CHAPTER 11

RIVERS UNDER CUSTOMARY INTERNATIONAL LAW

1. THE INTERACTION BETWEEN TREATY LAW AND CUSTOMARY LAW

The previous chapter began with the proposition that while each riparian state possesses a sovereign right to exploit the water resources of a shared river within its territorial jurisdiction, this right is not an absolute one. It can be exercised to the extent it conforms with international law. It was also noted that while there is agreement on the need for a legal regime to define and regulate these rights, the specific contours of the law continues to invoke considerable debate in which the existence of legal rules is both asserted and at the same time denied.

Given the existence of a large mass of water treaties spread over a long period of time and space, treaties which, moreover, reproduce certain similar general provisions, the task of abstracting substantive rules of customary law would appear quite simple. Taken in this context, the conventional regime would be said to do no more than evidence and affirm an established customary rule. However, this would not only be an oversimplification but normatively erroneous to reach such a literal conclusion. The drawback with this approach is a tendency of either reading too little out of a treaty or too much of it, both of which
lead to misleading results. Undeniably, a provision in
a convention, despite its specific applicability on state
parties to it, could and does play a role in the genera-
tion of a customary rule binding on third states, provided
it attains sufficient opinio juris, whether prior or sub-
sequent to its enactment. It thereby gets absorbed into
the general body of customary international law.

The problem of customary international law is a
stubborn one: it has always been difficult to ascertain
whether a given state is bound by a rule of that kind and,
if so, from what moment. It is not proposed to go into
the whole debate on the subject here as ample commen-
tary on the subject is available elsewhere, including in some
of the authoritative opinions of International Court of
Justice.¹

¹ For example, L. Brownlie, Principles of Public Interna-
tional Law, edn.3 (London, 1979), pp.4-12ff; A. D'Amato,
The Concept of Custom in International Law, (Cornell,
1971); H. W. A. Thirlway, International Customary Law and
Codification, (Leiden, 1972); L. Kopalmanas, "Custom as
a Means of the Creation of International Law," B.Y.I.L.,
MacGibbon, "Customary International Law and Acquiescence,"
B.Y.I.L., Vol.33 (1957), pp.115ff; R. R. Baxter, "Multi-
lateral Treaties as Evidence of Customary International
"The Colombian-Peruvian Asylum Customary Law," AJIL.,
Vol.45 (1951), p.726ff; Verkata K. Raman, "Toward a Gener-
ral Theory of International Customary Law," in W. M.
Reisman and B. H. Weston, eds, Toward World Order and
Human Dignity: Essays in Honour of Myres McDougal (New
Briefly, however, customary law and conventional law interact in three ways: a treaty or a convention may be an affirmation or a declaration of an existing customary rule of law; it may solidify an emergent or nascent rule; and a treaty provision may initiate a practice, de lege ferenda, which could in due course constitute customary rules of international law. These three approaches to doctrine of sources of customary law have been empli-
fied by the International Court of Justice in various cases submitted to it. In the Namibia Advisory Opinion, in a matter relating to termination of treaties, the Court interpreted Article 60 of the Vienna Convention as having been declaratory of customary law on this aspect. In this regard, it is pertinent to note that the convention on which the Court rested its opinion had neither come into force nor was it ratified by all the parties in the case. Yet the Court stated that the instrument (Article 60) may "in many respects be considered as a codification of exist-
ting customary law on the subject". 2

The Court again provides authoritative application of the second approach i.e., where a treaty possesses a crystallizing effect. Delivering its judgement in the North Sea Continental Shelf Cases, the majority of the Court explained:

"... that although prior to the (1958) Conference (on the Law of the Sea), continental shelf law was only in the formative stage, and state practice lacked uniformity, yet 'the process of the definition and consolidation of the emerging customary law took place through the work of the International Law Commission, the reaction of governments to that work and the proceedings of the Geneva Conference'; and this emerging customary law became 'crystallized in the adoption of the continental shelf convention by the Conference'".  

Thus there are often rules at an embroinic stage that states are prepared to follow as customary law. The act of incorporation of these rules into a treaty only accelerates their ripening pace and inclusion into the corpus of customary international law. It is in this sense that a treaty is viewed only as a via media through which the reception of an emergent rule takes place and therefore binding upon non-state signatories to the convention.

The third instance i.e., norm-generating treaties, denotes a situation in which a treaty or a provision in it breaks completely new ground. Over the time, through widespread usage, the new norm gains general acceptance and is transformed into a customary rule of international law. Among many text writers, Hyde and Schwarzenberger share this approach. Hyde expresses the view that:

some bi-partite agreements have... recorded the beginning of rules of restraint, in which states

were generally prepared ultimately to acquiesce.... Agreements between states are thus becoming increasingly regarded as the sources of law as well as furnishing evidence of what the contracting parties are agreed that the law should be.  

Schwarzenberger states the same opinion:

Many rules which are commonly considered today to be rules of customary international law are nothing but generalizations from clauses of innumerable treaties of the past which have found general acceptance. The historical evolution of international law since the Middle Ages proves that treaties are frequently the forerunners of rules of international customary law and general principles of law recognized by civilized nations. One such optimal standards of international conduct are generally accepted, clauses in which they had been embodied vanish from treaty and become part of the common fund of international customary law or general principles of law recognized by civilized nations. Thus treaties have provided a fertile nourishing ground for the growth of rules the original treaty character of which has subsequently sunk into oblivion. 

Besides scholarly opinion, the International Court of Justice has had occasion to pronounce on this aspect.

Both in the Continental Shelf Cases and in the Fisheries Jurisdiction Cases the Court endorsed the possibility of


a purely conventional rule passing into general interna-
tional law. In the Continental Shelf Cases, the Court, while denying Article 6 of the Geneva Convention the status of a customary rule nevertheless made a general observation that, "from time to time" the generating influ-
ence of a treaty does occur", and it is "one of the recog-
nized methods by which new rules of customary international law may be formed ...." 6 In the Fisheries Jurisdiction Cases, 7 the Court illustrated this adaptation process by pointing out how the two concepts of fishery zone and pre-
ferential rights of fishing in adjacent waters had been constituted into customary international law. Viewed in this light, the treaty norm in question marks a progressive development of international law.

Irrespective of what preference one is disposed to, the fact is that custom and treaty law continuously inte-
ract on one another. This is not a denial of the specific characteristics and functions each of them possesses and performs, but rather that in the context of a highly dyna-
mic world no watertight demarcation can be presumed. A state's commitments to a treaty, and the time when it becomes binding can be determined with a high degree of

6 I.C.J., Reports, n.3.
certainty. When it comes to a customary rule matters become unclear and raise complex issues. It is necessary to evaluate each case in terms of a wide range of variables in continuous process of interplay instead of viewing them as if they were unrelated elements and events.

Having said this, the question as to what constitutes a customary rule of international law remains unanswered. Generally, in order for a rule to attain the status of an international custom it must pass the test of two constitutive elements: a general practice of states; and the acceptance of the general practice as law. 8 While generality 9


9 Generality and consistency of practice are complementary elements. However, it is not always easy to ascertain the generality of state practice and its exact content. This varies from situation to situation, and thus it is a matter of appreciation. See, the Genocide Case, I.C.J., Reports (1951), p.25. On the question of uniformity of practice, see the Court's pronouncement in the Asylum Case in which it stated that the party invoking a customary rule "... must prove that this custom is established in such a manner that it has become binding on the other party...." and that such a rule "... is in accordance with a constant and uniform usage practised by the states in question ...", a usage which "... follows from Article 38 of the Statute of the Court which refers to international custom 'as evidence of a general practice accepted as law'" I.C.J., Reports (1950), pp.276-77; the Fisheries Jurisdiction Case, I.C.J., Reports, (1974), pp.23-6; the North Sea Continental Shelf Cases, I.C.J. Reports (1969), p.42.
of practice does not give rise to much difficulty, the second element, *opinio juris sive necessitatis*, the psychological element, is quite controversial. The *opinio juris* postulates that for state practice to coalesce into and ascend the regime of customary law, states should have followed that practice or abstained from acting in a particular manner in the correct belief that it is required by law.10 Thus a usage does not become custom if it is not backed by *opinio juris*. Such was the view held by the Court in the Continental Shelf cases when it insisted that:

Not only must the acts concerned amount to a settled practice, but they must also be such, or be carried out in such a way, as to be evidence of a belief that this practice is rendered obligatory by the existence of a rule of law requiring it. The need for such a belief, i.e., the existence of a subjective element, is implicit in the very notion of the *opinio juris sive necessitatis*. The states concerned must therefore feel that they are conforming to what amounts to a legal obligation. The frequency or ever habitual character of the acts is not of itself enough. There are many international acts, e.g., in the field of ceremonial and protocol, which are per-

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formed almost invariably, but which are motivated only by considerations of courtesy, convenience or tradition, and not by any sense of legal duty.\textsuperscript{11}

Thus, a widespread practice, a usage spreading over many years does not of itself amount to formation of a customary rule without proof of psychological attitude. If practice alone is taken as sufficient element, it would be difficult to distinguish between what is merely a usage, courtesy or comity, from usages which give rise to legally binding custom. To insist on the requirement of \textit{opinio juris} is not to equate the development of customary international law to depend on pure consent of states. What is required is consistent and uniform generality of practice which must, however, have been followed by either a sense of conforming with the law, or the view that the practice was potentially law as suited to needs of inter-

\textsuperscript{11} I.C.J. Reports (1969), p.44; see, the Lotus case, the first case in which the International Court reverted to the element. The Permanent Court of International Justice stated: "Even if the rarity of the judicial decisions to be found among reported cases were sufficient to prove in point of fact the circumstances alleged by the Agent for the French Government, it would merely show that states had often, in practice, abstained from instituting criminal proceedings, and not that they recognized themselves as being obliged to do so, for only if conscious of a duty to abstain would it be possible to speak of an international custom. The alleged fact does not allow one to infer that states have been conscious of having such a duty, on the other hand... there are other circumstances calculated to show that the contrary is true. P.C.J., ser.A, No.10 (1927), p.28."
national community, and not a mere matter of convenience or courtesy. The *opinio juris* element would, similarly, include the view that if the practice in question was not required by the law, it was in the process of becoming so. Considered in this perspective, the states which originate the practice which is to grow into a customary rule should have acted under the commitment of an *opinio necessitatis*,\(^{12}\) that the practice in question is necessary as law, not merely as a matter of convenience, and further that as a consequence of such practice a legal rule is born, so that states subsequently following it could be said to be acting in accordance with *opinio juris* in the most strict sense. Thus, while in the initial stages, *opinio necessitatis* is enough to create a rule of law, its sustained existence depends on subsequent practice accompanied by *opinio juris* without which the new rule will not survive.

