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International Law and Interstate River Disputes

*William W. Van Alstyne**

IN MAY of this year a Special Master for the United States Supreme Court reported certain determinations which may well be critical to the future development of Arizona and California.¹ His report climaxed a thirty-year dispute involving the rights of these states to the millions of acre feet of water which flow through the Colorado River each year.² The Master's particular findings have been viewed as assuring the future growth of Arizona while committing California to a multibillion dollar canal system to avoid serious water shortages in arid southern California within ten years.³

Similar disputes involving interstate rivers have occupied the Court's attention during the past thirty years,⁴ and with the demands expected to be made on natural waterways by the burgeoning western populace,⁵ we may expect a recurrence of such contests in the future. This is particularly likely due to the absence of clear and suitable standards having been promulgated by the Court in the past. The fact is that nonstatutory federal law relevant to the apportionment of interstate rivers is scanty and uneven,⁶ providing few guides to states concerned with the diversion of interstate rivers for internal uses. Moreover, the states have not been free to rely on the application of their own water law as binding on other quasi-sovereign

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¹ New York Times, May 9, 1960, p. 1, col. 1, and p. 24, cols. 1-3.

² For a lengthy case history of thirty years, see citations to *Arizona v. California* in *The Original Jurisdiction of the Supreme Court*, 11 STAN. L. REV. 665, 716 (1959).

³ See, e.g., the paraphrase of Governor Brown's remark that the decision "underscored the importance of the proposed \$1,750,000,000 Feather River Project for bringing water from moist northern California some 500 miles to the arid south." N.Y. Times, May 9, 1960, p. 24, cols. 5-6.

⁴ *Texas v. New Mexico*, 343 U.S. 932 (1952), *dismissed* for want of an indispensable party, 352 U.S. 991 (1957); *Nebraska v. Wyoming*, 325 U.S. 589 (1945); *Colorado v. Kansas*, 320 U.S. 383 (1943); *Washington v. Oregon*, 297 U.S. 517 (1936); *New Jersey v. New York*, 283 U.S. 336 (1931); *Arizona v. California*, 283 U.S. 423 (1931); *Wisconsin v. Illinois*, 281 U.S. 179 (1929); *Connecticut v. Massachusetts*, 282 U.S. 660 (1931). For a full chronology of these and other interstate water cases, see 11 STAN. L. REV. 708-19 (1959).

⁵ Unofficial census returns for 1960 indicate that Nevada, Arizona, and California are among the five fastest growing states, with percentage gains since 1950 of 75%, 71% and 46%, respectively. California has added nearly five million new residents since 1950. See N.Y. Times, June 17, 1960, p. 54, cols. 5-7.

⁶ See cases cited in note 4 *supra*, and compare *Kansas v. Colorado*, 206 U.S. 46 (1907), with *Wyoming v. Colorado*, 259 U.S. 419 (1922).

states,⁷ nor have they always been able to rely on congressional declarations, for none of general application are to be found.

For want of better authority, the Supreme Court has suggested that some useful guides may be derived from international law. Thus, it has reserved the right to analogize disputing states to quasi-sovereign nations and to apply appropriate rules of international law in resolving the issues. In the first significant interstate river case the Supreme Court observed:

Sitting, as it were, as an international, as well as a domestic tribunal, we apply Federal law, state law, and international law, as the exigencies of the particular case may demand.⁸

. . . .

Nor is our jurisdiction ousted, even if, because Kansas and Colorado are States sovereign and independent in local matters, the relations between them depend in any respect upon principles of international law. International law is no alien in this tribunal.⁹

What international law the Court was talking about and just how this law may be helpful continue to be matters of speculation; as yet, no interstate river dispute has actually been decided on the basis of such authority. These dicta are somewhat tantalizing under the circumstances, however, and since the Court has elsewhere made use of international law in its deliberations,¹⁰ it may not be presumptuous to explore the relevance of international law to interstate rivers in this article. But before embarking on that undertaking, it may first be well to understand what "international law" we are talking about.

I

SOURCES AND AUTHORITY OF INTERNATIONAL LAW

The usual sources of international law to be considered are those prescribed for the International Court of Justice, in article 38 of its statute:

⁷ See *Kansas v. Colorado*, 206 U.S. 46, 74, 95 (1907); *Connecticut v. Massachusetts*, 282 U.S. 660, 670 (1931); *Nebraska v. Wyoming*, 325 U.S. 589, 599, 618 (1945). Consider, too, the Court's remark in *Kansas v. Colorado*, 185 U.S. 125, 144 (1902): "Comity demanded that navigable rivers should be free, and therefore the freedom of the Mississippi, the Rhine, the Scheldt, the Danube, the St. Lawrence, the Amazon, and other rivers has been at different times secured by treaty; but if a State of this Union deprives another State of its rights in a navigable stream, and Congress has not regulated the subject, as no treaty can be made between them, how is the matter to be adjusted?"

⁸ *Kansas v. Colorado*, 185 U.S. 125, 146 (1902).

⁹ *Kansas v. Colorado*, 206 U.S. 46, 97 (1907). See also *Connecticut v. Massachusetts*, 282 U.S. 660, 670 (1931).

¹⁰ See, e.g., *The Paquete Habana*, 175 U.S. 677, 700 (1900): "International law is part of our law, and must be ascertained and administered by the courts of justice of appropriate jurisdiction, as often as questions of right depending upon it are duly presented for their determination." See also *The Nereide*, 13 U.S. (9 Cranch) 388, 423 (1815); *The Peterhoff*, 72 U.S. 28, 57 (1866); *Hilton v. Guyot*, 159 U.S. 113 (1895); *The Over The Top*, 5 F.2d 838 (D. Conn. 1925).

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;
- b. International custom, as evidence of a general practice accepted as law;
- c. The general principles of law recognized by civilized nations;
- 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.

It will be noticed that article 38 relegates the teachings of publicists to the category of *subsidiary* means for determining international law—a considerable understatement in fact, since the International Court, “as distinguished from dissenting or separate opinions of individual Judges, [has never] found it necessary to refer to the writings of a single author as representing the ‘teachings of the most highly qualified publicists of the various nations.’”¹¹ Since, however, our immediate concern is with the applicability of international river law to *interstate* cases, it is significant that the Supreme Court, in contrast to the International Court, has given considerable weight to the declarations of international law publicists: “Such works [*i.e.*, the works of international law publicists], are resorted to by judicial tribunals, not for the speculations of their authors concerning what the law ought to be, but for trustworthy evidence of what the law really is.”¹² And elsewhere, the Court has remarked that it “must follow the lights of reason and the lessons of the masters of international jurisprudence.”¹³ Considerable attention in this article will therefore be devoted to the position taken by various publicists as to the principles of international law relating to the diversion of rivers.

On the other hand, the difficulty in relying upon judicial decisions as suggested by article 38 raises a more substantial problem. For not only are such decisions merely secondary authority¹⁴ (the more so since the International Court has not adopted the principle of *stare decisis*),¹⁵ but in fact neither the International Court nor its predecessor, the Permanent Court, have ever decided a contest involving international fluvial diversions.

Judicial material on international river diversions is confined to a spate of *ad hoc* commission decisions, certain mediation efforts, and a very few

¹¹ LAUTERPACHT, *THE DEVELOPMENT OF INTERNATIONAL LAW BY THE INTERNATIONAL COURT* 23 (1958).

¹² *The Paquete Habana*, 175 U.S. 677, 700 (1900). See also *Hilton v. Guyot*, 159 U.S. 113 (1895).

¹³ *The Peterhoff*, 72 U.S. 28, 57 (1866). For examples of the Court's reference to international publicists, see *New Jersey v. Delaware*, 291 U.S. 361 (1934); *Missouri v. Illinois*, 200 U.S. 496, 520 (1906).

¹⁴ STAT. INT'L CT. JUST., art. 38, para. 1(d).

¹⁵ STAT. INT'L CT. JUST., art. 59.

decisions handed down by municipal tribunals where jurisdiction has been assumed over certain rights of foreign sovereigns or, in proper analogy to *Arizona v. California*, over rights of "quasi-sovereigns" within a federation.¹⁶ This meager authority will not be found to be especially persuasive.

In considering the use of treaties which are relevant under article 38 both as examples of general "international conventions" which establish a rule governing the signatory powers and as evidence of "international custom," the problem is assuredly not one of too little material. Rather, the problem is to determine the proper relevance of treaties to international custom in view of the following provocative questions:

1. Does the fact that nations have stipulated rules of conduct by treaty indicate that international custom is being followed?
2. Does it indicate, rather, that the parties have deliberately departed from a customary rule of conduct for the reason that customary international law would have prescribed a different rule?
3. Does it merely illustrate that international customary law is sufficiently undeveloped or ambiguous on this subject that some stipulation is needed for convenience?

