates a reasonable and equitable use theory, then this theory represents customary law by virtue of *opinio juris*, rather than due to the I.L.C. Watercourse Convention. While international case law demonstrates the existence of international law, the international environmental case law is, at best, sparse. International case law exists by virtue of several scenarios. First, a breach of an existing treaty concerning a shared watercourse can leads to a suit. In this regard, the I.C.J. is well suited to entertain such a case and apply international law. Interpretation of the treaty by the I.C.J. may shed light on the existence of international law regarding the treaty. From thereon, the I.C.J. pronouncement will fall squarely within Article 38(1)(a) as a source of international law for others to follow.[96] This situation presented itself in the Gabcikovo-Nagymaros Case. A treaty attempting to codify a principle of customary international law does not extinguish the principle as a matter of customary international law once the treaty is signed by parties to the treaty.[97] That is, a treaty codifying a principle does not supplant the principle's status as customary international law. In the Military and Paramilitary Case,[98] the I.C.J. stated:

> The Court would observe that, according to the United States argument, it should refrain from applying the rules of customary international law because they have been "subsumed" and "supervened" by those of international treaty law, and especially those of the United Nations Charter. Thus the United States apparently takes the view that the existence of principles

[96] Article 38(1)(a), Statute of the International Court of Justice, 59 Stat. 1055, T.S. No. 993, 3 Bevans 1179 ("1. The Court, whose function is to decide in accordance with international law, such disputes as are submitted to it, shall apply: (a) international conventions, whether general or particular, establishing rules expressly recognized by the contesting states.").

[97] It bears noting that where a "State committed an internationally wrongful act, its international responsibility is likely to be involved whatever the nature of the obligation it has failed to respect." Case Concerning the Gabcikovo-Nagymaros Project (Hungary v. Slovak Republic), 25 Sept. 1997, *reprinted in* 37 I.L.M. 168, para. 47; (citing Interpretation of the Peace Treaties with Bulgaria, Hungary, Romania, 1950 I.C.J. 228); *see also* Article 17, Draft Articles on State Responsibility, 1980 YB of the Int'l. Law Comm., Vol. II, part 2, pg. 32.

[98] Military and Paramilitary Activities in Nicaragua (Nicar. v. U.S.), 1986 I.C.J. 14 (June 27).

> in the United Nations Charter precludes the possibility that similar rules might exist independently in customary international law, either because existing customary rules had been incorporated into the Charter, or because the Charter influenced the later adoption of customary rules with a corresponding content. . . . On a number of points, the areas governed by the two sources of law do not exactly overlap, and the substantive rules in which they are framed are not identical in content. But in addition, even if a treaty norm and a customary norm relevant to the present dispute were to have exactly the same content, this would not be a reason for the Court to take the view that the operation of the treaty process must necessarily deprive the customary norm of its separate applicability.[99]

Thus, in the Gabcikovo-Nagymaros case, the codification of the rules into the 1977 joint treaty did not displace any customary rules that existed. Both Hungary and Czechoslovakia may have recognized the reasonable and equitable use theory as a function of customary law and intended to codify it in their 1977 joint treaty. However, there is no indication in the case that this occurred.

Second, a case may exist absent any treaty or convention on point, erupting by virtue of some international delict. In these instances, the I.C.J. can proclaim rules of international law such that the decision becomes non-binding precedent for the I.C.J.[100] - and guidance for others - in the future.

Finally, cases between disputing parties may be resolved in the domestic courts or via other non-I.C.J. international tribunals. The decisions of States or tribunals shape international law for the I.C.J. in that they purport to illustrate international law and the I.C.J. may look to these cases for guidance.[101] Thus, when examining any decision of an international tribunal or domestic Supreme Court, one must determine if the decision qualifies under Article 38(1)(d) and whether it rests on principles of domestic or international law. The decisions themselves illustrate norms of interna-

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[99] *Id.* at 93-94, para. 174.

[100] Article 59, Statute of the International Court of Justice, 59 Stat. 1055, T.S. No. 993, 3 Bevans 1179 ("The decision of the Court has no binding force except between the parties and in respect of that particular case.").

[101] Article 38(1)(d), Statute of the International Court of Justice, 59 Stat. 1055, T.S. No. 993, 3 Bevans 1179 ("1. The Court, whose function is to decide in accordance with international law, such disputes as are submitted to it, shall apply: . . . (d) subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.").

tional law that are also applicable under Article 38 (1)(b, c) since they represent customary or general international law.

A. *The Trail Smelter Arbitration*

The allegedly landmark international environmental decision was the Trail Smelter Case.[102] In that case, Consolidated Mining and Smelting Company operated a smelter in Trail, British Columbia. The emissions from the stacks traveled into adjacent Washington State and caused a nuisance. To deal with the problem, the U.S. and Canadian governments negotiated a treaty outlining the methods for determining the damages, as Canada accepted liability. Nonetheless, in a highly critical opinion, the tribunal stated a principle of environmental use holding that "[n]o State has the right to use or permit the use of its territory in such a manner as to cause injury [by fumes] to the territory of another. . .when the case is of serious consequence."[103]

While the Trail Smelter tribunal purported to recognize standing principles of customary international environmental law, the precedent it used was solely predicated on American law.[104] Moreover, the decision was based on theories of air pollution, not water pollution, and did not discuss the use of international watercourses at all.[105] Furthermore, the quoted passage states categorically that the injury is relative to fumes. Finally, the passage is pure *dictum* and is not contained in the Tribunal's holding. Given that the passage was predicated solely on American law, did not involve international watercourse use, concerned solely air pollution by specifically addressing injury by fumes, this case creates no unequivocal customary international law.