As pointed out from the outset, it is not within the scope of this study to go into the detailed debate on the theory of sources of international law. Therefore, this aspect need not detain the discussion any further. Having outlined the context under which customary law and treaty law interact and the main elements constituting a customary rule of international law, it is now proposed

\(^{12}\) Thirlway, n.1, pp. 55-56.
to test the treaty provisions surveyed earlier against this background. Attention will be centred on the question of the right of a riparian state to utilize the water resources within its territory, specifically the status of protection of existing uses as against future uses.

11. THE COMPETENCE TO UTILIZE WATER RESOURCES

Found in the majority of the water treaties\textsuperscript{13} is the principle that every riparian state has the sovereign right to exploit those water resources of a shared stream within its territory if in doing so it causes no "substantial", or "appreciable", "sensible", or "serious" injury on another co-riparian. Where the projected use is of such a nature as to affect substantially one or the other of the riparians affected.\textsuperscript{14} In essence, this provision attempts to reconcile two conflicting absolute theories: the theory of absolute territorial sovereignty and absolute territorial integrity both of which can be summed up in the Harmon doctrine. Instead of adhering to premordial absolutistic doctrines, this clause recognizes the principle of equal competence over shared water resources as a point of departure in defining legal rights

\textsuperscript{13} \textit{Supra.} Chapter 11.

\textsuperscript{14} \textit{Supra.} Chapter 11.
thereto. While the operative rules for its application are far from being clear and, therefore, rife with speculation, the principle may be examined on two broad levels: the first case relates to the competence of a state to use water resources when that use does not cause any injury; the second case around which centres the concept of protection of existing uses against future developments arises where such use definitely causes permanent and substantial injury. Out of this arises the question of prior consent along with the requirement for international cooperation.

A. Non-injurious Utilization of Water Resources

The proposition that a state is at liberty to utilize the water resources in its territory if in doing so it causes no injury to the other riparians is echoed in nearly all the treaties across all the regions. In the African continent this standard clause is found in Article 2 of the 1963\textsuperscript{15} Niger Act which recognizes the right of each state to utilize waters in its territory "without prejudice to its sovereign right." The colonial Nile agreements\textsuperscript{16} attempted to create a regime based on natural

\textsuperscript{15}Ibid., n.13.

\textsuperscript{16}See, for a detailed discussion, \textit{Infra}, Chap.V.
flow theory in that the upstream states were obligated not to interfere with the natural flow of the river. Leaving aside the inequities in the 1929 Nile Waters Agreement, Egypt recognized Sudan's right to use unspecified quantity of the Nile River. The Agreement establishing the Kagera Basin Organisation corroborates the rule that every riparian possesses the right to employ waters of a shared river. In short there is definite practice in Africa recognizing equal competence of access to shared water resources, that is, none of the extreme doctrines finds practical support in this region.

The same can be said of the Asian continent.¹⁷ Like in Africa, earlier there was a tendency to impose undue restrictions on the upstream state in favour of the downstream riparian. In recent times the tendency in the treaties is to abandon the natural flow theory by admitting the equal right of the upstream states to utilize water resources of a river flowing from its territory. The Indus Water Treaty of 1960¹⁸ between India and Pakistan demonstrates the clash between the Harmon doctrine and the natural flow principle. While Pakistan had insisted on the territorial integrity principle, India, on the

¹⁷ Supra. Chap.II.

¹⁸ Ibid.
other hand, asserted the Harmon doctrine. Acceptance of either doctrine would have deprived one or the other of the Parties of its legitimate legal right to the Indus waters. The Pakistan thesis, if put into its logical terms, meant that India could not have been in a position to undertake any water uses since by doing this it would have violated the doctrine of territorial integrity. Conversely, Pakistan would have been deprived of water had the Indian argument based on the sovereignty theory been the applicable law. Ultimately, the two states recognized each other's rights to the waters and proceeded to an equitable division of the Indus waters between themselves.

Turning to the Latin American region, one meets the same practice. Article IV of the Treaty for Amazonian Cooperation, 3 July 1978, stresses the sovereign right of each contracting state to "exclusive use and utilization of natural resources within their respective territories," the exercise of which "shall not be subject to any restrictions other than those arising from international law". This provision is consistent with principle 2 of the 1933 Montevideo Inter-American Declaration.

19 Ibid.
20 Ibid.
Turning to North America, the origin of the Harmon doctrine, it will be noticed how this doctrine has undergone a change, giving way to the modern principles of equitable apportionment. Rejecting the Mexican thesis of natural flow theory, the United States invoked the principle of absolute territorial sovereignty on the advice of Attorney-General Harmon who also based his opinion on the dicta in the Schooner Exchange. For many years, in fact until recently, the United States adhered to the

21 Ibid.

22 Justice Marshalls put forward the proposition that "the jurisdiction of the nation within its own territory is necessarily exclusive and absolute". He said: "This full and absolute territorial jurisdiction being alike the attribute of every sovereign, and being incapable of conferring extra-territorial power, would not seem to contemplate foreign sovereigns nor their sovereign rights as its objects. One sovereign being in no respect amenable to another, and being bound by obligations of the highest character not to degrade the dignity of his nation, by placing himself or its sovereign rights within the jurisdiction of another, can be supposed to enter a foreign territory only under an express licence, or in the confidence that the immunities belonging to his independent sovereign station, though not expressly stipulated, are reserved by implication, and will be extended to him...." W. W. Bishop, International Law Cases and Materials, edn. 2 (Boston, 1952), p.659; see Opinions of the Attorney-General, Vol.21 (1895), p.274; for detailed discussion, see generally, Jacob Austin, "Canadian-United States Practice and Theory Respecting the International Law of International Rivers: A study of the History and Influence of the Harmon Doctrine", Canadian Bar Review, Vol.37 (1959), pp.393-443.
Harmon doctrine as the applicable law. 23 In spite of this, the United States, by the 1906 Rio Grande Treaty, had no doubt that Mexico had a legitimate legal claim to the said waters. It would appear that what was at issue was the extent of this right, and not whether it existed or not. Moreover, this must be viewed in the context of Mexico's appeal to "natural and historic" rights. It seems that it was the validity and the consequences of this assertion that the United States was eager to obliterate as a legal claim. Yet, in spite of this suggestion, Article 11 25 of the Canadian-United States Treaty incorporated the Harmon doctrine. However, from the point of view of what is being analysed in this sub-section, that Article did not deny either party the right to utilize the waters of their shared streams. In concrete terms, it was a recognition of the equal existence of these rights.


25 Supra., Chapter 11.
The rule that every state has a right to the waters of an international watercourse and therefore to alter the natural regime of a river has long been acknowledged in European treaties. Further references are uncalled for.

This view is shared by a large number of authorities. William W. Van Alstyne states that:

As a matter of reason, it should be clear that each nation must be free to develop fluvial resources which will advance its economy or welfare when no substantial alteration of the river as it flows from or into co-riparian states results. Any rule to the contrary could operate to frustrate the useful application of a valuable natural resource, according to political jealousies of states tempted to invoke their veto power for unworthy reasons or for no reasons at all....

To him, therefore, the fundamental premise of the law on the subject lies on the concept of qualified sovereignty which is subject to a prohibition against inflicting damage in the territory of co-riparians. The same opinion is found in the 1961 Salzburg Resolution of the Institute.

26 Ibid., n.23, p.315.

of International Law, and the Asian-African Legal Consultative Committee.\textsuperscript{28} It is also in line with the basic assumptions underlying the 1966 Helsinki Rules\textsuperscript{29} of the International Law Association. Most recent studies on international rivers explicitly or implicitly support it, and above all it has a judicial backing in the 1957 Franco-Spanish Lake Lanoux\textsuperscript{30} arbitration.

Lake Lanoux is located in French territory but forms the source of the Carol River which flows from France into Spain. When France proposed inter-basin transfer of some of the Lake Lanoux waters for hydroelectric power production, Spain protested asserting that the diversion would be unlawful without its consent. Although France undertook to return the same flow of water to the river before it entered Spain, the latter stuck to its original position. The dispute was submitted to Arbitral Tribunal which declined to accept the Spanish claims on the grounds that; the French project would not affect any

\begin{itemize}
  \item \textsuperscript{28} Asian-African Legal Consultative Committee, \textit{Reports of the Fourteenth Session} (New Delhi, 1973).
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  \textsuperscript{29} International Law Association, Helsinki Rules (London, 1967); Text may also be found in Garretson, n.27, Appendix A, pp.779-830; \textit{Supra}, cha.11.
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\end{itemize}
interests in Spain, and that international law imposed no obligation on France to obtain Spain's consent before undertaking the project. It said,

"... the rule according to which states may utilize the hydraulic force of international water-courses only on condition of a prior agreement between the interested states cannot be established either as a custom, or even less as a general principle of law.... As between Spain and France, the existence of the water resources of an international water-course can therefore result only from a Treaty". 31

In categorical terms, then, this decision rejected the notion that consent of co-riparian states is a rule of customary international law. 32 On the contrary, it affirmed the right of unilateral action, at least in instances where its exercise causes no injury.

The American Supreme Court in the decisions in interstate water disputes arrives at the same result. For example, in Connecticut v. Massachusetts, 33 it refused to

31 Ibid., p.165.


33 282 U.S.660 (1931), see, also, Scott, n.23, p.452.
enjoin Massachusetts from diverting water from an inter-state river for use at Boston since the diversion would not have caused any real and substantial damage to Connecticut's existing use of the river. New Jersey v. New York,\textsuperscript{34} New York v. Illinois,\textsuperscript{35} Kansas v. Colorado,\textsuperscript{36} and Arizona v. California,\textsuperscript{37} among others, are of the same opinion.

It might appear that Nebraska v. Wyoming\textsuperscript{38} was a departure, for there the Supreme Court issued a decree that, in effect, prohibited Colorado from future diversions of water without the Court's permission despite unproven injury. Dissenting from the majority ruling, Justice Roberts maintained it was a departure and Justice Rutledge concurred with him. The difference between the majority and the minority opinions was in essence that, the majority, convinced of the inadequacy of water supply, concluded that any further diversions in Colorado were bound to cause injury downstream and should therefore be enjoined at once; on the other hand, the minority was not

\textsuperscript{34} 283 U.S.336 (1931).
\textsuperscript{35} 274 U.S.488 (1927).
\textsuperscript{36} 206 U.S.46 (1907), and also Colorado v. Kansas, 320 U.S.383 (1943).
\textsuperscript{37} 283 U.S.423 (1931), also 298 U.S.558 (1936).
\textsuperscript{38} 325 U.S.589 (1945). For a full review see, generally, Scott, n.23, pp.449-454.
satisfied that further diversions would necessarily cause injury downstream and, at any rate, felt that utilization of water should not be enjoined without proof of actual damage or a threat of substantial damage. In other words, the majority judgement enjoining Colorado was aimed solely at acts that would cause immediate injury. It did not, it is suggested, question the right of a state to use water when it can do so without injuring co-riparians.