There appears to be no convincing answer, for as Judge Lauterpacht of the International Court has remarked:

[N]o simple rule can solve the difficulty inherent in the question whether uniform treaties recognising obligations on the part of the successor State merely give more specific expression to the general customary principle of State succession or on the contrary, whether they are constitutive of obligations which but for their express regulation would not exist at all; or whether the frequent, almost uniform, provisions of treaties . . . are evidence of, or—by implication—deny the existence of a customary rule on the subject.¹⁷

Compare these observations by Professor Pollack on the same point:

[Treaties] . . . may go to show, according to the nature of the case and the particular circumstances, the existence of a general usage which the parties wished to record for convenience in apt words and an authentic form (though this is not common), or the dissatisfaction of the parties with existing usage and their desire to improve on it, or the absence of any settled usage at all antecedent to the particular agreement. It is, therefore, impracticable . . . to make any general statement as to the value of treaties and similar instruments as evidence of the law of nations.¹⁸

But even should we assume that treaties articulating a common rule of conduct may evidence customary international practice, it may be something else again to assert that widespread adherence to such a rule has

¹⁶ See text at footnotes 66-72, 101-02 *infra*.

¹⁷ LAUTERPACHT, *THE DEVELOPMENT OF INTERNATIONAL LAW BY THE INTERNATIONAL COURT* 377-79 (1958).

¹⁸ Pollock, *The Sources of International Law*, 2 COLUM. L. REV. 511 (1902).

created a *law* of "international custom" within article 38. With some opposition,¹⁹ several notable writers have maintained that customary law requires something more than adherence to a common rule from notions of convenience or expediency; to receive the impress of law, a common practice may have had to meet a further requirement of *opinio necessitatis juris*, i.e., it must have been adopted from a sense of juridical *obligation* or duty. As Charles Fenwick describes the evolution of customary international law:

Rules of customary law have had their origin in the practice of a single state or of a group of states; then in time other states have been led from various motives to adopt the same practice until a well-defined usage has grown up, which in its turn has slowly hardened into fixed custom carrying with it a *recognition that the practice is no longer voluntary but of obligation*.²⁰

Or, to revert to Lauterpacht:

[O] *pinio necessitatis juris* [requires] . . . consciousness that the conduct, frequently or constantly pursued, is due to the existence of a *sense of legal obligation* or at least of the will to undertake a legal obligation.²¹

Since, however, it may often be an insuperable burden to prove that a sense of legal obligation motivated a nation to arrive at a particular agreement, Judge Lauterpacht neatly rescues the authority of uniform international practice by asserting that a rebuttable presumption arises that the element of obligation is present once a certain practice is established as being frequent and widespread.²² Professor Schwarzenberger arrives at about the same place; although he maintains that a sense of obligation is required to prove customary international law, a general practice in the absence of such a feeling may still be some evidence of a "general principle of international law" and is at least persuasive authority under the *ex aequo* clause of the International Court statute when parties have agreed to be governed by broader notions of fairness.²³ It remains true, however, that "the two great difficulties with respect to custom are (1) the difficulty of proof, and (2) the difficulty of determining at what stage custom can be said to become authoritative."²⁴

For these several reasons, any writer's description of *the* customary

¹⁹ 1 HYDE, *INTERNATIONAL LAW* 10 (2d ed. 1945), implies that something less than a sense of obligation will do. See also HUDSON, *Working Paper on Customary International Law*, U.N. Doc. A/CN/4/16 (1950), suggesting that a sense of *consistency* with international practice is an alternative to a sense of *requirement* by international practice.

²⁰ FENWICK, *INTERNATIONAL LAW* 62-63 (2d ed. 1934). (Emphasis added.) See also 1 OPPENHEIMER, *INTERNATIONAL LAW* 27 (9th ed. 1948).

²¹ LAUTERPACHT, *THE DEVELOPMENT OF INTERNATIONAL LAW BY THE INTERNATIONAL COURT* 379 (1958). (Emphasis added.)

²² *Id.* at 380.

²³ SCHWARZENBERGER, *INTERNATIONAL LAW* 39-49 (3d ed. 1957).

²⁴ COBBETT, *CASES AND OPINIONS ON INTERNATIONAL LAW* 6 (3d ed. 1909).

international law of a given subject should be regarded reservedly. With respect to the use of water from international rivers, moreover, the problem is not merely one of resolving the authority of available materials; it also embraces the fundamental difficulty of establishing continuity in the treatment of this subject on the basis of the orthodox indicia of international law. A consensus of writers holds, with good reason, that this area of the law is still in a formative condition and that no clear rule has yet emerged to sanction a particular means of apportioning the use of international river water. The *1952 Report of the Economic Commission for Europe* contains a judicious appraisal of the writings of many international law publicists on this subject and concludes:

Most of the authors recognize that State sovereignty must be limited but their ideas as to the extent of and reasons for such limitations differ widely.²⁵

. . . .

[T]hese theories fail to withstand critical analysis, and their very diversity adds to the confusion.²⁶

. . . .

We ourselves shall make no attempt to construct a theory concerning the hydro-electric development of waters of common interest on the sole bases of purely legal concepts, as this would, we consider, be so much wasted effort.²⁷

In 1931, H. A. Smith canvassed the little material then available on the use of international river water, observing:

For the most part the leading textbooks have little or nothing to say upon the subject²⁸

[The case of *Wyoming v. Colorado*] . . . serves to illustrate . . . that there is really no general rule of law which can be applied indiscriminately to all disputes that may arise.²⁹

Brierly expresses the same feeling in stating:

The law relating to . . . uses of rivers [other than for navigation], and indeed the customary law relating to rivers generally, is still in an early stage of development, for the problems . . . are of recent growth.³⁰

. . . .

It is probable that in the absence of a treaty there is no rule of law in this matter.³¹

²⁵ REPORT OF THE UNITED NATIONS ECONOMIC COMMISSION FOR EUROPE, U.N. Doc. No. E/ECE/136 at 85 (1952) [hereinafter cited as ECE REPORT].

²⁶ *Id.* at 93.

²⁷ *Id.* at 94.

²⁸ SMITH, THE ECONOMIC USES OF INTERNATIONAL RIVERS 154 (1931) [hereinafter cited as SMITH].

²⁹ *Id.* at 87.

³⁰ BRIERLY, THE LAW OF NATIONS 204 (5th ed. 1955).

³¹ BRIERLY, THE LAW OF NATIONS 129 (1928).

Professor Clyde Eagleton, who has several times reviewed the status of international rivers, candidly concedes that "except for navigation, little attention has been said to the international law for rivers."³² In 1957, Professor Schwarzenberger pointed up the rudimentary state of the law in observing:

It is controversial whether international customary law or general principles of law recognized by civilised nations impose any restraint on states regarding rivers which traverse the territories of several States. . . . [U]ntil more convincing evidence of the existence of restrictive rules of international customary law or general principles of law recognised by civilised nations is forthcoming, the term *international rivers* must be reserved to rivers, whether, in a geographical sense, national, binational, or multinational, the régime of which is the subject of international treaties.³³

Charles de Visscher has explained that "periodic attempts to unify the law have not been too successful," because European waterways have traditionally been involved in problems of navigation which raise considerations quite different from those present in American disputes more commonly involving the appropriation of interstate waters for irrigation.³⁴ At least token judicial support for these cautious appraisals of international water law issued from the Imperial Administrative Court of Austria (the high municipal tribunal of Austria), in 1913:

[W]e have not passed beyond the postulate of the mutual and fair consideration of the contiguous states through which the river takes its course; and . . . opinions still widely differ regarding the extent to and the form in which this consideration should be applied³⁵

Thus, it should be acknowledged that "as regards the right of a riparian state to use, obstruct, or divert boundary waters, international law is obscure."³⁶ For this reason, as for others going to the doubtful weight of the sources of international law, the materials which follow are offered with considerable diffidence.³⁷

³² Eagleton, *The Use of the Waters of International Rivers*, 33 CAN. B. REV. 1018 (1955).

³³ SCHWARZENBERGER, *INTERNATIONAL LAW* 218 (3d ed. 1957).

³⁴ DE VISSCHER, *THEORIES ET REALITIES EN DROIT INTERNATIONAL PUBLIC* 260-65 (2d ed. 1955).

³⁵ 1 HACKWORTH, *DIGEST OF INTERNATIONAL LAW* 595 (1940).