B. *The Lac Lanoux Decision*

The next important decision was the Lac Lanoux Case.[106] In this case, Electricite de France wanted to build a hydroelectric dam across the Carol River which eventually courses its way into

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102 Trail Smelter (U.S. v. Can.) 3 R.I.A.A. 1905 (1938-41).

103 *Id.* at 1965.

104 For example, the tribunal examined cases such as Missouri v. Illinois, 200 U.S. 496 (1906); New Jersey v. New York, 283 U.S. 336 (1931); New York v. New Jersey, 256 U.S. 296 (1921).

105 Trail Smelter, 3 U.N.R.I.A.A. at 1965.

106 Lac Lanoux (Fr. v. Sp.) 12 R.I.A.A. 281, 285, 24 I.L.R. 101, 123 (decided Nov. 16, 1957).

Spain.[107] Originally, France desired diversion of the entire watercourse from the Lac Lanoux basin which would deprive Spain of water completely. However, after some negotiations, France agreed to return some of the water to the basin. Nonetheless, Spain sued France, alleging an illegal use of the Carol River. The arbitral tribunal held for France, commenting that a State is free to regulate its own natural resources without associating another State.[108] The tribunal, however, also stated that France must take into account Spanish interests.[109] Spain might have prevailed completely if it had alleged that the returned water had a composition different than before (e.g. from chemical contamination, varying temperatures, or varying quantity).[110] Implicit in the statement that France must take into account Spanish interests is the principle of a duty to consult and negotiate. This principle arose not from any theory of reasonable and equitable use, but rather from the mandatory consultation provisions of the 1866 Treaty of Bayonne. The Lac Lanoux case concerned interpretation of the 1866 Treaty and how the Treaty regulated use of the Carol River. The tribunal's decision, therefore, is not instructive on evolving trends of customary international law, but is illuminating regarding the interpretation of bilateral or multilateral treaties by joint commissions.

Furthermore, the decision stated that, under the treaty provisions, France was obligated to consult with Spain but was not required to accept the recommendations given. Therefore, France was at perfect liberty to consult with and then to ignore Spain. The Treaty was faulty in not addressing the level of discussion necessary, and whether France had to adhere to Spain's recommendations. Article 9 only recognized the legality of using the Carol River and did not address which type of use would result in an internationally wrongful act, thus invoking liability. Therefore in this case there was some obligation to negotiate and consult (*de lege ferenda*), but in the international sphere there was still no duty to cooperate (*de lege lata*). There is a trend however to stay projects for some time until reasonability of the project is deter-

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107 Brunson MacChesney, *Judicial Decisions: Lake Lanoux Case* (France v. Spain), 53 AM. J. INT'L L. 156, 158 (1959).

108 Lac Lanoux, 12 R.I.A.A. at 281.

109 *Id.* at 315.

110 *Id.* at 303.

mined through negotiation.[111] Again, any duty was imposed on the respective parties through the creation of joint commissions and their recommendations, not through the existence, or lack thereof, of any customary international law.

C. *Stichling Reinwater—The Alsatian Potash Case*

Finally, the case of Stichling Reinwater v. Mines Dominiales de Potasse d'Alsace[112] concerned the effect of French potash mining along the Rhine River. The district court of Rotterdam determined liability predicated on the Rhine Convention on Chlorides and the Trail Smelter decision. The district court concluded that the increased salinity of the Rhine could be linked to the mining activities, and thus the Convention imposed a duty on France to consult with lower riparians on the uses of the watercourse.[113]

These cases, along with the Gabcikovo-Nagymaros Dam case, show how joint commissions are created to regulate the use of the international watercourse. The cases indicate that there are no hard and fast rules of applicable international law. Each of these cases, and cases never brought before international tribunals, turn simply on the interpretation of treaties and conventions. Each case provides one more attempt to impose a reasonable and equitable use theory through conventional application, not through the creation or imposition of customary law. In this regard, the gap between international disputes and resolutions thereof fill the holes in the international law.[114] To this date, customary international law creates no binding obligations.

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111 *See* OECD, Council Rec. C(74)222, Title E. n.8, *reprinted in* 1975 I.L.M. at 246; *see also* C.B. Bourne, *Procedure in the Development of the International Drainage Basin: The Duty to Consult and to Negotiate*, 10 CAN. YB INT'L L. 212-34 (1972).

112 See REVUE JURIDIQUE DE L'ENVIRONMENT 71 (1976) for the French translation. *See also*, 1984 NETH. YB INT'L L. 474-84.

113 REVUE JURIDIQUE DE L'ENVIRONEMENT 323 (1977). *See also* 24 I.L.R. 101, 138-39 (1957); Convention for the Protection of the Rhine Against Pollution by Chemical Pollution, 1124 U.N.T.S. 375, *reprinted in* 6 I.L.M. 242 (1967); Convention for the Protection of Rhine Against Pollution by Chlorides, *reprinted in* 16 I.L.M. 265 (1977); *see also* European Economic Community, Council Directive of May 4, 1976 on Pollution Caused by Certain Dangerous Substances Discharged into the Aquatic Environment of the Community, Article 4(1), 19 O.J. EUR. COMM. (No. L 129) (1976).