In arguing for the right to use waters of an international river when it is not injurious, the statement should not be taken in its absolute sense for there can be no use which does not cause some interference in the natural conditions of a stream. If such inconvenience is of a minor magnitude it ought to be ignored by the other riparians. With this qualification, the principle requires further refinement, since taken in its present form, it amounts to no more than a restatement of the Maxim sic utere tuo ut non alienum laedas, too vague to be of practical application. If interpreted narrowly, it narrows the right of utilization. The decisive point in this context lies in the meaning attached to the term "injury". It is submitted here that the main objective of law is to promote maximum employment of water resources. Therefore, a restrictive interpretation of the term "injury" seems desirable. In fact there is reason for saying that
it is interpreted narrowly. Authorities indicate that a mere interference with the physical characteristics of a river is not unlawful. 39

As to the relevance of physical modifications in an international water-course, the Tribunal in the Lake Lanoux case spoke out more clearly. In dismissing the Spanish argument that France's proposed project could be executed only with her consent, because it would alter "the natural conditions of the hydro-geographic basin of Lake Lanoux", and make the "restitution of the waters of the Carol physically dependent upon human will", it said:

The Tribunal does not overlook the reality of each river basin which, from the point of view of physical geography, constitutes... "a whole". But this observation does not authorize the absolute consequences that the Spanish thesis would like to draw from it. The unity of a basin is sanctioned at the juridical level only to the extent that it corresponds to human realities. 40

True, the French project, by providing a return flow before the river cross into the Spanish territory, would not have changed in any appreciable way the physical features of the watercourse in Spain. Nevertheless, it would obviously have interfered with nature to a certain

39 See, for example, Van Alstyne, n.23, p.314.
extent, in particular with the natural rate of current, and yet the Tribunal declined to condemn the project in the absence of injury to Spain's interests. Instead, it stressed the irrelevance of mere physical geography in international river issues by pointing out that "modern technology leads to more and more frequent justifications of the fact that waters... should not be returned to their natural course." It said that within federations judicial decisions had recognized the validity of inter-basin water transfers. To the Tribunal, "human realities", much more than physical geography, were of concern of law in this field, dependence on water being the deciding factor.

The practice of altering the natural characteristics of a river by diversions is a familiar one. Although most of the diversions of international rivers are regulated by treaty, this is not to say that they would otherwise be illegal. This would seem to be the essence of the principle of freedom of utilization without causing substantial injury, or so long as it does not exceed a state's legal right.

Be that as it may, there is, nevertheless, some support for the view that a modification in the physical conditions of a river may in itself constitute "an injury"

41 Ibid., pp.162-163.
sufficient to give rise to an international claim. Article 11, paragraph 1, of the 1911 Madrid Declaration of the Institute of International Law provides that the point where a watercourse crosses the frontiers of two states may not be changed without the consent of the other. While the soundness of this principle is not debatable, it is, however, addressed to a problem of a different nature from the one being considered here. It is concerned with a change of direction of a watercourse. Paragraph 3 of the same article provides that:

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...42

while this rule of direct relevance, its exact meaning is not quite clear. Does it mean a prohibition against any change in the quantity or quality of water, in effect making it impossible for the upper riparian to use any water without infringing the rights of the lower state? If interpreted in the positive, the Article is a statement of the doctrine of territorial sovereignty. On the other hand, if what the Article means by "so much water" is diminution of quantity, then it does not prohibit an

42 Whiteman, n.32, p.922.
upstream state from taking and using its share of water. Read in this way, it is fair to conclude that the Institute viewed a harmless substraction of water to be legal. Yet it could also be argued that the Institute left the question open. In any case, an evaluation of the 1911 Madrid Declaration only of historical significance since the Institute again made a pronouncement on the subject and has modified its earlier understanding considerably. The 1961 Salzburg Resolution makes no reference to the constitution or character of a river or to its geographical features, but made interference with the utilization of its waters the basis of legal restraints on riparians.

The 1933 Montevideo Declaration, as already noted, was concerned only with the right of utilization of the waters of international rivers, qualifying it by the obligation not to injure the equal right of other riparians. It does not seem to suggest that a lower state could complain of upstream development simply on the ground that it produced physical changes in its territory. That granted, the procedure, however, prescribed in Articles 7 to 10 of the Declaration does in fact prevent unilateral acts, irrespective of their impact downstream. It

43 n.27.

44 Ibid.
requires a state to notify the other riparians of any development it proposes and obtain their consent or the approval of an arbitral tribunal.

Through these procedural requirements, the Declaration makes a strong defence of a state's right to the waters of an international river, but it does not enlarge the theoretical canvas of those rights. By making the consent of co-riparians or the approval of an arbitral tribunal a necessary condition, it does in practice hinder the right of utilization regardless of whether or not its exercise would produce adverse consequences, physical or otherwise.

In the works of some jurists one meets statements that appear to affirm that it is unlawful for a state to cause physical changes in another state's territory. Max Huber held the opinion that those developments are illegal which injure the natural or artificial watercourses of a downstream state, or acquired rights there. Oppenheim's treaties, citing only the 1911 Madrid Declaration, states that "it is a rule of International Law 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. Guillermo J. Cano put it more explicitly in his set of principles. He wrote that each state "has a right to demand physical and chemical integrity in that part of the waterway under its jurisdiction; the first requires that its course and volume should not be modified, and the second, that its waters should not be altered or polluted", and that "the distribution of the periculum and commodum will be left to nature, the result to be respected" by each state. Taken in their face value, the practical result of these statements would be to condemn the upstream development of an international water-course to the mercy of the downstream states. This was Spain's argument in the Lake Lanoux case, echoing the exact words used by these authorities, but it was emphatically rejected.

Pierre Sevette holds a slightly different view for


he concedes some interference with nature, admitting the legality of uses that do not cause more inconvenience and disadvantage to other states that neighbours might reasonably be expected to tolerate. But he added that, "the application of Grotius's theory to the development of waterways would lead us along a very dangerous road. It would enable an upstream state, in case of necessity, to divert a waterway if, for example, the downstream state was not exploiting it." H. A. Smith's contribution in this respect is the statement that "there has been no attempt in any international discussion to assert any claim of an absolute right to a particular volume of water apart from material injury."  

Finally, it must be concluded that the evidence supports the rule that a state can lawfully utilize the waters of an international watercourse within its jurisdiction for its own needs if in doing so it will cause no injury to utilization in neighbouring riparians.

9. The Case When Utilization Causes Serious Injury: Existing Uses v. Development

The principle analysed above is simple and presents


little conceptual and practical difficulties. However, moving on to a situation in which new developments or use of water resources of an international river will injure pre-existing uses in another riparian, the stage is rife with a delicate international dispute. Here then the clash between the projected new uses and protection of prior uses creates intricate legal issues, the significance of which is a matter of controversy. The question is: does the doctrine of prior appropriation, which provides that first in use, first in right — prior in tempore, potier in jure — have a definite place in international law making its protection sacrosanct?

There are various approaches to the law on this matter. One such approach is the classic opinion of Attorney-General Harmon of the United States. Delivering his opinion nearly a century ago (1895) on the international responsibility of the United States for injuries suffered by Mexican farmers as a consequence of diversions of the Rio Grande for irrigation in the United States, he stated that each country has exclusive jurisdiction and control over the use and diversion of all waters in its territory. 50 In effect, the Harmon doctrine reinforced powerfully the theory of absolute sovereignty over water resources on either side of the border

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in favour of the riparian state. The subsequent episode of the Harmon doctrine as applied in Canada - United States and Mexico-United States water relations has been extensively discussed and need not be revisited here. It is enough to note, however, that since then the doctrine received sustained official sanction so much so that some authors doubt whether the United States has actually abandoned it. This view is not altogether exaggerated considering the equivocal evidence of its representatives in the Senate hearings on the 1944 Mexico-United State's Treaty and in proceedings before the International Joint Commission in 1950 and 1951 when counsel for the United States relied on Article 11 of the 1909 Canadian-United States Boundary Waters Treaty.

51 See generally, Austin, n.23.


54 Supra. Chap.11.
The Harmon doctrine is not confined to North America alone. It has its exponents in other regions too. Austria, for example, has consistently adhered to it; in the Indus Waters dispute as pointed out already, India invoked it to counter Pakistan's prior appropriation theory. The Ethiopian Government, reacting to Aswan High Dam project, circulated a note in 1956 and 1957 which unmistakenly stated its position in terms of the Harmon doctrine. It is noteworthy that in the Indus Waters Treaty settling the dispute between India and Pakistan, the two states found it necessary to insert a provision to the effect that the settlement was based on other principles or factors and that the Treaty did not establish any general principles of law or any precedent.

During the negotiations leading to the 1909 Boundary Waters Treaty, Canada had opposed the doctrine as a


58 Art.11(2).
general principle, but accepted its inclusion in Article II of the Treaty. Subsequently, however, Canada felt entitled to apply Article II in the Columbia River Controversy. The problem was resolved by conclusion of the 1961 Columbia River Treaty.

Apart from the examples just cited, the Harmon doctrine has support among some authorities. Representing this school of thought, F. J. Berber, writing in 1959, is persuaded that: "... there are not yet in existence recognized rules of international law concerning the economic uses of rivers which flow through more than one country..." He rejected the principles adopted by the International Law Association in 1956 at its Dubrovnik Conference as statements de lege ferenda not de lege lata. His conclusion is that "state practice in the sense of customary law making practice exist only in the Scandinavian, possibly also in the Central European and perhaps even in the Western European legal system," and

60 Ibid.
61 Berber, n.56; Ibid., n.55, pp.149-150.
62 Ibid., n.56.
63 Ibid., n.55.
that these local practice "must remain clearly and neces-
sarily restricted to those cases where they can be proved
beyond doubt". Having arrived at this general conclu-
sion, he concedes the existence of "the principle of
mutual and general consideration for each other between
riparian states", which, in spite of its vagueness to be
of practical help, he nevertheless considers to be a
"general principle of international law recognized by
civilized nations". In this context, Berber seems to
qualify his acceptance of the Harmon doctrine.

Perhaps most notable among the defenders of the
Harmon doctrine is Hyde who maintains that "the upstream
proprietor... may in fact claim the right to divert at
will and without restraint such waters as the former may
require, and that regardless of the effect produced upon
the proprietor downstream". Under the influence of U.S.
Supreme Court in developing the doctrine of equitable
apportionment, Hyde too qualified his views since he did
not foreclose the progressive development of law on the
subject. Municipal decisions in the United States pro-
Municipal
tected him to observe "that the increasing tendency of

64 Ibid.
65 Ibid.
66 Hyde, n.4, p.565.
interested states to acquiesce through appropriate agreements in schemes of regulated diversions through accepted agencies bears testimony to the character of the practice that is in the process of development." Since the time of Berber and Hyde a lot has taken place in the development of international river law, so that some of their opinions and that of other writers may not carry as much weight as they did then.