³⁶ MacKay, *The International Joint Commission Between the United States and Canada*, 22 AM. J. INT'L L. 292, 295 (1928). See also BISHOP, *INTERNATIONAL LAW CASES AND MATERIALS* 298 (1953); 1 HYDE, *INTERNATIONAL LAW* 563 (2d ed. 1945); SIMSARIAN, *THE DIVERSION OF INTERNATIONAL WATERS* 99 (1939); KAECKENBEECK, *INTERNATIONAL RIVERS* 181 (1918); Austin, *A Study of the History and Influence of the Harmon Doctrine*, 37 CAN. B. REV. 393, 399 (1939).

³⁷ For an argument that apportionment of international rivers involves too many variables to make any statement of principles desirable, see BRIERLY, *THE OUTLOOK FOR INTERNATIONAL LAW* 42-43 (1944); REPORT OF THE NILE COMMISSION IN 130 BRITISH AND FOREIGN STATE PAPERS 112 (1929) [hereinafter cited as Br. St. P.].

II

THREE THEORIES OF INTERNATIONAL LAW ON THE DIVERSION OF RIVERS

A. That a State has an Absolute Right to All Waters Within Its Territorial Jurisdiction

That a state has absolute dominion over all water within its territory relies, of course, upon the rubric of national sovereignty. First popularized in the United States by Attorney General Judson Harmon,³⁸ the doctrine states that:

[T]here is no duty or obligation in international law on any state to restrain its use of the waters within its territory to accommodate the needs of another state. Jurisdiction and control of a state over the waters of an international river wholly in its territory is exclusive.³⁹

Not entirely by coincidence, the Attorney General asserted this position when it served American imperial interests to do so. In 1895, the Government of Mexico protested diversions of water from the Rio Grande River then being made on the American side of the border.⁴⁰ The complaint alleged that serious injuries had resulted to existing domestic and agricultural uses of the water in Mexico and claimed that Mexico's interest in the river with respect to future developments had been prejudiced as well. While the United States subsequently agreed to guarantee Mexico a certain minimum interest in the river, it did so in a Convention which expressly disavowed any recognition of Mexican rights as a matter of international law:

The delivery of water as herein provided is not to be construed as a recognition by the United States of any claim on the part of Mexico to said waters.⁴¹

In 1929, when the American Section of the International Water Commission convened to reconsider certain minimum guarantees to Mexico, it restated that no acknowledgment of Mexican rights as a matter of inter-

³⁸ For a recent discussion, see Austin, *A Study of the History and Influence of the Harmon Doctrine*, 37 CAN. B. REV. 393 (1959).

³⁹ *Id.* at 408.

⁴⁰ The undeveloped state of international law at the time is attested by reliance of the Mexican Minister on civil, rather than international, law. See SIMSARIAN, *THE DIVERSION OF INTERNATIONAL RIVERS* 44 (1939).

⁴¹ Art. IV, Rio Grande Convention of 1906, 1 MALLOY, *TREATIES, CONVENTIONS, INTERNATIONAL ACTS, PROTOCOLS AND AGREEMENTS BETWEEN THE UNITED STATES OF AMERICA AND OTHER POWERS* 1202, 1203 (1910). See also Article V, providing that: "The United States, in entering into this treaty, does not thereby concede, expressly or by implication, any legal basis for any claims heretofore asserted . . . by reason of any losses incurred by the owners of land in Mexico . . . nor does the United States in any way concede the establishment of any general principle or precedent by the concluding of this treaty."

national law was intended.⁴² And in 1939 a writer was safe in observing that:

The United States has maintained consistently in negotiations with Mexico that there is no limitation in international law on the right of a state to divert the waters of a river while it is wholly within its territory, before the river enters another state or forms the boundary line between that state and another state.⁴³

The doctrine has received mild support from a few publicists such as Briggs, who has written:

In the absence of [a special conventional regime between States] . . . national rivers and those portions of international rivers which are within the national territory are subject to the exclusive control of the territorial sovereign. No general principle of international law prevents a riparian State from excluding foreign ships from the navigation of such a river or from diverting or polluting its water.⁴⁴

Professor Klüber concurs by observing:

[T]he independence of States is particularly marked in the free and exclusive use of their right over the whole extent of the waters [in their territory].

. . . .

A State . . . is entitled to exploit its territory to achieve its proper objects . . . by . . . changing the course of waterways, even if that might turn out to be to the detriment of other States.⁴⁵

To a measured extent publicists who have maintained that there is no international law of rivers have lent unwitting support to the doctrine of absolute sovereign rights; in the absence of a positive set of rules apportioning the use of a river, one must more or less fall back upon the natural advantage a small state derives from its location on a river, limited only by considerations of power politics.

The doctrine is honored more with opposition⁴⁶ than support, however, and probably does not describe any international law today. American practice has abandoned the Harmon Doctrine. The Treaty With Mexico (Feb. 3, 1944) regulating rights in the Colorado, Tijuana, and Rio Grande Rivers expressly acknowledged the "common interest" and the protection of the

⁴² See *The Report of American Section of the Int'l. Water Comm.*, H.R. Doc. No. 359, 71st Cong., 2d Sess. (1930).

⁴³ SIMSARIAN, *THE DIVERSION OF INTERNATIONAL RIVERS* 71 (1939).

⁴⁴ BRIGGS, *THE LAW OF NATIONS* 274 (2d ed. 1952).

⁴⁵ ECE REPORT 52.

⁴⁶ See, e.g., Griffin, *The Use of Waters of International Drainage Basins Under Customary International Law*, 53 AM. J. INT'L L. 50, 69 (1959). Austin, *supra* note 38, at 407, bluntly states: ". . . Whatever merit [Attorney General Harmon's] argument may have as an exercise in logic it has no relation to common sense."

existing uses of both parties,⁴⁷ and a legal advisor of the State Department was explicit and vigorous in personally repudiating the doctrine.⁴⁸ Certainly with respect to rivers the headwaters of which are not within American territory, our position has been quite different from that of the Harmon Doctrine. Thus, in negotiating the use of the Columbia River with Canada the United States has asserted that Canada is not free to utilize the river so as to jeopardize existing uses or projects on the American side.⁴⁹

The bulk of the international publicists oppose the doctrine of absolute sovereign rights on grounds aptly stated by H. A. Smith, who has done the most extensive writing on this subject: "[The doctrine of absolute supremacy of the territorial sovereign] is . . . essentially anarchic . . . permit[ting] every state to inflict irreparable injury upon its neighbours without being amenable to any control save the threat of war."⁵⁰ More significantly, the doctrine of absolute sovereignty finds virtually no support within our federal system nor, indeed, could it be appropriate to the settlement of interstate water disputes among federal entities constitutionally inhibited from pursuing their own ends with indifference to the interests of others.⁵¹ If applied literally to interstate disputes, the rigorous application of this doctrine would oblige the Supreme Court to abandon to the quasi-sovereign states the means of apportioning vital rivers according to geographic advantage and practical ability to divert water away from each other, regardless of the social consequences to the nation. This is hardly a likely prospect.

B. That No State Can Use the Water of a Communal River in a Manner Which Substantially Affects Other States Without Their Prior Consent

It seems safe . . . to state as a general principle of international law that, while each state has sovereign control within its own boundaries, in so far

⁴⁷ See particularly articles 8 and 9. 59 Stat. 1219, T.S. No. 994 (effective Nov. 8, 1945).

⁴⁸ *Hearings Before the Senate Foreign Relations Committee on Treaty With Mexico Relating to the Utilization of the Waters of Certain Rivers*, 79th Cong., 1st Sess., pt. 5 at 1738-55 (1945). See also pt. 1 at 19-21. The Treaty elsewhere provided for dams to insure the continuance of existing uses. Timm, *Water Treaty Between the United States and Mexico*, 10 DEP'T STATE BULL. 282 (1944). See Austin, *supra* note 38 at 407, suggesting that article 7 of the Treaty of Guadalupe Hidalgo of 1848 flatly contradicts Harmon's thesis.

⁴⁹ *The United States Position—Diversion of Columbia River Waters*, in PACIFIC NORTHWEST REGIONAL MEETING OF THE AMERICAN SOCIETY OF INTERNATIONAL LAW (1956). See particularly the respective remarks of Hutcheson, Sherwood, Jordan, and Bourne, at 21, 35, 16-18.

⁵⁰ SMITH 144-45.