114 Gap fillers have been used by the I.C.J. regarding equitable tools. Frontier Dispute, (Burk. Faso v. Republic of Mali) 1986 I.C.J. 554, 567-68 (Dec. 33); *see also id.* at 632 ("As it has explained, the Chamber can resort to that equity *infra legem*, which both Parties have recognized as being applicable in this case (see paragraph 27 above). In this respect the guiding concept is simply that "[e]quity as a legal concept is a direct emanation of the idea of justice."). Furthermore, res judicata was recognized in the French Nuclear Test Case,

In summary, the above indicates that several theories of sovereignty over natural resources exist and international law is presently equivocal as to the status of international watercourse utilization. Even assuming that international law pronounces a reasonable and equitable rule for use of the watercourse regime, this theory is flexible and can provide for many differing views. The I.L.C. Watercourse Convention binds only its signatories and has no hold over non-signatories. It, therefore, becomes perfectly reasonable for nations to exploit their resources since no clear customary international law exists to the contrary. To this end, a developing nation will exploit its resources if it can, and will seek out international participation to do so. The most accessible source of international participation is through multinational funding organizations, and the impetus to reach out to these sources is great.

V. Economics of Development and the Role of the World Bank

Watercourse development, especially hydroelectric generation, is one of the best uses of a watercourse because it attracts vast sums of foreign development capital and generates vast sums of money from the export of goods and services created therefrom. It is therefore in the best interest of a developing State to act consistently with international development law, rather than with the intent to create international law by conduct. However, environmentalists counter this "best use" theory by positing that most watercourse development involves damming the watercourse, flooding adjacent lands, dislocating people, and depriving water quantity to the lower riparian, and is thus illegal. Yet even as early as 1923, the Reports from the Second Conference on Communication and Transportation advocated the development of hydroelectric power without reference to political boundaries.[115] Similarly,

1974 I.C.J. 253, 265 Dec. 20); reliance was recognized in the Status of Eastern Greenland, 1933 P.C.I.J. Ser. A/B No. 53, at 36-37, 69-73; good faith was recognized in Border and Transborder Armed Actions (Nicar./Hond.), 1988 I.C.J. 69, 105 (Dec. 20) (The principle of good faith is, as the Court has observed, "one of the basic principles governing the creation and performance of legal obligations"); clean hands, good faith, and proportionality were recognized in North Sea Continental Shelf, (F.R.G. v. Den; F.R.G. v. Neth.) 1969 I.C.J. 3, 53-54, (Feb. 20) and in the Continental Shelf Case Between Tunisia and Libya, 1982 I.C.J. 18, 43-44, 75-76 (Feb. 24); and estoppel was recognized in Chorzow Factory, 1927 P.C.I.J. Ser. A No. 9, at 31.

[115] Article 5, Convention Relating to the Development of Hydroelectric Power Affecting More Than One State, December 9, 1923, 36 L.N.T.S. 83.

the Montevideo Conference of 1933 recognized that a State not willing to do studies for the development of hydroelectric power on its own territory had a duty to facilitate such studies done by any other interested State.[116] Moreover, the former United Nations Secretary General stated in his report to the ECOSOC that watercourse basin development is now recognized as an essential feature of economic development.[117]

The World Bank is the largest actor facilitating economic development. Born from the Bretton Woods Conference of 1944, the World Bank is an international funding organization that operates in agreement with the United Nations.[118] Historically, it provided loans to post-World War II ravaged countries for rebuilding, hence its original name, The International Bank for Reconstruction and Development.[119] Now, the Bank concentrates on the needs of less developed countries by making project and program loans on preferential terms by acting as a lender of last resort, often facilitating watercourse exploitation projects.[120]

The economic effects of megaprojects are staggering. Recalling that developing nations need capital infusion to solve their impecunious conditions, the World Bank provides this much needed capital. For example, it funded the Sardar Sarovar hydroelectric program in India, which cost over 450 million U.S. dollars. Despite the dislocation of 250,00 people and the flooding of 117,000 hectares of land, the project was lauded at the time as a technological wonder. In another example, the Export and Import Bank (EXIM Bank) recently guaranteed a loan for 420 million U.S. dollars to the Westinghouse Corporation to build a nuclear facility in the Czech republic.[121] While this loan was not for a hydroelectric generator project, it demonstrates the vast sums of money involved. The World Bank has loaned about 203 billion U.S. dollars to 109 developing nations.[122]

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116 *See* Montevideo Declaration on Industrial and Agricultural Uses of International Rivers (1933).

117 U.N. ECOSOC, 21st Sess., Annex 6, U.N. Doc. No. E/2827 (1956).

118 Agreement Between the United Nations and the International Bank for Reconstruction and Development, Nov. 15, 1947, 16 U.N.T.S. 346.

119 Article 1(1), World Bank Articles of Affiliation.

120 Jonathan Cahn, *The World Bank and the Democratization of Development*, 6 HARV. HUM. RTS. J. 159, 162 (1993).

121 Thomas M. Kerr, *What's Good For General Motors Is Not Always Good For Developing Nations*, 29 INT'L LAW. 153, 166 (1995).