Admittedly, in diplomatic correspondence exchanged in the course of water disputes, one finds states still make extreme claims for the lawfulness of their freedom to act as they please. Likewise, states contesting these claims make extreme representations for rules restraining freedom of action. Being a negotiating tool, it is not surprising, therefore, that states have not behaved in accordance with the absolutist principles they profess and have ultimately resolved their disputes on some moderate level of understanding.

The suggestion that in dealing with non-navigational uses of international rivers there is no international law regulating the acts of riparians in this field is rejected by an overwhelming body of opinion. If one

67 Ibid., p.571.

68 For a list of these authorities, see Sevett, n.48, pp.51-67; Berber, n.55, p.149; Van Alstyne, n.23,p.308.
considers the large mass of agreements among states,\footnote{69} the judgements of international\footnote{70} and municipal\footnote{71} judicial tribunals; the resolutions of learned associations and institutes; the work of the International Law Commission;\footnote{72} and other opinions expressed by inter-governmental and private agencies that have studied these problems; it is clear that all reject the notion of non-existence of law on the subject.\footnote{73}

The Influential English jurist, H. A. Smith, though apprehensive of the existence of legal rules to be applied by a Court or tribunal, did not accept the Harmon doctrine and any other similar absolute principle which he characterized as "... essentially anarchic permitting every state to inflict irreparable injury upon its neighbours without

\footnote{69} Supra., Chap.11.

\footnote{70} Lake Lanoux Arbitration (France and Spain), remains the only international judicial decision in this field, n.30.


\footnote{73} see the 1911 Madrid Declaration, n.32; the 1933 Montevideo Declaration, n.27; the 1961 Salzburg Resolution, n.27; the 1966 Helsinki Rules, n.29; Asian-African Legal Consultative Committee, n.28.
being amenable to any control save the threat of war. Such a doctrine, he continues, is "intolerable" and "radically unsound."

The widely held understanding that there is in existence a legal regime governing international rivers for uses other than navigation is not free from controversy. In fact, herein lies the key of the matter. There is no dispute over Andrassy's statement that use of waters of a watercourse invites international concern at the moment it causes transboundary damage. But how far does it carry the matter? Persons with diametrically opposite views may agree with it. One perception, for example, may be that pre-existing uses take precedence over new uses and, as such, must be protected as a matter of a customary rule of international law. Another vantage point of view is the opinion that prior appropriations are but only one of the elements to be taken into account in determining the legality of a project or use that may have a substantially damaging effect on them. The refutation of the Harmon doctrine that no damage is illegal does not logically lead to the proposition that all damage

74 Smith, n.49, pp.144-147.
is prohibited under law. This seemingly contradictory derivation leads squarely to the question: In the use of waters of an international river, what constitutes an "injury" under the general principles of international law?

In the first place there is abundance of authority to dispose off minor injuries from the category of unlawful injuries. At this point one can bring in aid statements of principles adopted by various associations of learned bodies\(^76\) and the work of the International Law Commission.\(^77\) Article 4 of the Salzburg Resolution contains the qualifying word "seriously", wherein it provides that no state "can undertake works or utilization of the waters... which seriously affect the possibility of utilization"\(^78\) by other states. The 1966 Helsinki Rules\(^79\) adopted by the International Law Association make no express mention of injury in its general articles, (i.e., Chapter 1), except in Chapter 3 addressed to pollution problems. Even here, Article X(b) is quite equivocal, for it states that a basin state "should take all reasonable measures to abate existing water pollution in an

\(^{76}\) n.73.

\(^{77}\) n.72.

\(^{78}\) n.73.

\(^{79}\) Ibid.
international drainage basin to such an extent that no substantial damage is caused in the territory of a co-basin state. Moreover, in the commentary accompanying this Article minor injuries are ignored since a "state that engages in a use or uses causing pollution is not required to take measures with respect to such pollution that would deprive it of equitable utilization." Similarly, the Geneva Convention of 1923 requires riparians to negotiate when an envisaged development of hydro-power by one riparian "might cause serious prejudice" to another.

The proposed draft Article 9, directed to prohibitions against activities causing "appreciable harm" read together with Article 7 dealing with the principle of equitable apportionment, by the International Law Commi-

80 Ibid., emphasis added.

81 Commentary to this Article may be found in Garretson and others, n.27, pp.793-796.

82 Ibid., p.796.

83 Convention Relating to the Development of Hydraulic Power Affecting more than one State, 1923, L.N.T.S., Vol.36, p.77. It came into force on 30 June 1925, but was ratified by only ten states. See commentary to these Draft Article where a view was expressed "that the framework agreement should recognize the right of each state to use its share of water, as well as the international watercourse system within its territory, in accordance with its own policies, programmes and principles." Ibid., p.166.
sion contemplate exclusion of minor injuries among its set of applicable rules in any future convention. Draft Article 9 reads:

A system state shall refrain from any prevent (within its jurisdiction) uses or activities with regard to a watercourse system that may cause appreciable harm to the rights or interests of other system states unless otherwise provided for in a system agreement.84

Article 7 would require states to develop water resources in a "reasonable and equitable manner on the basis of good faith and good-neighbourly relations... consistent with adequate protection...."85 Certainly the concepts of "good faith" and "good-neighbourliness" do not connote strictness. The cornerstone of these principles rests on the willingness and ability of the neighbouring states to accommodate certain inconveniences caused by one on the other's territory. It is in this context that one must view the mild wording of Draft Article 9 in which the drafters seem to avoid imposition of strict legal rules with a fear that they might be counter-productive. These statements, taken together, therefore, are substantial authority for the inference that the law ignores minor injuries and inconveniences since, as

84 n.72, p.167.
85 Ibid., p.164.
as Fauchill\textsuperscript{86} taught, they are a necessarily logical corollary of neighbourliness.

The soundness of this view is equally underscored by judicial decisions. Although the Lake Lanoux Arbitration is not a precedent in the legality of minor injuries, since the question was not directly raised there, it is of significance that in spite of Spain's assertion of a veto right over the French project she conceded in her Counter-Memorandum the right of a "State to utilize unilaterally that part of a river which runs through it so far as such utilization is of a nature which will affect on the territory of another state only a limited amount of damage, a minimum of inconvenience, such as falls within what is implied by good neighbourliness".\textsuperscript{87}

The Trail Smelter Arbitration, commonly relied on as the \textit{locus classicus} of transnational injuries, may be cited at this point, although it had nothing to do with international rivers. It was concerned with a complaint that sulphur fumes emitted by a smelter located in the town of Trail, Canada, had caused injury in the United States. Of relevance here is the remark made by the Tribunal that "under the principles of international law...\textsuperscript{86}


\textsuperscript{87} \textit{International Law Reports} (1957), p.124.
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 injury is established by clear and convincing evidence. Clearly, the Tribunal admitted of minor injuries, for it stressed that the consequences must be of "serious" magnitude.

Decisions of municipal courts on interstate river disputes in federal systems firmly support the proposition that states must accommodate minor injuries resulting from a neighbour's reasonable utilization if its water resources. The earliest instance in point is to be found in Wuttemberg and Prussia v. Baden, a case in which the German Court had to consider: first, an application by Wuttemberg for an injunction to restrain Baden from constructing dams to increase the loss of Danube waters by seepage and thus depriving Wuttemberg of it, and; second a counterclaim by Baden for an injunction to restrain Wuttemberg from undertaking works to reduce in its territory the seepage of water which flowed through natural channels into the Aach River to the advantage of Baden.

89 see, Annual Digest of Public International Law Cases (1927-28), p.128.
The Court located the applicable law in the general principles of international law, but delivered only a provisional judgement directing the dispute to be settled by agreement. What is relevant here are the following statements made by the Court: "No state may substantially impair the natural use of the flow of such a river by its neighbour"; 90 "... only considerable interference with the natural flow of inter-rivers can form the basis for claims under international law, 91 and Wuttemberg was enjoined "to refrain from such interference with the natural distribution of water as damages the interests of Baden to any considerable extent". 92 In the opinion of the German Court, therefore, injuries must be "substantial" or "considerable" before international law entertains them.

The decisions of the United States Supreme Court are of the same tenor. In applying the doctrine of equitable apportionment in the various interstate disputes posted to it, and in balancing the conflicting interests equitably, the Supreme Court has not found a minor injury

90 Ibid., p.131.


92 Ibid., pp.598-599.
sufficient for declaring a reasonable use in another state inadmissible.

The Supreme Court overruling a demurrer, in the very first of the leading cases, *Kansas v. Colorado*, 93 upheld this view. Kansas had sought to enjoin the utilization of Arkansas River for irrigation in Colorado alleging that diversions in the latter state deprived Kansas and its inhabitants of water previously utilized there, thus causing irreparable injury. The Supreme Court did not agree with Kansas' contention. Among other things, it said: "It cannot be denied... that the diminution of the flow... has worked some detriment to the southwestern part of Kansas", but "the withdrawal of the water... has not proved a source of serious detriment". 94 In another case, *Colorado v. Kansas*, 95 the Supreme Court yet again declined to interfere on the grounds that if Kansas were to be granted relief, Kansas would have to prove "additional takings working serious injuries to her substantial interests." 96 This was in tune with other decisions in similar disputes.

93 206 U.S.46 (1907).
94 Ibid., pp.113-114.
95 320 U.S.383 (1943).
96 Ibid., pp.392-393.
In the second Missouri v. Illinois, Justice Holmes turning away the complaint state due to insufficiency of proof, put the rule more directly: "Before this Court ought to intervene the case should be of serious magnitude, clearly and fully proved...." The same dicta is maintained in Connecticut v. Massachusetts where the Supreme Court said: "The governing rule is that this Court will not exert its extraordinary power to control the conduct of one state at the suit of another, unless the threatened invasion of rights is of serious magnitude and established by clear and convincing evidence". Connecticut was turned away because the evidence supplied did not show "any real or substantial injury or damage" that would be caused by the Massachusetts diversions.