⁵¹ *Kansas v. Colorado*, 185 U.S. 125, 143 (1902): "But when one of our States complains of the infliction of such wrong or the deprivation of such rights by another State, how shall the existence of cause of complaint be ascertained, and be accommodated if well founded? The States of this Union cannot make war upon each other. They cannot 'grant letters of marque and reprisal.' They cannot make reprisal on each other by embargo. They cannot enter upon diplomatic relations and make treaties." See also *Rhode Island v. Massachusetts*, 37 U.S. (12 Peters) 657, 726 (1838); *United States v. Texas*, 143 U.S. 621 (1892); *Kansas v. Colorado*, 206 U.S. 46, 97 (1907).

as international rivers are concerned, a state may not exercise that control without taking into account the effects upon other riparian states. This is a negative statement which I can as confidently put into positive form in the old maxim *sic utere tuo ut alienum non laedas*.⁵²

This limited principle of international law has gathered authoritative support among publicists, conventions, cases, and our own federal practice. With respect to international law publicists, the following expressions are on point. In *The Economic Uses of International Rivers*, Professor Smith states:

Where any proposed employment of waters by one state threatens to injure the legitimate and vital interests of another, the latter is justified in offering an absolute opposition to the employment proposed

No state is justified in taking unilateral action to use the waters of an international river in any manner which causes or threatens appreciable injury to the lawful interests of any other riparian state.⁵³

In his *Treatise on International Law*, Professor Hall has observed:

Obstruction or diversion of the flow of a river by an upper riparian State to the prejudice of a lower is alleged to be forbidden on the principle that 'no State is allowed to alter the natural conditions of its own territory to the disadvantage of the natural conditions of the territory of a neighbouring state', and the same principle applies to the use of the river so as to cause danger to a lower riparian State.⁵⁴

In an article which surveyed the municipal law of Germany, France, Switzerland, Italy, and the United States, Professor Sauser-Hall stated:

[N]o diversion of a stream which is of a character to strongly prejudice other riparians or communities whose territories are bordered by or traversed by the same stream [is permissible].⁵⁵

Professor Oppenheim, adverting again to the catchlines of tort law, maintained:

[A]n abuse of a right enjoyed by virtue of International Law . . . occurs when a State avails itself of its right in an arbitrary manner in such a way as to inflict upon another State an injury which cannot be justified by a legitimate consideration of its own advantage The maxim, *sic utere tuo ut alienum non laedas* . . . is one of those general principles of law recognized by civilised States which the Permanent Court is bound to apply by virtue of Article 38 of its Statute.⁵⁶

⁵² Eagleton, *The Use of the Waters of International Rivers*, 33 CAN. B. REV. 1018, 1021 (1955).

⁵³ SMITH 151.

⁵⁴ HALL, *TREATISE ON INTERNATIONAL LAW* 175 (8th ed. 1924).

⁵⁵ *L'Utilisation Industrielle des Fleuves Internationaux*, 83 RECUEIL DES COURS 470, 517 (1953). (Author's translation from the French.)

⁵⁶ 1 OPPENHEIM, *INTERNATIONAL LAW* 345-47 (8th ed. 1955).

The same principle recurs in the writings of Brierly,⁵⁷ Cardona,⁵⁸ Baty,⁵⁹ and Kaekenbeeck.⁶⁰

Of recent vintage are the resolutions of international associations and conferences. Such material may reasonably be considered as once removed from the authority of "highly qualified publicists," although it probably comes closer to this source of law than to any other allowed by article 38 of the International Court Statute. And as expressions of aspiration by unofficial representatives from a considerable number of countries, these resolutions are not without value. In 1956 the Dubrovnick Conference attended by members of the International Law Association passed the following resolutions, among others:

III. While each state has sovereign control over the international rivers within its own boundaries, the state must exercise this control with due consideration for its effects upon other riparian states.

IV. A state is responsible, under international law, for public or private acts producing change in the existing regime of a river to the injury of another state, which it could have prevented by reasonable diligence.

. . . .

VI. A state which proposes new works . . . or change of previously existing use of water which might affect utilization of the water by another state must first consult with the other state.⁶¹

In 1957 the plenary session of the Inter-American Bar Association resolved that the following principles, among others, form part of "existing international law":

1. Every state having under its jurisdiction a part of a system of international waters, has the right to make use of the waters thereof insofar as such use does not affect adversely the equal right of the states having under their jurisdiction other parts of the system.

. . . .

3. States having under their jurisdiction part of a system of international waters are under a duty to refrain from making changes in the existing regime that might affect adversely the advantageous use by one or more other states having a part of the system under their jurisdiction except in accordance with: (i) an agreement with the state or states affected or (ii) a decision of an international court or arbitral commission.⁶²

⁵⁷ BRIERLY, *LAW OF NATIONS* 205 (5th ed. 1955).

⁵⁸ *El Regimen Juridico de los Rios Internacionales*, 56 *REVISTA DE DERECHO INTERNACIONAL* 24, La Habana, No. 111 (1949).

⁵⁹ BATY, *THE CANONS OF INTERNATIONAL LAW* 83 (1930).

⁶⁰ KAECKENBEECK, *INTERNATIONAL RIVERS* 181 (1918).

⁶¹ *Principles of Law Governing the Uses of International Rivers*, in *REPORT OF THE INTERNATIONAL LAW ASSOCIATION CONFERENCE (1956)* [hereinafter cited as *I.L.A. REPORT*].

⁶² *RESOLUTIONS OF THE TENTH CONFERENCE OF THE INTER-AMERICAN BAR ASSOCIATION* No. 4 (1957).

In 1952 the United Nations Economic Commission for Europe concluded a study on the development of hydro-electric power in Europe. While disavowing any principles purporting to represent settled international law, it stated that "most authorities" claim that states enjoy a *limited* sovereignty over communal waters, but that as soon as "serious injury" may be caused to another state, the consent of the affected state must be obtained.⁶³ At another point, the *Report of the Commission* justifies the prerequisite of consent as a necessary means of respecting the absolute sovereignty of riparian states, rather than as a manifestation of the *sic utere* principle:

[The fact that compromises have been reached does not impair the absolute sovereignty of States, but] . . . on the contrary, . . . resolves itself into the consent which the State may give for the execution of the works, and finds expression in the agreement

A State has the right to develop unilaterally that section of the waterway which traverses or borders its territory, insofar as such development is liable to cause in the territory of another State, only slight injury or minor inconvenience compatible with good neighbourly relations.

On the other hand, when the injury liable to be caused is serious and lasting, development works may only be undertaken under a prior agreement.⁶⁴

As to what constitutes "serious injury," the ECE, unhappily, declined to specify. The suggestion of the ECE that *trivial* injuries to other states do not genuinely impugn their sovereignty or require their prior consent dovetails with the *Madrid Declarations of 1911* (a source of international fluvial law cited with only slightly less frequency than the magnum opus of H. A. Smith):

I. [N]either State may, on its own territory, utilize or allow the utilization of the water in such a way as *seriously* to interfere with its utilization by the other State or by individuals, corporations, etc., thereof.

II. When a stream traverses successively the territories of two or more States:

1. The point where this stream crosses the frontiers of two States, whether naturally, or since time immemorial, may not be changed by establishments of one of the States without the consent of the other.

. . . .

3. No establishment (especially factories utilizing hydraulic power) may take so much water that the constitution, otherwise called the utilisable or essential character of the stream, shall, when it reaches the territory downstream, be *seriously* modified.⁶⁵

⁶³ ECE REPORT 61.

⁶⁴ *Id.* at 209-11. See also Sikri comments in the I.L.A. REPORT 8.

⁶⁵ 24 INSTITUT DE DROIT INTERNATIONAL ANNUAIRE 170 (1911); SMITH 156; ECE REPORT 261. (Emphasis added.)

Let us now turn briefly to a consideration of the judicial and quasi-judicial support for the principle that international law requires the prior consent of affected parties to sanction the use of a river which may adversely affect them. In 1939, the Italian Court of Cassation attempted to clarify the mutual interest of France and Italy in the Roya River with the following observations:

International law recognizes the right on the part of every riparian State to enjoy, as a participant of a kind of partnership created by the river, all the advantages deriving from it for the purpose of securing the welfare and the economic and civil progress of the nation

However, although a State in the exercise of its right of sovereignty, may subject public rivers to whatever regime it deems best, it cannot disregard the international duty, derived from that principle, not to impede or to destroy, as a result of this regime, the opportunity of the other States to avail themselves of the flow of water for their own national needs.⁶⁶

The implication is, therefore, that some mutually satisfactory agreement must be reached before use of a river can be made by one sovereign where such use would adversely affect another.