122 Cahn, *supra* note 120, at 163.

The World Bank is now funding Project X, a yet to be announced project. This hydroelectric development project will build two power plants in some yet unnamed location. The capital infused is projected to be 978 million U.S. dollars. The damming of this watercourse will flood about 46,000 hectares of land, and dislocate 4500 people.[123] Although these projects were heavily criticized for their failure to have adequate environmental impact surveys (EIS),[124] they provided an impetus to developing nations to exploit the watercourse, as well as massive capital infusions into poor areas.[125]

Moreover, while environmentalists argue that damage of this type is hazardous, this situation illustrates the polar extremes presented.[126] One extreme is leaving a watercourse alone, which is unattractive for the developing State, since if no work is generated the State cannot import capital, skilled/technical labour or current technology. The other extreme is developing a watercourse and confronting the harm to the environment. Even if the harm is highly probable, the harm is borne by the nation who develops the watercourse, a decision that must be left to that nation alone. Rarely does the damming of a watercourse affects the global commons. Further, the mere damming of a watercourse is not a pollution of the watercourse to the downstream nation's detriment.[127]

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123 *Id.* at 166.

124 See Bradlow, *International Organisations and Private Complaints*, 34 VA. J. INT'L L. 553 (1994) for a discussion on the Sardar Sarovar project. *See also* Kerr, *supra* note 121, at 166; Chandler, *US Backing for Atom Plant Assailed.* See *Bank Guarantees Loan for Czech Republic That Critics Say Is Unsafe*, BOSTON GLOBE, Feb. 8, 1994, at 21, for a discussion on the EXIM Bank loan.

125 Aside from the obvious benefits of capital infusion such as cash given to employees, the purchase of local supplies, the improvement of infrastructure, and communications, there is also another important benefit to capital infusion for third world countries. As development is the underlying goal of any project, it cannot be done without scientific and technological investment. However, as nations become poorer, subscriptions to scientific journals fall and eventually science libraries become barren. This causes researchers to duplicate experiments, thus spending precious capital on duplicity. As capital infusion increases, scientific experimentation increases and development progresses at a much faster rate. See W. Gibbs, *Information Have-Nots*, 272 SCIENTIFIC AMERICAN 12B (May 1995) for a discussion on the effect of the lack of journals in third world countries.

126 B. RICH, MORTGAGING THE EARTH: THE WORLD BANK, ENVIRONMENTAL IMPOVERISHMENT, AND THE CRISIS OF DEVELOPMENT (BEACON PRESS BOSTON 1994) (condemning the World Bank's role as the central impetus of development resulting in environmental impoverishment and the crises in on-going development projects).

127 *See* Trail Smelter (U.S. v. Can.) 3 R.I.A.A. 1905, 1965 (1938-41) ("No State has the right to use or permit the use of its territory in such a manner as to cause injury... in or to the territory of another or of the properties or persons therein, when the case is of serious

Where another nation's interests may be affected, the applicable solution is to create a joint commission between the nations. If this option is unavailable, the developing nation will have to deal with the affected nation's wrath.

Accordingly, the extremes can only be reconciled depending on the vantage point. A developing country strongly desires capital, skilled labor, and the benefits that can be derived from the watercourse. It is the country's sovereign decision to weigh both the environmental impact and the consequences imposed upon affected nations. By contrast, a developed nation by definition enjoys a higher standard of living, a capital export based economy, and a highly technical and sophisticated workforce. Consequently, the developed nation believes - wrongfully - that their view is the correct view, in fact the only view.

VI. International Environmental Impact Surveys and the Problem of Standards

One of the major obstacles to reconciling the conflicting views between developing and developed States is the imposition of standards. Environmentalists argue, *ad nauseam*, that environmental impact surveys (EIS) are mandatory in watercourse development proposals. One author believes that EIS's are required for any project that produces transboundary pollution as a function of

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consequence and the injury is established by clear and convincing evidence."). *See also* Corfu Channel, 1949 I.C.J. Rep. 4, 22 (April 9) (often cited for the principle that a State cannot use its territory in such a manner as to cause harm to others); Stockholm Declaration on the Human Environment, Principle 21, U.N. Doc. A/CN.48/14/Rev.1, *reprinted in* 11 I.L.M. 1416 (1972) (states have the obligation to ensure that its activities within their jurisdiction or control do not cause damage to the environment of other States or of areas beyond the limits of national jurisdiction); *Rio Declaration on Environment and Development*, U.N. Doc. A/CN.151/5/Rev.1 (1992), 31 I.L.M. 876; OECD Council Recommendation C(74)224, Nov. 14, 1974, Title B(2), in OECD, OECD and the Environment 142 (1986) (states "should, individually and jointly, take all appropriate measures to prevent and control transfrontier pollution"). *See, e.g.*, *Co-operation in the Field of Environment Concerning Natural Resources Shared by Two or More States*, G.A. Res. 3129 (XXVIII), U.N. GAOR, Supp. No. 30A, U.N. Doc. A/9030/Add.1 (1973); Montreal Rules of International Law Applicable to Transfrontier Pollution, art. 3(1), Int'l Law Assn., Rep. 60th Conf., at 1-3 (1982) ("States are in their legitimate activities under an obligation to prevent, abate, and control transfrontier pollution to such an extent that no substantial injury is caused in the territory of another State."); U.N. Convention on the Law of the Sea, Dec. 10, 1982, art. 194(2), U.N. Doc. A/CN.62/121, 21 I.L.M. 1261 (1982) ("States shall take all measures necessary to ensure that activities under their jurisdiction or control are conducted so as not to cause damage by pollution to other States and their environment.").

customary international law.[128] However, the customary international law is, at best, unclear regarding the propriety of EIS's when the proposed activity does not implicate serious pollution and the project is solely within a nation's borders.[129] The questions remaining are whether an EIS is required (and if so, to what extent), and what international participation is required for these projects.