Thus far, the claim for the existence of such a rule is quite persuasive. Beyond this the rule itself is too general to be reduced to a general formula so as to render push-button answers to all kinds of problems arising out of diverse water utilization of an international river. Paradoxical though it may appear, it is

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97 200 U.S. 496 (1906).
98 Ibid., p.521.
100 Ibid., p.669.
this generality or more correctly its adaptability, which
draws preference for it. This is so because it is based
upon a contextual approach which is deemed to be the
touchstone of reasonableness. It is not necessary to
draw upon a whole range of authorities in support of this
interpretation on the meaning attached to the term injury.
But it is sufficient to note that the International Law
Commission in its Draft Convention governing this field
of international law, has adopted the same approach. In
a commentary to the proposed Draft Article 9, concern
was voiced on the vagueness of the term "appreciable
harm", and it was suggested that it could be replaced by
another term, such as "material harm". 101 However, the
Commission felt that "the system states concerned should
agree on what constituted appreciable harm, since a simple
over-all definition was not possible". 102 This is a more
practical approach since it takes account of the indivi-
duality of each watercourse within which specific fea-
tures - physical, political and economic - are frequently
encountered. What amounts to a minor injury in the Indus
River system may constitute a substantial injury in the
Rhine. The converse is also true. Under these under-

101 n.72, p.167.
102 Ibid.
lying complex variables it is not practicable to assign a precise meaning to the term injury which could be applied uniformly in all situations and in every watercourse.

To summarise this part of the discussion the rule may be restated as follows: Every state is entitled to utilize its water resources in a reasonable manner. To the extent that such uses cause minor injuries to or in a neighbouring state, good neighbourliness requires the affected riparian to acquiesce to these inconveniences. What amounts to a minor injury depends on the circumstances of each case the determination of which is to be made in accordance with the principle of equitable apportionment.

C. Substantial and Permanent Injury

The analysis has so far moved in two stages: First, the simple situation where a riparian's use of water of an international river is of negligible consequence and cannot be categorized as an injury to another state; second was an examination of an intermediate stage, an instance when a utilization is established as an injury but, nevertheless, of minor proportions to be tolerated. Both the cases, confirm the proposition that every riparian has the right to employ water resources within its territory in a reasonable manner so as to avoid substantial
injury to its neighbours. Attention will now be focussed on the complex problem where a use threatens to inflict substantial injury to another state. This is the typical case of conflict between protection of existing uses and the right to development, a scenario which raises challenging legal issues.

What is not at issue, however, is whether international law protects rights of the states that develop an international river first, but the extent to which it does so. In the absence of a general convention and sufficient international case law, legal opinion spans from the understanding that all substantial injury to prior appropriations is unlawful unless it is done with the consent of the appropriator, to the view that a substantial injury to a co-riparian is but one of the factors to be considered in the development of an international river. Under the latter view, a riparian may cause serious injury without being accountable for its actions.

Against this background, it is proposed first to take up the question whether the consent of a riparian state is a requirement of international law, apart from treaties.

1. The Consent Clause:

Numerous treaties provide that in case a proposed
use is likely to cause serious injury to one of the parties, it cannot be executed without the consent of the state that would be so affected.

For a long time, the 1911 Madrid Declaration of the Institute of International Law was considered authoritative on this aspect. The Declaration had pronounced the existence of a legal regime regulating the economic uses of international rivers. Among other things, it proclaimed that, a regime expressly required the consent of riparians in respect of two aspects:

(a) When a modification in a contiguous watercourse will be detrimental to the river bank, and

(b) When a change at the point of entry of a successive river into the territory of another state is proposed.

As for other instances, it prohibited, without reference of the need for consent, pollution of waters, infringement of the "right of navigation by virtue of a title recognized in international law", the flooding of an upstream state by damming of water downstream, and serious interference with utilizations of waters.103

Taken on its face, the effect of the Madrid Declaration is clearly to make illegal any substantial injury

103 1911 Madrid Declaration, n.32.
to existing uses. However, a careful reading of its wording does not point out unambiguously whether it makes the consent of a riparian a mandatory condition for proceeding with works with a potential risk of serious injury or it permits a riparian to proceed unilaterally at the risk of incurring an international liability for causing injury to other riparians. The fact that the express requirement of consent is addressed only to two instances leads to the latter interpretation, which would afford a large latitude of protection against an arbitrary veto of a state bent on blocking the right of development of another state. All the same, the Declaration has generally been uncritically received to require the consent of riparians in all cases potentially injurious. Considered in that light it has influenced the settlement of many water disputes by agreement and, in particular, it was the pattern for the 1933 Montevideo Declaration. For all that, its defects were apparent as pointed out by H. A. Smith who summed it up thus:

In the light of what we now know, it is clear that the formal incorporation of the proposed rules into the body of positive international law would have proved a serious obstacle to the economic development of river systems. Any state which wished to maintain a purely obstructive attitude would have found its position strongly fortified by an agreed rule of law, and there can be little doubt that in some cases this advantage would have been used in order to extort a heavy price for a consent which
on broader principles could not reasonably have been withheld.\textsuperscript{104}

The Madrid Declaration was superseded by the Institute's restatement of principles in 1961.\textsuperscript{105} Article 5 of the Salzburg Resolution only requires a proposing state to notify a concerned state in case the contemplated works (Article 4) would seriously affect utilizations in another state. It is of interest to note the attitude of the International Law Association towards the consent clause. Commenting on Article 34 of its Helsinki Rules,\textsuperscript{106} dealing with a duty to give prior notice, a large number of committee members spoke against the desirability of such a requirement.\textsuperscript{107} They argued that to require the proposing state to suspend its plans until the objecting state refused to submit to judicial settlement or arbitration, as provided in Article 8 of the Resolution of the Institute, in effect made it obligatory for the proposing state to resort to judicial settlement, thereby arming the objecting state with an unlimited means of

\textsuperscript{104} Smith, n.49, p.158; see also Berber, n.55, p.125; Savet, n.48, pp.47-48; 263-264; Cano, n.55, pp.869-870.

\textsuperscript{105} n.27.

\textsuperscript{106} n.29.

\textsuperscript{107} Ibid., Garretson, p.819.
blockage. In the light of this, the International Law Association decided to put the principle as only a recommendation.108

Consent and its corollary, the duty to notify other riparians in the event of an ensuing serious injury, has been considered by the International Law Commission in large measure. The outcome of these studies and deliberations are now contained in the form of Draft Articles 11-14 of the emerging convention.109 Article 11(1)110 would require a state moving a proposal which may be "appreciably" harmful to the rights and interests of other states to notify the concerned states. Logically, such notification must contain all the relevant technical data. In accordance with the provisions of Draft Article 12, the receiving state is given at least six months within which to respond. Meanwhile, the notifying state "may not initiate the project and programme... without the consent of the system state or system states concerned".111 The same condition is repeated in Article 13(3) setting down procedure for settling disagreements arising out of the proposed project, but with the qualification that if

108 Ibid.
109 n.72, pp.169-171.
110 Ibid., p.169.
111 Ibid.
the "notifying state deems that the project or programme is of the utmost urgency and that a further delay may cause unnecessary damage or harm... to it and other riparians, it can carry out the project. These provisions indicate that the proposed regime is not intended to impose on riparians a straightjacket rule based on a pure theory of consent. Besides prescribing a time limit within which the notified states must respond, Article 13 grants the receiving state the right to proceed with the project specified in the notification, if the receiving state fails to transmit its view in accordance with Article 12. It is quite possible that the requirement on notification is likely to get diluted in the final text since some members are strongly opposed to the present text on the grounds that it is "too rigid and went too far in providing for the suspension" of projects and amounts to a veto. The point to underline here is that while the desirability of notification is stressed as a concomitant of equitable utilization of shared resources, the Commission, at the same time, rejects a veto rule. To insert a veto clause would defeat the cardinal principle of cooperative approach to shared

112 Ibid., p.170
113 Ibid., p.173.
water resources development, a principle based on good faith and good neighbourliness.

Among modern writers, John Laylin stands out as the foremost advocate of the veto clause or consent rule. At least on the one occasion he included the "principle of mutual consent to substantial alterations affecting the interested parties" in a set of doctrines which, he asserted, "seem to find such widespread application and support that they should be classed as customary international law". 114 And yet in the same paper he softened his position by suggesting that an absolute veto would be intolerable and the alternative to adjudication had to be made available. 115 Still on other occasions, he apparently admits that prior uses may be unilaterally interfered with when there is an overriding public interest for doing so but subject to payment of proper compensation. In this regard he remarked "existing uses should not be allowed to impose a straitjacket on a river system and prevent its further development". 116


155 Ibid., p.172.

116 Laylin, n.47, Appendix D. p.68.
By and large he does not give comfort to an advocate of a pure consent theory.

A. Sevette's statement could be read to show that he believes consent to be mandatory "when the injury liable to be caused is serious and lasting"; in such a situation, "development works may only be undertaken under a prior agreement,"117 But Sevette did not stop there, he then went on to make a distinction between "serious" and "slight" injury. The criterion he applied to distinguish between what is "serious" and "slight" is one involving weighing the value of the injury to one state against the value of development to the other riparian.118 This is to a certain degree in line with the principle of equitable apportionment which, in any case, does not sanction the consent principle.

Most often, treaty practice of the states are cited in support of the existence of a rule requiring the consent of the state.119 It is not denied that a cross-section of treaties as indicated in the previous chapter make consent a condition of any change in the river by one or the other of the parties. Obviously, the parties

117 Sevette, n.48, p.211.
118 Ibid., p.212.
119 supra., chap.11.
having agreed on certain developments of a river or part of it, are eager to guarantee that future developments shall be undertaken harmoniously within the existing treaty framework, and thus undertake the obligation to consult or seek prior consent before carrying out such developments outside the treaty arrangements. By doing so, therefore, it does not necessarily lead to the inference that they support the proposition that consent is so required by international law independent of treaty provisions.

To get a better perspective of the nature of these general principles, it is important to turn to multilateral instruments in which states have attempted to legislate on the subject rather than confining attention to bilateral treaties dealing with specific problems. The League of Nations convened the General Conference on Communication and Transit in 1923 at Geneva with the objective of adopting a general convention relating to hydro-electric power development. Underlying the convention was the desire to formulate a framework treaty which would encourage conclusion of agreements to facilitate harmonious use of rivers for hydroelectric power. It would be recalled that the draft convention placed before the Conference had made prior agreement of riparian states mandatory. This provision, however, provoked strong
opposition from many states and, as a result, it was deleted from what came to be known as the 1923 Geneva Convention. Adopted by 24 votes to 3 with 6 abstentions, the convention preserved the right of each riparian state "within the limits of international law, to carry out on its own territory any operations for the development of hydraulic power which it may consider desirable". It imposes only an obligation to enter into negotiations "with a view to the conclusion of agreements" when a proposed project would alter the course of a river in the territory of another state or might cause it serious prejudice. In spite of this watered down obligation, the convention was ratified by only ten states, none of whom had adjoining territory. The reluctant reception of the convention and the fact that the provision requiring prior consent was deliberately excluded, weaken the arguments in favour of the veto clause based on the treaty practice of states.

The Tribunal in the Lake Lanoux Arbitration case refused to endorse the principle of prior consent.