In 1927 the Deutsches Staatsgerichtshof adjudicated a dispute between Wurttemberg, Prussia, and Baden concerning use of the Danube River. Wurttemberg and Prussia had protested the diminished flow of the Danube through Wurttemberg. The court indicated that "general principles of international law concerning the flow of international rivers" would support the *sic utere* principle:

[E]very State is subject to limitations based on general principles of international law precluding it from infringing the rights of another member of the international community. No State has the right to cause substantial injury to the interests of another State by the use it makes of the waters of a natural waterway.⁶⁷

In 1892 British authorities apportioned the use of thirteen rivers traversing Madras and Mysore according to the proposition that the upper riparian could proceed with certain irrigation projects only after obtaining the prior consent of the affected lower riparian. The agreement fell short of giving the lower riparian a veto power, however, in providing that consent could be withheld only in the interest of protecting certain existing rights in the river.⁶⁸

⁶⁶ *Société Énergie Électrique du Littoral Méditerranéen v. Compagnia Imprese Elettriche Liquori*, in the Italian Court of Cassation, Feb. 13, 1939, reported in LAUTERPACHT, ANNUAL DIGEST OF PUBLIC INTERNATIONAL LAW CASES No. 47, at 121 (1938-40).

⁶⁷ ANNUAL DIGEST OF PUBLIC INTERNATIONAL LAW CASES 128 (Lauterpacht ed. 1927-28).

⁶⁸ Salient passages are reproduced and discussed in the Note on Sikri comments, in the I.L.A. REPORT 5-6.

In 1856, preceding settlement by treaty, Dutch ministers were instructed to regard Dutch rights in the Meuse River common to Holland and Belgium in light of the following statement of principle:

The Meuse being a river common both to Holland and to Belgium, it goes without saying that both parties are entitled to make the natural use of the stream, but at the same time, following general principles of law, each is bound to abstain from any action which might cause damage to the other. In other words, they cannot be allowed to make themselves masters of the water by diverting it to serve their own needs, whether for purposes of navigation or of irrigation.⁶⁹

The statement is of interest not only because it appears to support a broad *sic utere* principle, but also because it may mark the earliest appeal to principles of law as a means of governing the use of communal rivers.⁷⁰ Nearly one hundred years later the same theme has been echoed. Speaking before the United Nations Security Council in 1953, the Syrian delegate stated his understanding of principles which must govern use of the Jordan River common to Syria and Israel, expanding the *sic utere* principle into a doctrine of prior consent: "There is no doubt whatever that in this case a mutual prior agreement for the use of the waters is necessary before any project can be started in connexion with them."⁷¹

As might reasonably be expected, the doctrine of prior consent is reinforced by widespread treaty practice.⁷² The explanation for its incidence here rests upon the *prospective* nature of many treaties, attempting as they frequently do to fix general rules which will control the future conduct of the signatory states with respect to subjects of mutual interest, rather than focusing upon the settlement of existing disputes or past wrongs. The principle that the use of communal water which substantially affects other states requires their prior consent is well designed to head off unilateral exploitation of international rivers which might otherwise involve states in an unwelcome test of power and in an undesirable, abrasive relationship. What the prior consent doctrine may imply, however, by way of remedy against a state which ignores it and whether such a remedy is practically available in American interstate suits must be considered hereafter. The following treaties are offered as examples of the inclusion of the doctrine of prior consent in treaties between nations:

⁶⁹ SMITH 217.

⁷⁰ *Id.* at 136.

⁷¹ U.N. SECURITY COUNCIL OFF. REC. 8th year, 649th Meeting 21 (S/PV.649) (1953). See also I.L.A. REPORT 26-27.

⁷² H. A. Smith, *The Chicago Diversion*, 8 CAN. B. REV. 330, 335 (1930): "Taken as a whole . . . treaties proceed upon the principle that works executed in the territory of *A* require the consent of *B* if they injuriously affect his interests. In general they indicate a tendency to incorporate this principle in the conventional law of nations."

On the significance of multilateral conventions, see BISHOP, INTERNATIONAL LAW CASES 24 (1953).

1. *Treaty Between the Netherlands and Prussia, 1816*

One of the earliest international river treaties on point was this treaty signed at Aix-la-Chapelle on June 26, 1816, fixing frontiers between the Netherlands and Prussia. With respect to future use of certain frontier rivers, it provided: "[Neither State] shall make any alteration whatever in the course of the rivers or in the actual banks of the rivers, nor grant any concession or diversion of water, without the consent and agreement of the two Governments."⁷³

2. *Treaty Between Belgium and Holland, 1843*

Signed at Maestricht on August 8, 1843, this treaty fixed the conditions for the prospective use of several rivers in determining the frontier between Belgium and Holland: "No new use of water, no concession or innovation whatsoever, entailing some modification of the rivers or other boundary watercourses, or to the present condition of the banks, can be admitted without the consent of the two Governments."⁷⁴

3. *Treaty Between Sweden and Norway, 1905 (Treaty of Karlstadt)*

Signed at Stockholm on October 26, 1905, the Treaty of Karlstadt severed the two countries. It provided, generally, for the regulation of communal lakes and watercourses and is notable for resting the prior consent doctrine on general principles of international law:

Article II: Conforming to general principles of international law, it is understood that works mentioned in Article I, (re communal lakes and rivers), shall not be executed in one of the two States without the consent of the other, every time that these works, in affecting the water situated in the other State, sensibly hinder the use of the water course for navigation or the floating of logs, or otherwise effect serious changes in the water over a considerable area.⁷⁵

4. *Treaty Between France and Italy, 1914*

Signed in Paris on December 17, 1914, and previously referred to in our discussion of cases,⁷⁶ this treaty strongly supports the prior consent doctrine in the prospective use of the international Roya River:

Article I: The high contracting parties mutually bind themselves not to exploit, or to permit the exploitation of the hydraulic force of the Roya or its tributaries, on the side of the river exclusively subject to their sovereignty, in any manner which will be of a nature to sensibly modify the regime or the method of natural flow of the water in the lower state.

Article II: The . . . parties mutually recognize their equal rights to the water and descent of the Roya and of its tributaries, in all the parts where this river course forms the frontier between France and Italy. In conse-

⁷³ 3 BR. ST. P. 720, 729 (1838). (Author's translation from the French.)

⁷⁴ 35 BR. ST. P. 1202 (1860). (Author's translation from the French.)

⁷⁵ 98 BR. ST. P. 828, 829 (1905). (Author's translation from the French.) See also FAUCHILLE, *DRÖIT INTERNATIONAL PUBLIC* 498-99 (1925).

⁷⁶ See text at note 66 *supra*.

quence, each of the two States declares its inability, on its own territory, to utilize or to permit the utilization of the water in a manner which causes injury to the equal right of utilization by the other State on the other side, without the consent of that State.⁷⁷

Article III: No works are to be constructed along the banks of the frontier stretches without the consent of the other party.⁷⁸

5. *Treaty Between France and the Netherlands, 1915*

Signed September 30, 1915, this Convention limited use of the Maroni River which formed the boundary between French Guiana and Dutch Surinam in South America:

Article III: No works, whether for purposes of public or private utility, are to be constructed in the frontier section of the river, such as to be capable of constituting an obstacle to navigation or of modifying the nature of the river, except by consent of both parties.⁷⁹

6. *Treaty Between Finland and Russia, 1922*

Signed at Helsingfors on October 28, 1922, this agreement applied to the vast network of frontier watercourses between the two countries: "Waters may not be diverted from the watercourses . . . unless a special agreement has been concluded in each case between the Contracting States."⁸⁰

Similar agreements with fully analogous provisions have been promulgated among the following nations: France and Switzerland;⁸¹ Finland and Norway;⁸² Germany and France;⁸³ South Africa and Portugal;⁸⁴ Great Britain and Belgium;⁸⁵ the United Kingdom and the United States;⁸⁶ the United Kingdom and Brazil;⁸⁷ and Costa Rica and Panama.⁸⁸ Further

⁷⁷ 108 BR. ST. P. 467-68 (1914). (Author's translation from the French.)

⁷⁸ See the appendix in SMITH at 179.

⁷⁹ 110 BR. ST. P. 872 (1916). (Author's translation from the French.) See also SMITH 181.

⁸⁰ 19 LEAGUE OF NATIONS TREATY SERIES 193, 194-95 [hereinafter cited as L.N.T.S.].

⁸¹ 110 BR. ST. P. 886.

⁸² 122 BR. ST. P. 530 (1925). See particularly art. I: "In the river systems of the Pasvik and the Jakobselv, no measure shall be taken on the territory of one of the contracting States which causes a change in the natural regime of the waters at their lowest point, to the detriment of the other State, without its consent." (Author's translation from the French.)

⁸³ 75 L.N.T.S. 264, 268.

⁸⁴ 123 BR. ST. P. 593 (1926).

⁸⁵ 139 BR. ST. P. 746 (1934). For support of the *sic utere* principle, see articles 1, 4, 6, and 10.

⁸⁶ See article XI of the Treaty of 1925, governing diversions from the Lake of the Woods. 44 Stat. 2108, T.S. No. 721 (effective July 17, 1925). See also Convention with Canada Respecting Emergency Regulation of Rainy Lake, Sept. 15, 1938, 54 Stat. 1800 (effective Oct. 18, 1940).