One solution to the problem of lax environmental standards in developing countries is to require international investment projects to adopt the standards that prevail in the developed countries. This presumes that developed nations are more responsible regarding environmental regulation and enforcement than the developing State.[130] This is only a half-truth since developed nations cause many of the adverse environmental problems.[131] Developed nations have solved, or attempted to solve, the bulk of their own environmental problems caused in the course of their development which have devastated their own landscapes or waters.[132] The reality is that by imposing industrialized nations' standards on projects based entirely in the territory of the developing State, the industrialized nation infringes the sovereignty of that developing State.[133]

Moreover, this solution fails to recognize differences in tolerance levels between the developing State and the developed nations. For example, the latter's strict compliance laws may be too complex, or too strict for it to have any reasonable justification in

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128 Kerr, *supra* note 121, at 157.

129 The issue of environmental impact assessments were introduced in the case, Request for an Examination of the Situation in Accordance with Paragraph 63 of the Court's Judgment of 20 December 1974 in the Nuclear Tests Case. The dissenting opinion of Judge Weeramantry stated, "It is clear that on an issue of the magnitude of that which brings New Zealand before this Court the principle of Environmental Impact Assessment would prima facie be applicable in terms of the current state of international environmental law. This Court, situated as it is at the apex of international tribunals, necessarily enjoys a position of special trust and responsibility in relation to the principles of environmental law, especially those relating to what is described in environmental law as the Global Commons. When a matter is brought before it which raises serious environmental issues of global importance, and a prima facie case is made out of the possibility of environmental damage, the Court is entitled to take into account the Environmental Impact Assessment principle in determining its preliminary approach. Of course the situation may well be proved to be otherwise and fears currently expressed may prove to be groundless. But that stage is reached only after the Environmental Impact Assessment and not before." Request for an Examination of the Situation in Accordance with Paragraph 63 of the Court's Judgment of 20 December 1974 in the Nuclear Tests Case (N. Z. v. Fr.), 1995 I.C.J. Rep. 288, 345 (Sept. 22).

130 Kerr, *supra* note 121, at 157.

131 JAN SCHNEIDER, WORLD PUBLIC ORDER OF THE ENVIRONMENT 64 (1979).

132 HARGROVE, LAW, INSTITUTIONS, & THE GLOBAL ENVIRONMENT 49-50 (1972).

133 Klein-Chesivoir, *Avoiding Environmental Injury*, 30 VA. J. INT'L L. 517, 528 (1990).

the developing State.[134] In addition, tolerance levels change with different cultures and what is reasonable in the developing State may be deemed unreasonable in the developed world.[135] Finally, from an administrative standpoint, a developing State usually receives many projects from different nations and it would be an administrative nightmare for the local department of environmental conservation to monitor or regulate which project in its country shall be governed by which nation's laws.[136]

The opposite solution is to have the developing State's standards govern. This beneficially recognizes the autonomy and sovereignty of the developing State. Environmentalists would generally argue that a developing State's standards are too lax and therefore any attempt at regulation would be a façade. However, this argument perpetuates the presumption that developing States are backward, unprogressive, uncivilized, and have no adequate environmental safeguards. Chile has a fine environmental enforcement record, albeit recent.[137]

Another solution is to adopt standards promulgated by international law. Several declarations, such as the Rio Declaration, tried to import some standards concerning environmental impact.[138] Again, the reality of declarations and international law is that they lack enforceable weight. These documents tend to be non-binding aspirational documents, filled with ambiguous and vague terms. To create new binding international law in these documents, whether as customary or conventional law, is complex, laborious, and painfully slow.[139] Therefore, the creation of binding international environmental law regarding EIS's cannot be achieved through the promulgation of documents, especially when pitted against well-established principles of sovereignty and territoriality.

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[134] Kerr, *supra* note 121, at 158.

[135] Stockholm Declaration on the Human Environment, June 16, 1992, Principle 23, U.N. Doc. A/CONF.48/14/Rev.1, *reprinted in* 11 I.L.M. 1416 (1972); *see also* Principle 11, Rio Declaration on Environment and Development, U.N. Doc. A/CONF.151/5/Rev.1 (1992), *reprinted in* 31 I.L.M. 876; Ch. 17.2, 18.12, Agenda 21, U.N. Doc. A/CONF. 151/26 (vols. I, II, III) (1992); *and* P. Dupuy, *Overview of the Existing Customary Legal Regime Regarding International Pollution*, in D. MAGRAW, INTERNATIONAL LAW AND POLLUTION 67 (1991).

[136] Kerr, *supra* note 121, at 158.

[137] *Id.*

[138] *See* Principle 14, Rio Declaration, stating that it discourages the relocation of projects which may pose harm to health and safety to Developing States.

[139] JAN SCHNEIDER, WORLD PUBLIC ORDER OF THE ENVIRONMENT 113 (1979).