120 L.N.T.S., Vol.36, p.77. For background to the conventions, see, Sevette, n.48, pp.152-165.
121 Ibid., L.N.T.S., Art.1.
122 Ibid., Arts.3, 4.
had asserted that France was precluded by a rule of customary international law from undertaking its proposed project without Spain's consent. In overruling the Spanish argument, the Tribunal emphatically rejected prior consent rule saying: "the rule according to which states may utilize the hydraulic force of international watercourses only on condition of a prior agreement between the interested states cannot be established either as a custom, or even less as a general principle of law". It added that the Treaty of 1866 and its Additional Act were neither declaratory nor constitute either a general principle or a customary rule of international law, and that the existence of such an obligation could arise only from a treaty. The Court was, of course, dealing with a situation where the proposed development would cause no injury, but the sweep of its statements indicates that it did not intend to limit its observations to the particular instance. An argument may be advanced to the effect that nearly thirty years have passed since the Lake Lanoux dictum and therefore it has been superseded by subsequent developments. The work of the International Law Commission could be cited as the most recent authority to this effect; but as it has already been noted, the relevant

Draft Articles of that body, besides there being strong opposition to them within the Commission, do not envisage incorporation of a rigid consent theory.

Given the preceding considerations, by no means exhaustive, the requirement of prior consent as a tentative rule of law must be modified to ensure the expeditious utilization of water resources in an equitable manner. Freedom of utilization of water resources is a right of each state, but subject to the equitable rights of every riparian. Thus considered, prior consent should be discounted as a rule of customary international law dressed with an unqualified veto, thereby arming riparians with a powerful excuse to obstruct any development of water resources of an international river except on their own terms.

2. The Problem of Protection of Existing Uses:

Max Huber is credited with being the first to have adopted (1907) the doctrine of primacy of prior or existing uses. But earlier Vattel had already alluded to the suggestion of a "first use" as perfecting a claim based on the tradition of territorial sovereignty:

The 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 navigation or fishing, it is presumed with greatest certainty that she has resolved to appropriate the river to her own use.\(^{126}\)

Shortly after Max Huber, the 1911 Madrid Declaration incorporated the principle in its set of rules. And yet in 1907 itself, the United States Supreme Court in Kansas v. Colorado\(^ {127}\) had pronounced on the need for a flexible rule which it found to rest on the "doctrine of equitable apportionment".

In recent times the sanctity of existing uses as "vested rights" was given prominence by John Laylin\(^ {128}\) on the justification that prior appropriations generally result in a dependent relationship which would be unfair to disturb by new demands on the limited water resources of an international river. Andrassy is of the same persuasion that existing uses should be respected "since needs have already been adopted to those possibilities

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127 206 U.S.46 (1907).

created by this previous construction.\textsuperscript{129} The view of these two authors are of particular interest. Laylin played a crucial role in the international water resources deliberations, both of Inter-American Bar Association and International Law Association, and was counsel for Pakistan in the Indus Water dispute. Similarly, Andrassy has played a role in the work of the two bodies already mentioned and was the Rappoteur of the Committee constituted by the Institute of International Law to study the non-navigational uses of inland waters and prepared the first draft of the 1961 Salzburg Resolution of the Institute.

In view of the leading role that these professional bodies have played on the development of the law on the non-navigational uses of international rivers, discussion will focus on the results of their works. The 1957 Buenos Aires Resolution,\textsuperscript{130} adopted by the Inter-American Bar Association, endorsed the principle of equitable apportionment. It declared that each riparian state has the


right to share in the benefits of a river system, including the right to "the benefits of future development", but it subjected that right to "the maintenance of the status of... existing beneficial uses" and to the prohibition against affecting detrimentally the advantageous uses of other states.131 Put in other words, it relegated the principle of equitable apportionment to a secondary position, since it would come into operation only where there is surplus water after satisfying prior appropriations. Formulated thus, equitable apportionment becomes a doctrine directed towards ensuring the primacy of existing uses instead of for sharing the water resources of a river in an equitable and reasonable manner.

The 1966 Helsinki Rules132 of the International Law Association depart from the Buenos Aires Resolution significantly. These Rules leave each state to decide for itself whether or not to proceed with a project unilaterally at the risk of being held liable for any unlawful injuries. They do not require either the prior consent of another riparian or compulsory arbitration, although the latter is recommended.133 In the same way, the

131 Ibid., Articles 2 and 3 of Resolution 1.
132 n.29.
133 Ibid., Garretson, p.819.
Helsinki Rules merely recommend the states to give notice of their proposed works, not as a requirement but only as a desirable procedure; and to negotiate when there is a dispute as to the legal rights or other interests arising out of the proposed works.134 Above all else, the Rules underline equitable apportionment far more than priority of appropriation.135

For the purposes of the present discussion the substantive part of these Rules is found in Chapter 2, particularly in Articles 4, 5, 8. Article 4, as already noted, recognizes the right of each state to equal access to the waters of a shared river, both in kind and correlative with that of other riparians. The fundamental principle underlying this Article is the doctrine of reasonableness and equitableness, considered to be the corner-stone of the legal regime of shared water resources. It is provided that: "Each basin State is entitled, within its territory, to a reasonable and equitable share...." Article 5(1) then goes on to say: "What is a reasonable and equitable share within the meaning of Article 4 is to be determined in the light of all the relevant factors in each particular case". Among the illustrative factors

134 Ibid., Article 29.
135 Ibid., Article 4, along with accompanying commentary.
enumerated in Article 5(2), factor 2(d) is of relevance which provides that "past utilization of the waters of the basin, including in particular existing utilization are to be taken into account". Article 5 does not stop at that, for in clause 5(3) it states: "... in determining what is a reasonable and equitable share, all relevant factors are to be considered together and a conclusion reached on the basis of the whole". Furthermore Article 7(1) contains the provision that: "An existing reasonable use may continue unless the factors justifying its continuance are outweighed by other factors leading to the conclusion that it be modified or terminated so as to accommodate a competing incompatible use".

The effect of Articles 4 and 5 is clearly this. In the first place, the rights of a state to shared water resources are determined by the application of the doctrine of equitable apportionment which makes the needs of a state an important but not the decisive factor. Secondly, if it is determined that a state's use of water resources - existing or planned - has encroached on another state's equitable share, therefore, one to which it is not entitled, then the advantages of that utilization can be seriously affected by a new work undertaken by one or the other of the riparians. This is so because outside the parameters of equitable utilization, a state's rights are
not protected. Put the other way, an existing use within a given state's equitable utilization is entitled to protection, since it does not exceed that state's share of the water resources, but it could, nevertheless, be modified\textsuperscript{136} to improve the efficiency of methods currently in use to increase the volume of water available.

There could be no argument against these propositions since they ensure every riparian state a fair apportionment of water resources, the share contingent upon its requirement, and all the other relevant factors of which existing uses is but one of the variables to be taken into account.

The 1961 Salzburg Resolution\textsuperscript{137} of the Institute of International Law, though in agreement with the Helsinki Rules on the right of each state to a reasonable and equitable share of water resources differs, in its approach to the status of existing uses. While Article 3 incorporates the doctrine of equitable apportionment, Article 4 says:

\textsuperscript{136} Ibid., p.783. The Nile Waters Commission had made reference to this point when it recommended that basin irrigation in Upper Egypt and northern Sudan should be sacrificed because it was wasteful. \textit{Report of the Nile Commission, 1925}, B.F.S.P., Vol.130 (1929), pp.116, 122.

\textsuperscript{137} n.27.
No state can undertake works or utilizations of waters of a water course or hydrographic basin which seriously affect the possibility of utilization of the same waters by other states except on condition of assuring them the enjoyment of the advantages to which they are entitled under article 3, as well as adequate compensation for any loss or damage. 138

Inserted in Article 4 is a tenuous distinction between existing uses within a riparian's equitable right and those that are outside it. The former can be taken as assured, at any rate that they must be protected and evaluated on an equal basis in any fresh developments. On the other hand, the latter need not be preserved, provided compensation is paid for any injury to them. This distinction is not objective, for it effaces the substance of Article 3, by requiring payment of compensations even when a state's pre-existing uses exceed that state's equitable share. Unless the purpose of the Article was to rationalize inviolability of prior uses, its contentions are untenable. In a situation when developments in one part of a river system have substantially appropriated its water resources, new developments by another riparian state are certain to affect seriously existing uses. The enormity of compensation, as required by Article 4, under these circumstances, would be too great for the new user

138 Ibid.
to pay in addition to costs of the proposed project. Practically, this will preempt any developments by the new state irrespective of whether it is within its legitimate rights or not.

If the rule in Article 4 were to prevail, it would have been impossible for India to have undertaken any development of the Indus Waters without payment of compensation for substantial injuries that Pakistan would have suffered. The magnitude of that compensation was so prohibitive that India alone could not have been able to settle it. Consequently any rights she had would have been meaningless since on the strength of its existing uses, Pakistan would have had a legal veto over India’s projected utilization of the Indus River. In this particular case, India accepted to pay what was considered proportionate to the benefits it gained from these uses which were passed over to it. Thus, the rule in Article 4 was not applied.

Article 4, albeit Articles 2 and 3 of the Salzburg Resolution appears to flow from the following reasoning. Firstly, when a state strictly exercises its right under Article 2 to use water resources, that use is legal and has the character of a vested right in international law.

139 For details see supra., chap.11.
Secondly, a state may have the right in accordance with Article 3 to use water resources in its territory and could proceed to do so regardless of uses elsewhere. Lastly, because the first right is a vested right, it can only be disturbed on payment of compensation. It is plainly evident that this train of thought markedly differentiates the right of a new user from that of the earlier user. In the case of the subsequent user, it is a "right" that must be bought on payment of compensation to the prior appropriation. Interpreted thus, the meaning of "right" in Article 2 paragraph 2 becomes obscurced and at variance with the doctrine of equitable apportionment. And most importantly, it ignores possible inequities that may have been inflicted on a new user's rights to utilize water resources within its territory.

The proposition that prior appropriations form but one among several factors to be evaluated in the uses of international rivers under the doctrine of equitable apportionment comes out clearly in the Draft Articles by the International Law Commission.140 This view is substantiated in Draft Articles 7, 8 and 9, which are part of Chapter 11 considered to contain general principles defining rights and duties of riparian states. Art-

140 n.72.
icle 7 essentially echoes Article 4 of the Helsinki Rules\textsuperscript{141} and Article 2 of the 1961 Salzburg Resolution.\textsuperscript{142}

The draft article proposes that:

An international watercourse system and its waters shall be developed, used and shared by system states in a reasonable and equitable manner on the basis of good faith and goodneighbourly relations with a view to attaining optimum utilization thereof consistent with adequate protection and control of the watercourse system and its components.\textsuperscript{143}

Article 8 like Article 5 of the Helsinki Rules, goes on to enumerate some of the factors that may be taken into consideration in determining what is reasonable and equitable use of water resources in a given river system. Relevant in the present context are sub-clauses 8(1)(e) and 8(1)(h) wherein it is provided respectively that included in factors to be considered are "the other uses of a watercourse system in comparison with the uses by other system states, including the efficiency of such uses"; and that account will be taken of "other interferences with or adverse effects, if any, of such use for the uses or interests of other system states including but not restricted to, the adverse effects upon existing

\textsuperscript{141} n.29.