⁸⁷ See ECE REPORT 149: [A]ny work such as canalization, irrigation, or the development of electrical power shall only be undertaken subject to the mutual consent of both riparian States."

⁸⁸ 144 BR. ST. P. 751 (1941). See particularly art. 5: "Any work either one of the two countries may desire to undertake on the rivers marking the frontier line must be approved, in anticipation, by the other party."

support for the prior consent doctrine is found in the coerced Treaty of Peace of 1919, signed at Versailles by the Allied and Associated Powers with Germany, which provided:

Article 359: Subject to the preceding provisions (which secured certain extraordinary rights to France for exploitation of the Rhine River), no works shall be carried out in the bed on either bank of the Rhine where it forms the boundary of France and Germany without the previous approval of the Central Commission or of its agents.⁸⁹

Also, in the Treaty of Peace of 1919, signed by the Allied and Associated Powers and Bulgaria at Neuilly-sur-Seine, the use of international rivers for irrigation purposes was stipulated to have priority over navigation interests only "with the consent of all the riparian states represented on the International Commission."⁹⁰

A Convention signed at Barcelona on April 20, 1921, acceded to by more than twenty small countries and ratified by Italy, Denmark, Bulgaria, Albania, India, New Zealand, and the British Empire, tends to establish the prior consent doctrine as a "general principle of law recognized by civilized nations":

It is understood, however, that [certain uses of international rivers] . . . cannot be undertaken [by a riparian state] so long as the State on the territory of which they are to be carried out objects on the ground of vital interests.⁹¹

Since scarcely any of the signatory states have any rivers in common, however, the Convention is deprived of much practical significance. Moreover, the requirement of prior consent appears to be limited to those uses to be carried out *within* the territory of another state and may not obtain where the injury or interference with sovereign territory would be indirect.

More significant, perhaps, is the Convention among Great Britain, Belgium, Czechoslovakia, France, Germany and Italy of 1922, instituting the Statute of Navigation of the Elbe. Here the geographic proximity of some of the signatory states is most meaningful:

Save where there is reasonable ground of opposition on the part of one of the riparian States, founded . . . upon . . . needs of irrigation . . . or the need for the construction of other and more advantageous means of communication, a riparian State may not refuse to execute the works included in the said programme on condition that is not bound to assume a direct share of the expenses.⁹²

⁸⁹ BRITISH TREATY SERIES No. 4, at 1 (1919) [hereinafter cited as BR. T.S.].

⁹⁰ BR. T. S. No. 5, at 781 (1920).

⁹¹ BR. T. S. No. 28, art. 9(3) (1923).

⁹² 26 L.N.T.S. 219, 239; BR. T. S. No. 3 (1923). Translation of article 43 in SMITH, appendix at 193.

Ostensibly, this Convention is antagonistic to the prior consent doctrine, but in reserving to each state its right to reject a proposed use of communal rivers on the ground of injury to vital interests and in failing to provide for any means of testing the reasonableness of such an objection, the Convention adheres to the prior consent doctrine in conferring an absolute veto right on each state, as H. A. Smith has properly remarked.⁹³ The same veto is featured in the Convention between Great Britain, Northern Ireland, New Zealand, Denmark, Greece, Siam, Southern Rhodesia, and Newfoundland signed at Geneva on December 9, 1923, and relating to the Development of Hydraulic Power (along rivers) affecting more than one state:

The provisions [relating to reference of disputes to judicial settlement] shall not be applicable to any State which represents that the development of hydraulic power would be seriously detrimental to its national economy or security.⁹⁴

As a final item in this chronology of treaties and conventions, attention should be drawn to the Declaration of the Seventh International Conference of American States (1933). A salient passage provides:

[N]o State may, without the consent of the other riparian State, introduce into water courses of an international character, for the industrial or agricultural exploitation of their waters, any alteration which may prove injurious to the margin of the other interested State.⁹⁵

These, then, are the authorities which support concepts of international law which may reasonably be brought within the general principle or doctrine of prior consent. In its mildest aspect, as an avatar of the *sic utere* maxim, the principle may mean only that a state must develop its water resources with due regard for the interests of other states—a proposition which is more platitudinous than helpful as it leaves unanswered the following questions: What degree of interest must another state establish to forestall injury by a state which subsequently wishes to exploit the river? Should competing interests be weighed and a decision rendered in favor of the state with "superior" interests? Should proof of anticipated "substantial" injury to one state forever foreclose a particular use of the river by another? Is some ultimate agreement apportioning use of a river mandatory? And, not the least significant, who shall decide these issues? International publicists have proffered no answers, treaties offer us little assistance, and the occasional cases touching the *sic utere* principle are not on point. In this posture, we are obliged to concede that the notion of *sic utere tuo ut alienam non laedas* is largely an aspiration of international jurisprudence which encourages states to anticipate disputes and to provide for

⁹³ SMITH, appendix at 194.

⁹⁴ Article 12, 36 L.N.T.S. 76, 81; Br. T. S. No. 26 (1925).

⁹⁵ 28 AM. J. INT'L L. 59 (Supp.) (1934).

them by treaty and which deals with a subject which might otherwise be settled only through power politics. At best, currency of the *sic utere* notion negatives the assertion of an absolute sovereign right to make uninhibited use of all waters within a state's territory and may, in prospect, provide for the peaceful apportionment of international rivers through negotiation.

In its more stringent aspect the principle of prior consent means that a state cannot use an international river in any capacity where such a use would affect the river's suitability for use by any other state without first obtaining the prior consent of all states so affected. The principle is, in this view, an unequivocal interdict against unilateral appropriations, and one would suppose that a tribunal deciding a dispute under this doctrine would require the undoing of state projects constructed without the permission of affected states or would award damages to the full extent that the affected states were prejudiced; its decision would be unaffected by other considerations, and it would not weigh the needs which impelled the offending state to use the river nor would it consider the unreasonableness of the affected states in withholding their consent to that use as long as they could show some injury. It purports to confer an absolute veto on each state, paying full tribute to the negative virtues of sovereignty;⁸⁶ but as a forceful inducement to states to negotiate their differences and to anticipate their needs by treaty, the doctrine of prior consent is not without merit. Moreover, it is in many respects consonant with international law which commonly seeks the protection of the sovereign independence of nations by a matrix of negative rules and prohibitions. This emphasis on the protection of sovereignty is, perhaps, the hallmark of international law. The law of nations, in the main, is derived from the consent of states which are naturally jealous of their own "vital interests;" the law seeks to insulate smaller states from the incursions and pressures of larger, self-aggrandizing states, and it attempts to avoid sanctioning conduct giving rise to disputes unlikely to be settled by peaceful means. But the doctrine of prior consent effects these aims at the risk of cutting off the fruitful use of international rivers among states obstinately hostile to any use which might work to their own slight disadvantage.

Moreover, considerations which support the doctrine in international politics do not obtain within our own federal system, and so its acceptance by the Supreme Court is both unlikely and unwarranted. In contrast to the international community, our federal political subdivisions can be controlled by laws not promulgated by their own local legislatures, as each has relinquished a large measure of its sovereignty to Congress and the Union. Quite obviously, too, the settlement of disputes by means of war is not a real prospect which should figure in arriving at principles to govern the

⁸⁶ See SMITH 147, 151, 156. See also 1 REPORT OF THE INDUS COMMISSION 54 (1950).

apportionment of interstate rivers. To the extent that the doctrine of prior consent is useful in adjudicating interstate cases, it should therefore be accepted merely as one consideration among several; perhaps it is not unfair that where a state has made no attempt to consider the interests of its quasi-sovereign neighbors and has promoted its own interests in cavalier disregard of the welfare of adjoining states, the principle of prior consent affords a reasonable basis for the Supreme Court to require a tailoring of such projects to maximize the use of a river for all the parties concerned, including the nation-at-large. This suggests that the prior consent of affected riparian states ought not to be controlling, although it is relevant depending upon the extent of the affected state's interest and the reasonableness of its refusal as measured by the extent of probable injury.

*C. That Waters of a Communal River Must be Equitably Apportioned
According to a Number of Relevant Considerations*

[E]very river system is naturally an indivisible physical unit, and as such it should be so developed as to render the greatest possible service to the whole human community which it serves, whether or not that community is divided into two or more political jurisdictions.⁹⁷

This general philosophy is supported not only by a convincing number of international publicists,⁹⁸ treaties,⁹⁹ and cases,¹⁰⁰ but corresponds to the doctrine of equitable apportionment purportedly followed in the American cases as well.¹⁰¹ As the Supreme Court stated in *Connecticut v. Massachusetts*:

⁹⁷ SMITH 150-51.