Whatever solution is proposed, the fears of the developing State must be accounted for. The UN Panel at the Founex Conference crystallized the developing State's fears, *inter alia*, as:

> (1) the fear that the developed nations will create rigorous environmental standards for products traded internationally and generate a "neo-protectionism," excluding non-conforming goods from poor lands;
> (2) the fear that the emphasis on non-polluting technology and recycling may eliminate or reduce demand for some raw materials or agricultural products in which pesticides are found;
> (3) the fear that aid for development purposes will be delayed or curtailed if the rich lands focus largely on their own environmental problems;
> (4) the fear that developed lands will unilaterally dictate environmental standards to the developing lands without considering how to relate those standards to the conditions of the developing lands, and;
> (5) the fear that the developed states will saddle the developing states with their own definition of what are proper global environmental concerns.[140]

Finally, while the World Bank mandates an EIS in projects funded since 1989, it only applies to assessments involving transboundary pollution, not the simple question of whether watercourse use requires an EIS.[141] To its credit, however, the World Bank has implemented some environmental goals as part of its project financing.[142] Therefore, stretching the requirement of the EIS in transboundary pollution to simple watercourse utilization becomes untenable, especially since legal authority to do so remains unclear.

Therefore, where the law is unclear and equivocal, where the presence of unsigned Conventions are of no avail, where the rights

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[140] "Development and Environment," Report submitted by a panel of experts convened by the Secretary-General of the UN Conference on the Human Environment, 4-12 June 1971, à Founex, Suisse. U.N. Doc. GE 71-13738, at 22-30 (1971).

[141] R. Goodland, *World Bank's Environmental Assessment Policy*, 14 HASTINGS INT'L & COMP. L. REV. 811, 813 (1990).

[142] A. Keck, N. Sharma, G. Feder, Population Growth, Shifting Cultivation, and Unsustainable Development, A Case Study in Madagascar, World Bank Discussion Paper 234, 78 (May 1994, ISBN 0-8213-2793-3); Development Issues: Presentations to the 48th Meeting of the Development Committee at Washington DC on April 26, 1992, pg. 158 (May 1994, ISBN 0-8213-2870-0); R. Goodland & V. Edmundson, Environmental Assessment and Development, A World Bank Symposium, pg. 174 (June 1994, ISBN 0-8213-2762-3); S. Kirmani & R. Rangeley, International Inland Waters: Concepts for a More Active World Bank Role, World Bank Technical Paper No. 234 (June 1994).

of sovereignty are strongly rooted in *jus cogens*, and where the developing nation requires watercourse utilization as a function of economic development, then the truth becomes self-evident. The plain and only truth available is to leave watercourse utilization and disputes thereof to the nations involved. Time has shown that mutual cooperation through joint commissions is more effective in watercourse management than through equivocal pronouncements of sweeping international law.

VII. THE SOLUTION OF THE JOINT COMMISSION OR BILATERAL TREATY

Identification of a problem without propounding a solution is a mere academic exercise of no benefit. Cognizant that the reasonable and equitable use law is unclear and that the I.C.J. did not pronounce it as a binding law, one of the only practicable solutions to international watercourse development and management is the creation of the joint commission via bilateral (or multilateral) treaty. The States directly concerned with an environmental problem should be the States to deal with the issue. After all, given the lack of clarity on any issue involving watercourse use, each State must have the ability to craft joint documents individually tailored to the circumstances at hand.[143] Therefore, the regional joint commission is the best solution for several reasons, since:

(1) the watercourse is found in those States;
(2) the impact is felt by the people of those States alone;
(3) there may be a history of good neighborliness between the nations;
(4) local government and technocrats are in the best position to make recommendations without the interference of nations far removed from the situation;
(5) implementation and administration is more feasible, and;
(6) there is the presence of regional customary international law.

With respect to the environmental impact of watercourse utilization, the affected States would need to cooperatively determine:

(1) the problem, if any, at hand;
(2) if the problem requires joint intervention;
(3) what information is necessary to exchange or to investigate;
(4) the geographic extent of the problem, and;

[143] BONAYA A. GODANA, AFRICA'S SHARED WATER RESOURCES 66 (1985).

(5) the most effective means of dealing with the problem.

Regionalization recognizes problems in the environmental sphere that transcend the States in scope, but do not rise to the level of global cooperation and do not affect the global commons. In fact, there is an increasing recognition that while an environmental problem is global in nature, its solution need not be.[144] Especially in the context of developing nations and the hostility to the imposition of developed nation's will, deferential consideration must be given to the developing State in the management of its watercourse.[145] Even former Secretary-General U. Thant stated, with respect to a developing State's control over its own resources by the creation of regional joint commissions, that

> [t]he developing countries are intimately concerned with these problems, which are crucial both to their own future and to the future of the environment. Their voices must be heard, and listened to. . . Their confidence and their cooperation, as representing the largest part of the world's population, are vital. Otherwise we shall once again increase the gap between advanced and developing nations which is already one of the major sources of tension in the world.[146]

As evidence that joint commissions do work despite the lack of rules in the international realm, there are several examples of joint commissions over international watercourses. These include the Rhine River Commission, the Danube River Commission, and the International Joint Commissions.[147]

The Rhine River Commission governs the Rhine River, which travels from Basel, Switzerland to Rotterdam, Netherlands. The commission was first created as the Central Commission for the Navigation of the Rhine. It was established as a result of the Congress of Vienna in 1815. The problem with the first commission was that it was only concerned with navigation and pollution stem-

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144 HARGROVE, LAW, INSTITUTIONS, & THE GLOBAL ENVIRONMENT 256.