\textsuperscript{142} n.27.

\textsuperscript{143} n.72, p.164.
Furthermore, Article 8(2) paragraph 1 recommends states to negotiate in order to determine "whether a use is reasonable and equitable". Lastly, Article 9 is addressed to uses which may have serious effects on another state. It asks states to "refrain from and prevent ... uses or activities... that may cause appreciable harm to the rights and interests of other states...."

However imaginatively one interprets the Commission's Draft Articles, they do not give comfort to the proponent of primacy of prior appropriation theory. Pause for a while and recall that the International Law Association in its Helsinki Rules, though rejecting the supremacy of prior uses, had nevertheless accorded existing uses a place in the form of Article 8. On the other hand, the International Law Commission does not put emphasis on existing uses by retaining an independent article on their behalf. It recognizes these uses as only one of the factors which is to be placed on the same scale with other variables in arriving at a reasonable and an equitable solution in water resources utilization. In spite of this diluted status of prior uses, it was stressed in a commentary to Article 7 that "the framework agreement should recognize the right of each state to use its share of water, as well as the international watercourse system

144 Ibid., p.165.
within its territory, in accordance with its own policies, programmes and principles.\textsuperscript{145} Similarly, there was opinion that while Article 8(1) was on the right direction, the enumeration therein would be understood only as indicative of "a range of policy factors, not rigid rules, providing guidance as to what constituted reasonable and equitable use\textsuperscript{146} And in addition it was emphasized that "each state determined its own priorities in the light of its requirements\textsuperscript{147}

Interpreted against this background, it is not possible to see the ascendancy of prior uses as a rule of international law. This view is strengthened further by Article 8(2). It does not pre-judge the relative superiority of any use, for it says: "In determining... whether a use is reasonable and equitable... states concerned shall negotiate in a spirit of good faith and good-neighbourly relations..." Even conceding for a moment that prior uses enjoyed a fixed status, their survival would depend on the efficiency of such uses (Article 8(1)(h).

Most often adherents to the theory of protection of prior uses, cite the Helmand, Indus and Nile Rivers in

\textsuperscript{145} Ibid., p.166.

\textsuperscript{146} Ibid.

\textsuperscript{147} Ibid.
support of the conception that in case of serious injury to existing uses compensation must always be paid. In 1872 Sir Frederick Goldsmid delivered an award aimed at resolving a long-standing border dispute between Afghanistan and Persia (now Iran). The Goldsmid Award stipulated that: "no works are to be carried out on either side calculated to interfere with the requisite supply of water for irrigation on the backs of the Helmand". In the following year Sir Goldsmid clarified that his award was not intended to prohibit new irrigation canals upstream in Afghanistan "provided the requisite supply of water for irrigation on the Persian side is not diminished". A change in the channel of the Helmand prompted Britain to constitute another enquiry mission in 1905, led by Colonel A. H. McMahon, its terms of reference being restricted to the provision that its decision should not

deviate from the Goldamid Award. Part of the McMahon Award allocated to Iran one-third of the Helmand measured at a point thirty-five miles upstream in Afghanistan, an amount taken to have been sufficient to sustain existing irrigation in Iran and allow substantial future agricultural expansion. The Award was rejected.\textsuperscript{149} Towards the end of the 1947, the United States volunteered its good offices to conciliate the two neighbours to an agreement on the Helmand River problem. In response to this Afghanistan and Iran agreed to set up an Expert Commission in 1950.\textsuperscript{150} The following year, the Commission submitted its report, but there has so far been no agreement.

These Awards are illustrative of an attempt to apportion water resources to maintain existing uses as well as allowing opportunity for future expansion. However, they do not appear to contribute an answer to the question whether a prior use must necessarily be ensured by the payment of compensation for any interference with it. The Award rendered by Colonel McMahon allowing for future expansion would seem to suggest that Iran's existing uses were within her reasonable and equitable right.

\textsuperscript{149} Ibid.

to the Helmand water resources. Assuming this to be so, one would expect the result to have been more or less identical if a pure doctrine of equitable apportionment had been applied. As such the utility of these Awards is of doubtful relevance.

The experience of the Indus River is equally equivocal. In 1918 representatives of the Province of Punjab and of the states of Bahawalpur and Bikaner met to apportion the waters of the Sutlej River System. A statement of principles put forward by Sir Claude Hill, representative of the Government of India was accepted. Sir Claude Hill's statement provided that "the general principle is recognized that these waters should be distributed in the best interests of the public at large, irrespective of Provincial or State boundaries, subject always to the proviso that established rights are fully safeguarded or compensated for...." Sometime in 1939 the Province of Sind lodged a complaint that planned diversions from the Indus River in Punjab would affect its existing uses. Although by that time responsibility for irrigation had

been vested on the provinces, the Central Government reserved the jurisdictional powers to settle water disputes that might arise between its various provinces. In view of the controversy between Sind and Punjab, the Central Government appointed the Indus Commission under the chairmanship of Sir Benegal Rau. (Hence the Commission became commonly referred to as the Rau Commission).

To make its task easier, the Rau Commission formulated six guiding principles which were accepted by the disputants. These principles were assumed to contain the basics of the international law on water resources disputes. Of relevance here are principles 3 and 4. Principle 3 states: "If there is no such agreement, the rights of the several provinces and states must be determined by applying the rule of 'equitable apportionment', each unit getting a fair share of the water", the fourth principle says: "In the general interests of the entire community inhabiting dry, arid territories, priority may usually have to be given to an earlier irrigation project over a later one".  

152 The principles are taken in, Whiteman, n.48, pp.943-944, see also I.L.A.; American Branch, n.114, pp.97-98.

153 Ibid., Whiteman, p.943.

The Rau Commission places the principle of equitable apportionment above protection of prior uses granting only that priority may usually have to be given, not must always be given, to existing uses. Besides, the Commission did not mention compensation as part of its principles. Nevertheless, in its concluding report, the Commission definitely indicated that "no project, however beneficial in other ways, should be allowed to impair existing inundation canals without payment of compensation". What is not clear is whether the Commission thought this statement regarding compensation was reflective of applicable international law, for it raises doubts as to why it did not list it among its statement of principles. In any case compensation to injuries to lower stream canals was sanctioned by the laws of India which the Commission only applied and reiterated in its report. Pertinently, India argued strongly against the principle of compensation in the Indus River dispute, a point reflected in the final settlement of the controversy. India accepted to pay an amount proportionate to the benefits it would gain from the existing facilities, but did not pay the full cost of the works to compensate Pakistan.

156 supra, chap.11.
The Nile experience provides yet another typical but interesting experience of this aspect, the story of which is dealt with at length elsewhere in the present inquiry. 157 There it is shown that the preponderance of the British Government in the entire Nile Basin created a unique non-international character between Britain and Egypt, a factor reflected in the arrangement worked out by them about the Nile waters. Allocation of surplus water and not injuries to prior uses has always formed the bone of contention.

Although Sudan admitted in the 1959 Agreement that Egypt was entitled to 48 milliards of water which she was actually using, this must be judged in the light of the matters then at issue between the two states, and furthermore it must be viewed against recent developments on the matter. Finally, but of great significance, the 1959 apportionment of the Nile waters does not include the other seven states with a direct interest in the river and its water resources. From these, it is hard to draw in the Nile lessons any international law precedent for the problems that emanate when a development in one state will injure existing uses in another riparian.

Several agreements in which protection of prior

157 Infra., chap. V.
uses was first priority could be pointed out. For example, Clayton, then counsel to the United States Section of the U.S.-Mexican International Boundary Commission records his research efforts thus:

... I have made an attempt to digest the international treaties on this subject - or all that I could find. There may be more. I am not infallible. But in all those I have been able to find, the starting point seemed to be the protection of existing uses in both the upper riparian country and the lower riparian country, without regard to asserting the doctrine of exclusive territorial sovereignty. Most of them endeavor to go further than that and make provision for expansion in both countries, both upper and lower, within the limits of the available supply.158

In addition, most of these treaties also provide for prior consent of the parties to alterations in the watercourse affecting the interests of one or the other of the co-riparians. If that be the case, it is submitted here that these clauses in bipartite agreements do not prove that consent of a state for modifications injuriously affecting it is an obligatory requirement of international law.

In determining whether these treaties embody an irreducible rule of international law, it would be necessary to note the last sentence in Clayton's statement

158 n.52, pp.97-98.
at which he admits the fact that in the situations obtaining in most of them, the 1944 Mexico-U.S. Treaty inclusive, sufficient water supply was available to sustain existing uses as well as permit expansions by either Party. Understood in that sense these treaties were not, therefore, directly involved with an infringement of rights to prior uses, but with the apportionment of surplus water resources. To say the least, these treaties are not decisive precedents in instances where there is insufficient water supply to continue existing uses in one state and at the same time meet new development needs in another. For example, in the case of Indus and the Nile Rivers, enough water flowage was available to satisfy the competing requirements of the concerned riparians. What the treaties do bring out is the due considerations that the international community attaches to existing uses, far from declaring that international community makes the protection of existing uses a primary objective without regard to equitable sharing of water resources of a river.

The same argument runs through the case law too. In fact, there is so far no international decision in point. Applicable treaty governed the Lake Lanoux Arbitration, and besides, once the Tribunal ascertained that the French project would not affect detrimentally Spanish interests, the question of compensation for injuries
became an irrelevant element in the arbitration. Despite this, the Tribunal did make a distinction between a state's rights in the water resources of an international watercourse and its interests therein. It acknowledged that "Spain may demand that her rights be respected", adding that France had to take into account all Spanish interests "which might conceivably be affected by the work undertaken", irrespective of whether those interests were correlative to actual rights or not. It found this obligation to be in conformity with the trends in international practice, at least in the field of hydro-electric power development. But it hastened to clarify that the requirement to take account of a neighbour's interest pertains only to procedural matters of prior notice and consultation, and that a state that follows this procedure in good faith is not bound by any further obligation if its projects affect the interest of any other state. Therefore, however critically one scrutinizes what the Tribunal had to say in the Lake Lanoux case, it does not give an answer to the question whether the duty to pay compensation for injuries to a neighbour's prior uses is a rule of customary international law.