⁹⁸ See, e.g., *Principles of Law Governing the Uses of International Rivers*, No. V, I.L.A. REPORT at 4; RESOLUTIONS OF THE TENTH CONFERENCE OF THE INTER-AMERICAN BAR ASSOCIATION No. 2 of Committee I at 78 (1957); Eagleton, *The Use of the Waters of International Rivers*, 33 CAN. B. REV. 1018, 1021-23 (1955); SMITH at 151; Cardona, *El Regimen Juridico de los Rios Internacionales*, 56 REVISTA DE DERECHO INTERNACIONAL 24, 26 La Habana, No. 111 (1949); Quint, in ECE REPORT at 60; Andrassy, *Le Droit International De Voisinage*, II RECUEIL DES COURS 119-21 (1921); Griffin, *Legal Aspects of the Use of Systems of International Waters*, U.S. Cong. Doc. No. 118, 85th Cong., 2d Sess. 90 (1958); Bourne, PACIFIC NORTHWEST REGULAR MEETING OF THE AMERICAN SOCIETY OF INTERNATIONAL LAW 29 (1956).

⁹⁹ See, e.g., Franco-Hispanic Treaty of 1866, arts. IX and X, 56 BR. ST. P. 212, 226; Treaty With Mexico, Nov. 14, 1944, art. 8, 59 STAT. 1219, T.S. No. 690 (effective Nov. 8, 1945); Treaty With Great Britain Relating to Boundary Waters Between the United States and Canada, Jan. 11, 1909, art. VIII, 36 STAT. 2448 (effective May 13, 1910); Franco-Turkish Treaty of 1921, art. 12, 114 BR. ST. P. 771 (1921) (commented on by Hirsch in 50 AM. J. INT'L L. 81, 88 (1956)); Regime of Navigable Waterways of International Concern, art. 6, BR. T.S. No. 28 (1923); Convention of 1923, art. 2, 36 L.N.T.S. 76, 81; Franco-Turkish Protocol of 1930, translated by Hirsch in 50 AM. J. INT'L L. 81, 86 (1956) from the Rapport a la Societe des Nations sur la situation de la Syrie et du Liban, Année 1930, at 177.

¹⁰⁰ See, e.g., 1 REPORT OF THE INDUS COMMISSION 10-13 (1950): "It follows from (these principles) that the rights of the several units concerned in this dispute must be determined by applying neither the doctrine of sovereignty, nor the doctrine of riparian rights, but the rule

[D]isputes [over interstate rivers] are to be settled on the basis of equality of right. But this is not to say that there must be an equal division of the waters of an interstate stream among the States through which it flows. It means that the principles of right and equity shall be applied having regard to the "equal level or plane on which all the States stand, in point of power and right, under our constitutional system" and that, upon a consideration of the pertinent laws of the contending States and all other relevant facts this Court will determine what is an equitable apportionment of the use of such waters.¹⁰²

The signal difficulty with the doctrine of equitable apportionment is, however, that the same platitudinous quality which makes it so agreeable also makes it disturbingly vague and uncertain. All parties are assured that a tribunal will treat their interests "fairly," without the mechanical application of a rigid rule, but none can anticipate from this alone precisely how safe they will be in appropriating the use of a communal river. As a bald proposition, equitable apportionment merely negatives or mitigates the two principles previously discussed, *i.e.*, the doctrines of absolute sovereignty and prior consent.

There is, however, some authority which may give this principle a certain clarity on at least two points, the latter one being of considerable significance. Although the occasion would be rare when two states or nations were planning fluvial diversions at the same moment, the notion of equitable apportionment has been spelled out in recognizing a preference for certain kinds of uses. Thus, diversions for domestic purposes assume priority over those for industrial or agricultural purposes,¹⁰³ and the construction of

of 'equitable apportionment,' each unit being entitled to a fair share of the waters of the Indus and its tributaries."

The *Donauversinkung Case*, ANNUAL DIGEST OF PUBLIC INTERNATIONAL LAW CASES 128 (Lauterpacht ed. 1927-28): "[A]n attempt must be made to apportion or measure the respective interests in an equitable manner, balancing the advantages gained by one state against the injury, or possible injury, caused to another." The case is discussed in SMITH 54; SEMSARIAN, DIVERSION OF INTERNATIONAL RIVERS 93-95 (1939). The original report is found in 116 *Entscheidungen des Reichsgerichts in Zivilsachen* 18 (Ger.).

The *Leitha River Case*, reported in 1 HACKWORTH, DIGEST OF INTERNATIONAL LAW 595 (1940): "[W]e have not passed beyond the postulate of the mutual and fair consideration of the contiguous states through which the river takes its course . . ."

See also the case of *Aargau v. Zurich*, *Entscheidungen des Schweizerischen Bundesgerichts aus dem Jahre 1878* (Jan. 12, 1878), noted by Schindler, *The Administration of Justice in the Swiss Federal Court in Intercantonal Disputes*, 15 AM. J. INT'L L. 149, 169-72 (1921).

¹⁰¹ See Austin, *A Study of the History and Influence of the Harmon Doctrine*, 37 CAN. B. REV. 393, 433-34 (1959), and cases cited therein.

¹⁰² 282 U.S. 660, 670-71 (1931).

¹⁰³ Treaty With Great Britain Relating to Boundary Waters Between the United States and Canada, Jan. 11, 1909, art. VIII, 36 Stat. 2448 (effective May 13, 1910); Treaty With Mexico, Nov. 14, 1944, art. III, 59 Stat. 1219, T.S. No. 994 (Nov. 8, 1945); REPORT OF THE INDUS COMMISSION 11 (1950). *But see* I.L.A. REPORT 4; Hirsch, *Utilization of International Rivers in the Middle East*, 50 AM. J. INT'L L. 99 (1956): "No priority categories of water use exist in Middle East conventional law, such as exist in European and American international agreements . . ."

canals to divert previously unused portions of a river to supply municipal water systems is to be preferred if the river is not sufficient also to support irrigation canals. The same common sense attitude generally prefers agricultural uses over recreational uses for hunting and fishing.¹⁰⁴ Some qualitative distinctions among uses, therefore, do exist to assure a state of the propriety of its diversion in advance, as evidenced by international customary law.

The more serious question arises, however, where one state initiates a use of a certain kind without the consent of other riparians and is subsequently confronted with their demand that water committed to this pre-existing use must now be released for their own projects of the same or a "preferred" nature. Specifically, the issue has arisen in disputes involving right in communal rivers for irrigation purposes, and the question is what weight will be given to a pre-existing project or use.

The answer which seems to be emerging is that the *prior appropriator will enjoy a superior right in the absence of a showing of extreme hardship to adversely affected parties*. In an address before the Inter-American Bar Association in 1957, John Laylin asserted this principle most vigorously:

As a rule, the protection of uses, lawful when they came into existence, so long as they remain beneficial, has been treated as an absolute first charge upon the waters.

. . . .

In less favored regions, not only are existing uses protected, but as between existing uses those first established ordinarily enjoy a priority over uses established later.¹⁰⁵

The *rapporteur* for the Institute de Droit International, Professor Andrassy of the University of Zagreb, Yugoslavia, concurs with the following illustration:

Certain developments and constructions have taken place before the conflict of interest and the necessity for regulation made themselves felt. In such a case, one applies the principle of acquired rights. The priority of the existing fact is respected, since needs have already been adapted to those possibilities created by this previous construction.¹⁰⁶

¹⁰⁴ See, e.g., Treaty With Mexico, Nov. 14, 1944, art. III, 59 Stat. 1219, T.S. No. 994 (Nov. 8, 1945). The priority of navigational uses, in contrast, is not uniformly agreed upon, some ranking it second to domestic use (REPORT OF THE INDUS COMMISSION 11) Treaty With Great Britain, Jan. 11, 1909, art. VIII, 36 Stat. 2448 (effective May 13, 1910), others ranking it after industrial and agricultural uses; Treaty With Mexico, Nov. 14, 1944, art. III, 59 Stat. 1219, T.S. No. 994 (Nov. 8, 1945); remarks of Laylin, *Principles of Law Governing Use of International Rivers*, in INTER-AMERICAN BAR ASSOCIATION CONFERENCE 146 (1957).

¹⁰⁵ INTER-AMERICAN BAR ASSOCIATION CONFERENCE, PRINCIPLES OF LAW GOVERNING USE OF INTERNATIONAL RIVERS 63, 68 (1957).

¹⁰⁶ Andrassy, *Le Droit International De Voisinage*, II RECUEIL DES COURS 119-21 (1951). (Author's translation from the French.)

Indeed, as early as 1858 Vattel identified actual appropriation of communal waters as a sovereign act sufficient to establish an enduring, legitimate claim:

[T]he nation that first established her dominion on one of the banks of the river is considered as being the first possessor of all that part of the river which bounds her territory.