145 With the growth of population and industrial development, good water quantity and quality become important to developing nations in order to continue its development. Any available water is highly desired and utilized. *See* Groundwater in Western and Central Europe, pg. 363, Natural Resources/Water Series No. 27, U.N. Pub. E.86.II.A.2 (ISBN 92-1-104175-9); Groundwater in Eastern, Central, and Southern Africa and Maps of Africa, pg. 320, Natural Resources/Water Series No. 19, U.N. Pub. E.88.II.A.5 (ISBN 92-1-104223-2); Institutional Issues in the Management of International River Basins: Financial and Contractual Considerations 111, U.N. Pub. E.87.II.A.16 (ISBN 92-1-104210-0).

146 U. Thant, Human Environment and World Order, Address to University of Texas at Austin, May 14, 1970, *in* U.N. Press Release SG/SM/1259 (1970).

147 *See also* A. UTTON & L. TECLAFF, TRANSBOUNDARY RESOURCES LAW 17-25 (1987).

ming from navigation. To remedy this, the second commission, the International Commission for the Protection of the Rhine Against Pollution, was created. The Rhine Commission is working as well as could be expected. Since the Commission came into existence, after great devastation to the Rhine, it has been effective insofar as it has promulgated more conventions on the use of the Rhine and has created a list of contaminants that are zero-tolerance.[148]

The Danube River Commission governs the Danube River, which runs in Europe from Germany to the Black Sea. The scope of the Danube River Commission implicates navigation, coordinated hydrological services, flood control, hydropower planning, sanitation, and watercourse inspection. But again, the Commission is only effective in its effort to clean up the Danube from past uses.

One of the most successful commissions is the International Joint Commission between Canada and the United States. The 1909 Boundary Water Treaty[149] created the International Joint Commission (I.J.C.) after a dispute over the use of the Milk River.[150] The I.J.C. has jurisdiction over any dispute concerning any transboundary environmental concern.[151] The Boundary Water Treaty, however, is limited in its scope. It does not include waters flowing into the boundary and sections of transboundary waters above the frontier, over which each State retains full jurisdiction and control.[152] Further, the Treaty does not include the waters flowing from the boundary and sections of the transboundary water lying below the frontier, over which exclusive control is limited, to the extent that permission of the I.J.C. is required for works which would raise the natural level of waters on the other side of the boundary.[153] Therefore, it does not include watercourses flowing across the frontier or water flowing into or out of

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148 *See* Convention for the Protection of the Rhine Against Pollution by Chemical Pollution, 1124 U.N.T.S. 375, *reprinted in* 6 I.L.M. 242 (1967); Convention for the Protection of the Rhine Against Pollution by Chlorides, *reprinted in* 16 I.L.M. 265 (1977); *see also* European Economic Community, Council Directive of May 4, 1976 on Pollution Caused by Certain Dangerous Substances Discharged into the Aquatic Environment, Article 4(1), 19 O.J. EUR. COMM. (No. L 129) (1976).

149 Boundary Water Treaty of 1909, January 11, 1909, U.S.-Eng., 36 Stat. 2448, T.S. No. 548, [hereinafter B.W.T.].

150 James Simsarian, *Diversion of Water Affecting United States and Canada*, 32 AM. J. INT'L L. 488, 491 (1938).

151 Compare with the Rhine River and Danube River Commissions, which have jurisdiction over a limited number of complaints.

152 Article 2, B.W.T.

153 Article 4, B.W.T.

the waters along which the frontier runs. However, one of the more interesting features is that Article 3 provides access to injured parties in the courts of the country where the interference occurred. This access to courts was used in the Gut Dam Arbitration.

In the 1960s, Canada wanted to build a dam across the Gut, a part of the St. Lawrence Seaway, an international watercourse, from Adams Island (Canada) to Les Galops Island (USA). The U.S. Congress permitted the construction[154] subject to certain conditions.[155] During construction, the Canadians raised the height of the dam which caused damage to adjacent neighbors and private lawsuits subsequently commenced.[156] Separately, the I.J.C.[157] resolved the dispute by holding Canada responsible by adopting a strict liability standard and requiring Canada to pay compensation for the damages.[158] Unlike the Helsinki Rules or the I.L.C. Watercourse Convention, the B.W.T. creates a list of preferences concerning the use of watercourses.[159] It is the creation of the joint commission that has resolved most of the international environmental law disputes.

Commissions finding success in developing States include the Committee for the Lower Mekong River,[160] which promotes, coordinates, supervises, and plans water development projects on the

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154 Act of June 18, 1902, 32 Stat. 392.

155 The conditions were that the dam should be of a type that would not materially affect the level of Lake Ontario and the St. Lawrence River, and that no injury would be caused to any U.S. citizen.

156 Lawsuits were commenced by U.S. citizens injured by the raised water levels. *See* Oster v. Dominion of Canada, 144 F. Supp. 746 (N.D.N.Y. 1956) (dismissing the case for lack of effective service of process), *aff'd*, 238 F. 2d 400 (2nd Cir. 1956), *cert. denied* 353 U.S. 936 (1957).

157 A Congressional law authorized claims to be entertained through the Foreign Claims Settlement Commission. Before the Commission rendered any decisions, Canada and the U.S. created an International Joint Commission to arbitrate the claims. 17 U.S.T. 1566, T.I.A.S. No. 6114.