If that nation has made any use of the river, as, for navigating or fishing, it is presumed with greatest certainty that she has resolved to appropriate the river to her own use.¹⁰⁷

Also, in a State Department memorandum prepared by the Office of the Legal Advisor, high priority for what is "just and reasonable" is given to "established lawful and beneficial uses" even in preference to a "comparison of the economic and social gains accruing from the various possible uses . . . to the entire area dependent upon the waters in question."¹⁰⁸ The statement is consistent with the position taken by Mr. Len Jordan, Chairman of the United States Section of the International Joint Commission, who has argued against proposed Canadian diversions from the Columbia River by relying on "substantial investments in existing power plants" already undertaken by the United States.¹⁰⁹

The 1956 Conference of the International Law Association suggested that the following considerations are relevant to the equitable apportionment of communal rivers:

- (a) the right of each [state] to a reasonable use of the water;
- (b) the extent of the dependence of each state upon the waters of that river;
- (c) the comparative social and economic gains accruing to each and to the entire river community;
- (d) pre-existing agreements among the states concerned; and
- (e) pre-existing appropriation of water by one state.

In explaining the comparative weight which might be attached to each factor, a member of the reporting committee suggested that "an especial importance attaches to existing uses," subordinate only to a prior agree-

¹⁰⁷ VATTEL, *THE LAW OF NATIONS* 120 (1858).

¹⁰⁸ Griffin, *Legal Aspects of the Use of Systems of International Waters*, U.S. Cong. Doc. No. 118, 85th Cong., 2d Sess. 90 (1958).

¹⁰⁹ Jordan's statement has been construed as favoring the protection of existing *projects* and not merely existing uses, *i.e.*, once preparation for the use of a river has begun, a right is established over the use of whatever water is contemplated by the project. See Austin, *A Study of the History and Influence of the Harmon Doctrine*, 37 CAN. B. REV. 393, 442 (1959); Remarks of Ladner in *The United States Position—Diversion of Columbia River Waters*, in PACIFIC NORTHWEST REGULAR MEETING OF THE AMERICAN SOCIETY OF INTERNATIONAL LAW 16-17 (1956).

ment between the parties which would otherwise form the law to govern the parties.¹¹⁰

Treaties dating from 1816 have offered similar support for the rank of pre-existing uses in determining what constitutes equitable apportionment. Thus, the Netherlands and Prussia agreed in that year that "established rights (in frontier rivers) shall continue to be recognized for the benefit of the same State which presently enjoys them."¹¹¹ A treaty between Belgium and Holland signed in 1843 provided that "uses of water which exist at this moment on the rivers or other watercourses falling on the frontier shall be preserved in their present condition."¹¹² A Convention ratified by Great Britain, Northern Ireland, New Zealand, Denmark, Greece, Siam, Southern Rhodesia, and Newfoundland in 1923 provided that future power projects were to be developed "with due regard for any works already existing, under construction, or projected."¹¹³ A Franco-Hispanic Treaty of 1866 provided for the apportionment of frontier waters only after "deduction [was] made for lands already under irrigation."¹¹⁴ Examples could be multiplied,¹¹⁵ but it is sufficient to summarize these treaties by stating that pre-eminent respect for existing uses is reasonably well established within the framework of equitable apportionment.

Some disagreement has, of course, been registered,¹¹⁶ and certainly cases can be imagined where rigorous application of the doctrine of pre-existing uses would work an intolerable hardship. Thus, if the prior appropriator were wasting a substantial part of its diversions through excessive absorption in unlined canals or only occasional actual use of the total water diverted, it might lose its priority.¹¹⁷ In another vein, it might be more equitable to permit subsequent diversion where the later use could be clearly demonstrated to be more productive or socially beneficial, *provided*

¹¹⁰ I.L.A. REPORT at p. 4 of the *First Report of the Committee on the Uses of the Waters of International Rivers*, and at p. 12 of *Laylin's Comments*.

¹¹¹ 3 BR. ST. P. 720 (1838). (Author's translation from the French.)

¹¹² Art. 37, 35 BR. ST. P. 1202 (1860). (Author's translation from the French.)

¹¹³ Art. 2, 36 L.N.T.S. 76, 81; BR. T.S. No. 26 (1925).

¹¹⁴ Art. X, 56 BR. ST. P. 212, 226 (1866). (Author's translation from the French.)

¹¹⁵ See, e.g., REPORT OF THE INDUS COMMISSION 10-11 (1950): "In the general interest of the entire community inhabiting dry, arid territories, priority may usually have to be given to an earlier irrigation project over a later one: 'priority of appropriation gives superiority of right'; U.N. SECURITY COUNCIL OFF. REC. 8th year, 649th Meeting 21 (S/PV.649) (1953) (remarks of Syrian delegate); Convention between Persia and Russia, art. IV, 73 BR. ST. P. 97 (1882); *Hearings Before the Senate Foreign Relations Committee on Treaty With Mexico Relating to the Utilization of the Waters of Certain Rivers*, 79th Cong., 1st Sess., pt. 1, at 19-21 (1945).

¹¹⁶ See, e.g., remarks of Ladner in *The United States Position—Diversion of Columbia River Waters*, in PACIFIC NORTHWEST REGULAR MEETING OF THE AMERICAN SOCIETY OF INTERNATIONAL LAW 18 (1956). And see authors, at notes 38, 44 and 45 *supra*, who support the doctrine of absolute sovereignty.

¹¹⁷ See *Washington v. Oregon*, 297 U.S. 517, 523-24 (1936).

that due compensation were made to the prior appropriator.¹¹⁸ On these matters, however, international law is not helpful for there is virtually no authority which indicates the influence of these competing factors.

CONCLUSION

Bearing in mind that international custom, agreement, or opinion has not yet developed sufficiently so as comprehensively to spell out a law governing the diversion of communal rivers, a consensus of authority may lean towards the following propositions:

1. No state enjoys an absolute claim on communal waters by virtue of its geographic situation alone.

2. The equitable apportionment of international rivers requires in the first instance an attempt to secure the consent of all states which would be adversely affected by a proposed use.

3. Such consent may reasonably be withheld where the proposed diversion conflicts with *imminent* diversions for purposes of higher or equal priority, or where the proposed diversion would adversely affect pre-existing uses of any reasonable kind.

- a) Where consent was reasonably withheld, subsequent diversions by the state which applied for or which should have applied for consent shall have no influence in determining the outcome of an ensuing dispute.
- b) Where consent was unreasonably withheld, or circumstances clearly indicate in advance that no state would be presently and adversely affected by a proposed diversion of communal waters, the use of the water then diverted for any reasonable purpose shall act to establish the right of the appropriator to its continued use.

If these propositions are at least suggested by considerations of international law, there is probably even more reason to apply them to interstate disputes within the United States. First, notions of the absolute integrity of state sovereignty occupy a lesser importance within our federal system than they do in the community of nations; rather, we are more properly concerned that our natural resources be put to use in some capacity which will benefit a substantial number of people within the nation viewed as a single community. Thus, there is less reason to apply the doctrine of prior consent in its most rigorous form by giving to each state an absolute veto over proposed uses of interstate rivers which might result in a stalemate to

¹¹⁸ For another consideration, see *Nebraska v. Wyoming*, 325 U.S. 589, 618 (1945): "But if an allocation between appropriation States is to be just and equitable, strict adherence to the priority rule may not be possible. For example, the economy of a region may have been established on the basis of junior appropriations. So far as possible those established uses should be protected though strict application of the priority rule might jeopardize them."

be resolved only by congressional action. It would seem better to encourage the development of our river systems by providing some assurance that should a state make heavy investments in projects not detrimental to any existing interest of other states, those projects will not subsequently be disturbed by later claims of others. The doctrine of pre-existing uses seems well adapted to this end.

Second, and perhaps correlative to the first proposition, there is less of a need for explicit consent among states of a federation where rules of conduct are otherwise clear than among national states, because of assured access to judicial authority in case of dispute. Whether national states will seek friendly recourse to an arbitration commission or to the International Court is still within their discretion, leaving open the unhappy possibility of settling a dispute by force or coercion. Thus, international law may be inclined to favor a rule requiring prior agreement in every case, as a means of avoiding possible misunderstandings and a resort to force. States within the United States must settle their differences by lawful means, however, and thus it is easier to adopt a rule upon which they can rely in anticipation of judicial support in the event that a dispute does develop. To the extent that international law may be helpful in the solution of interstate water disputes, it would seem best for the courts to draw from those principles which promote rapid development of river systems by assuring the states that projects undertaken with due regard for others at the time will not later be upset.