158 Gut Dam Arbitration, Canada-U.S. Settlement of the Gut Dam Claims, September 22, 1968, *reprinted in* 8 I.L.M. 118, 133-42; 7 CAN. YB INT'L L. 316-18 (1969).

159 Article 8 states that the I.J.C. shall have jurisdiction over all cases of international rivers and shall give preference to the following uses:

(a) for domestic and sanitary purposes,

(b) for navigation, including the service of canals for the purposes of navigation,

(c) for power and for irrigation purposes.

160 Statute of the Committee for Coordinating Investigations of the Lower Mekong Basin. Signed in Phnom-Penh, October 31, 1957, Cambodia- Laos- Thailand- Vietnam.

Mekong. Despite political upheavals, the Committee has operated uninterrupted since 1955, a laudable achievement.

The Permanent Indus Commission,[161] established between India and Pakistan in 1960, has jurisdiction over disputes concerning the Indus River and coordinates the parties' water development policies. A noteworthy feature is that the World Bank is a party to the treaty which monitors how the loans are distributed. Similarly, in India, the Joint Ganges Commission was created between India and Bangladesh.[162] This Commission also regulates the use of water and mandates a duty of prior consultation before undertaking any development.

Africa is also rich in joint commissions. Included are the Congo River Commission;[163] the Niger River Commission,[164] which governs the use of the river by controlling technical data, plans and projects, and research and development; and the Senegal River Basin Management Organization,[165] which has established various committees, sub-committees, and a judicial resolution panel. This commission has also established a joint cost sharing plan wherein all party-nations contribute to the cost of a project, so long as all nations agree to the project in the first place.

In South America several commissions exist. There exist the Joint Commission for the Integrated Development of the Mirim Lagoon basin shared by Uruguay and Brazil,[166] the Lake Juija Commission,[167] the Lake Titicaca Commission,[168] the Uruguay

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161 Indus Water Treaty, September 19, 1960, (India-Pakistan-World Bank), 419 U.N.T.S. 125.

162 *See also* Sharing of the Ganges Waters at Dakka, November 5, 1977, India- Bangladesh, *reprinted in* 17 I.L.M. 103 (1978); *see also* Treaty Concerning the Integrated Development of the Mahakali River, India-Nepal, 36 I.L.M. 531 (1997) *and* Treaty Between Bangladesh and India Sharing the Ganges Water at Farakka, 36 I.L.M. 519 (1997).

163 International Commission for the Navigation of the River Congo, Hertslett, 17 Commercial Treaties 62 (1885) (establishing principle of freedom of navigation to African Rivers).

164 *See* Act Regarding Navigation and Economic Cooperation Between the Nine Co-Basin States of the Niger River Basin, October 26, 1963, 587 U.N.T.S. 9.

165 Convention relativ au statut du fleuve Senegal, Mali-Mauritania-Senegal, *reprinted in* U.N./Africa Water Treaties, March 11, 1972.

166 April 26, 1963, 622 U.N.T.S. 259, and May 20, 1974, 957 U.N.T.S. 255.

167 Agreement on Free Trade and Economic Integration between El Salvador and Guatemala, April 15, 1957, 131 U.N.T.S. 132.

168 Agreement Concerning the Joint Utilisation of the Waters of Lake Titicaca between Bolivia and Peru, February 19, 1957.

River Commission,[169] and the Amazon Cooperation Treaty.[170] The Amazon Commission is so sophisticated that it binds immediate riparians but also nations closely related to the basin because of their geographic, economic, and ecological characteristics. Unanimity is required for all proposed projects and mandates that projects are carried out giving utmost faith to good and friendly neighborly relations.

Finally, it should not be forgotten that the Gabcikovo-Nagymaros case involved a joint commission and a treaty between Hungary and Czechoslovakia, and that the I.C.J. declared some principles of law based on treaty interpretation, not based on customary law. In sum, the joint commission is the most practicable means for solving international watercourse disputes. The cooperating States have the most to gain from a mutual cooperation.[171]

VIII. Conclusion

General principles of international law cannot cope with the reality that each watercourse system has its own physical peculiarities and it is governed by nations with their own peculiar sensitivities regarding development. As developed nations push harder for environmental respect in the wake of their own destructive policies, they try to create binding obligations of customary international law. However, developing nations resist this trend by falling back on current entrenched principles of sovereignty over natural resources. As binding international law is not present, the most sensible approach to international watercourse management is to expand and improve intergovernmental relations by creating joint commissions. Thus the use, administration, and protection of the international watercourse can be maximized by allowing the regional nations to govern the watercourse.

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[169] Agreement Concerning the Utilisation of the Rapids of the Uruguay River in the Salto Grande Area between Argentina and Uruguay, December 30, 1946, 621 U.N.T.S. 17.

[170] Treaty for Amazonian Cooperation between Bolivia, Brasil, Colombia, Ecuador, Guyana, Peru, Surinam, and Venezuela, July 3, 1978, *reprinted in* 17 I.L.M. 1045.

[171] A.E. Boyle, *The Gabcikovo-Nagymaros Case: New Law in Old Bottles* 19, in 8 Y.B. of Int'l Env. L. (Oxford Press, 1997, ISBN 0-19-826799-1) ("Third, in order to give effect to this new vision of international watercourse law, cooperation between riparians in the management of international watercourses will be now more imperative than it is presently.").