160 Ibid., p.169.
Municipal decisions in water controversies throw some light in this point. Earliest among them is the 1878 Swiss decision in Aargau v. Zurich. The Canton of Zurich had granted a concession to construct a hydroelectric plant on the Jonabach, a river which flows successively from Zurich into Aargau. In this regard, a condition had been attached requiring a specified amount to be deposited in a bank the purpose of which was to indemnify persons whose existing uses downstream might be adversely affected. In the process, some mills in Aargau were affected since the new works in Zurich resulted in a diminution of the river volume at certain hours of the day. Responding to the new situation, the Canton of Aargau lodged a complaint with the Swiss Federal Court praying it to declare the concession invalid. The Court adopted the principle of "equality of the Cantons" from which it inferred that no Canton "may, to the prejudice of others, take such measures upon its territory, as the diversion of a river... or the construction of dams... as may make the exercise of the rights of sovereignty over the river impossible for other cantons, or which exclude the joint use thereof or amount to a violation of

territory". Nevertheless, the Court qualified its statement significantly by adding: "... a right of Aargau to uninterrupted conveyance of all the water in the Jona does not exist in every case. With regard to public waters, the cantons have no private ownership, but only sovereignty.... Each canton is rather entitled... to take the necessary measures for a rational utilization of the public waters, corresponding to its needs...."162 Found herein are the first outlines of the doctrine of equitable apportionment and by applying the principle of equality, the Court dismissed the action, on the ground that Aargau could construct necessary remedial works for which purpose a sufficient sum had been set aside to meet the costs. The important point to note is that Zurich had voluntarily provided for compensation to injured prior uses downstream, and as such the Court did not have to adjudge in that issue.

Wuttemberg and Prussia v. Baden163 is another famous case. The geological structure of the banks and bed of the Danube River at certain portions in Wuttemberg and Baden is such that a large volume of its water is lost

162 Ibid., p.170.
by percolation, and after flowing through underground channels, emerges as the headwaters of the River Aach in Baden. Consequent to this "sinking of the Danube", part of it in Wuttemberg was completely dried up for varying periods every year. Baden planned to construct a series of dams and water-power plants on the Danube which would have had the effect of aggravating the loss of water.

Wuttemberg brought an action in the German Staatsgerichtshof for an injunction restraining Baden from carrying out its proposed power projects. It also sought an order directing Baden to remove natural accumulation of gravel and sand that obstructed the flow and thus increased the sinking of the water. Prussia, farther downstream, was equally affected and joined Wuttemberg in the action.

For its part, Baden put forward a counter-claim enjoining Wuttemberg from undertaking conservation works to reduce or stop the sinking of the Danube, thereby depriving the Aach of some of its natural flow. Central to both claims was the issue of diversions of water in a manner causing serious injury to existing uses in the territory of another riparian state.

First, the Court decided that in the absence of relevant municipal law, international law governed the relations of the German states. Turning to this branch of law, however, it found it lacked well-defined rules...
applicable to the problem before it. Therefore, it reso-

rted to general principles relating to international rivers
which turned out to be the doctrine of equitable apportionment. It declared that a state was bound by "the
duty not to injure the interests" of other states, that
it might not "substantially impair the natural use of the
flow of such a river by its neighbour"; and that the ap-

lication of this principle was governed by "the circum-
stances of each particular case", in which "the interests
of the states in question must be weighed in an equitable
manner against one another. One must consider not only
the absolute injury caused to the neighbouring states,
but also the relation of the advantage gained by one to
the injury caused to the other."\textsuperscript{164}

While the German staatsgerichtshof dictum on the
principle of equitable apportionment is well known, it
does seem that the scope of protection of existing uses
is given little attention. Baden had propped its argue-
ment on the basis of the claims of its prior uses on the
River Aach. The Court declined to entertain the idea
that private rights in one state could affect that state's
rights and obligations under international law or the
rights and obligations of other states. The gist of the
\textsuperscript{164} Ibid., p.131.
judgement may be restated as follows:

The legal relations between states concerning an international river, are not affected by private law rights which their citizens may have acquired therein. Where such private rights are incompatible with the obligations of a riparian state under International Law, they must give way in order that the state may satisfy the international claims of the other riparian states. It must be left to the state concerned to come to terms with its own citizens.\(^{165}\)

The differentiation between rights acquired, or "vested", under municipal law and rights arising under international law is of great significance because some of the difficulties posed by the problem in question are due to the tendency to readily equate vested rights under domestic legal system and vested rights under international law. In \textit{Wuttemberg and Prussia v. Baden}, the German Court has cautioned of the risks of that analogy. Furthermore, in answer to the protest that otherwise vested rights under municipal law may sometimes be injured without compensation, it said, \textit{inter alia}, that the state whose laws create those rights must itself come to terms with its own citizens. For the German Staatsgerichtshof, therefore, the doctrine of prior appropriation, whether in an absolute or modi-
fied form, finds no definite position within the general doctrine of equitable apportionment.

However, having set forth these general principles of international law, the court delivered only an interlocutory judgement. But it expressed the opinion that neither Baden nor Württemberg could construct works altering the natural flow of the Danube and that Baden should keep the channel clear of accumulated impediments. Finally, it advised the parties to work out a satisfactory solution through an agreement. Therefore, the court did not offer a ready-made solution by the application of its principles. In essence, it told the parties to set aside legal niceties and seek a reasonable compromise.

The largest body of case law on the subject, particularly on the elaboration of the doctrine of equitable apportionment is provided by the United States Supreme Court which has handed down numerous decisions in interstate water controversies. Among these cases, Wyoming v. Colorado 166 commands special attention, for its decision is frequently relied on by proponents of prior appropriation theory. Wyoming, a downstream riparian, sought for the benefit of her prior appropriations

166 359 U.S.419 (1922).
to enjoin Colorado from permitting proposed diversions on upper Laramie River. Relying on the fact that since both Colorado and Wyoming followed the appropriation theory in their domestic law, the Supreme Court decided that in the given circumstances the doctrine furnished "the only basis which is consonant with the principles of right and equity applicable to such a controversy as this is".\(^{167}\) It therefore enjoined Colorado from carrying out diversions that might interfere with the prior appropriations downstream in Wyoming.

On its own, Wyoming v. Colorado might have been taken as a firm precedent supporting a strict rule of primacy of prior appropriations in water disputes. However, this is not the case because on more than one occasion since that decision, the Supreme Court has unequivocally denied that the case is an authority for that conclusion. Twenty years later it did so, interestingly enough, in Nebraska v. Wyoming,\(^{168}\) a case in which Colorado had been impleaded by Wyoming. Nebraska, complaining of injury caused by increasing diversions from the North Platte River upstream in Wyoming and

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Colorado, sought for an equitable apportionment of the waters of the river and an injunction restraining unlawful diversions. The Supreme Court found that the dependable natural flow of the river during the irrigation season had long been over-appropriated and that there had been out-of-priority diversions upstream in Wyoming and Colorado which had had adverse effects in Nebraska. Serious injury was presumed in spite of the evidence having been "inconclusive in showing the existence or the extent of actual damage to Nebraska". In this regard, the central question was whether, as Wyoming contended, the Common Law doctrine of prior appropriation in force in the three states should be applied. If it were applied, Wyoming's prior uses could not be injured. But the Special Master appointed by the Supreme Court had said that "a right decision cannot be rendered solely on the basis of priorities, and that a decree so based would not be wholly equitable or accomplish equitable distribution." He had gone as

169 325 U.S. 589 (1945). In fact, the decree in the first Wyoming v. Colorado went back to the Supreme Court on a complaint by Wyoming that Colorado was not abiding by the Court's decree. Wyoming alleged that Colorado's diversions exceeded the specified quantities. The demurrer was overruled. see Wyoming v. Colorado, 286 U.S. (1932); Scott, n.23.

170 Ibid., 325 U.S., pp.112-113.
far as suggesting that the principle of priority of appropriation was only one of the major variables among other factors in determining an equitable apportionment. The Supreme Court concurred with the Special Master, saying:

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. Apportionment calls for the exercise of an informed judgement on a consideration of many factors.

Priority of appropriation is the guiding principle. But physical and climatic conditions, the consumptive use of water in the several sections of the river, the character and rate of return flows, the extent of established uses on downstream areas, the damage to upstream areas as compared to benefits to downstream areas if a limitation is imposed on the former - these are all relevant factors. They are merely an illustrative, not an exhaustive catalogue. They indicate the nature of the problem of apportionment and the delicate adjustment of interests which must be made.171

Given that all the three litigant states applied the priority rule in their domestic law, this was all the more reason for its application. Yet the Supreme Court rejected it because it would have led to inequitable and unjust result. Still further, the decree was

171 Ibid., p.618.
silent about the obligation to pay compensation for injuries to existing uses. The paramount consideration, thus, was an equitable apportionment of the water resources of a river, but not the protection of prior uses. This was made explicit in the statement that "the equitable share of a state may be determine in this litigation with such limitations as the equity of the situation requires and irrespective of the indirect effect which that determination may have on individual rights within the state".\textsuperscript{172} In short, considerations of equity permitted Colorado to deprive Nebraska's prior users of water benefits they had hitherto enjoyed.

The Hinderlider v. La Plate River and Cherry Creek Ditch Company\textsuperscript{173} provides further valuable insight on the matter. In a 1898 adjudication under the Colorado law, the Ditch Company had been granted a concession to abstract a quantity of water from the La Plata River. In 1928, the State Engineer of Colorado, implementing the provisions of an agreement between Colorado and New Mexico, cut-off the said water supply. As a result of this act, an order was sought enjoining the State Engineer. The Ditch Company argued that it was

\textsuperscript{172} Ibid., p.627.
\textsuperscript{173} 304 U.S.92 (1938).
unconstitutional to deprive it of its prior vested rights by an agreement between the two states. Since a constitutional question was raised, the Attorneys-General of several states intervened. Thus, this private suit assumed an interstate character. The Supreme Court decided that by law water resources must be equitably apportioned between Colorado and Mexico, and that this had been constitutionally done by the agreement. As to the Ditch Company's contention, it acknowledged that the Company had a "property right, inalienable so far as concerns the state of Colorado, its citizens, and any other person claiming water rights there", but "the Colorado decree could not confer upon the Ditch Company rights in excess of Colorado's share of the water of the stream; and its share was only an equitable portion thereof".\textsuperscript{173} Or, to put it in other words, the rights of New Mexico under the doctrine of equitable apportionment could not be varied by a provision of Colorado's laws, and judgement was rendered in favour of the defendant.

The task before the Supreme Court of the United States or any other national tribunal was relatively

\textsuperscript{173} Ibid., p.102, see also Nebraska v. Wyoming where the Supreme Court endorsed this statement, n.168, 627.
easier compared to an international court. A domestic
court, such as that of the United States, is free of
complications caused by an international boundary; and
it can exercise a continuing jurisdiction in accord-
dance with ever changing circumstances. Notwithstanding
this advantage, the United States Supreme Court, as the
cases indicate, seems to undertake its task with relu-
ctance and has been cautious not to lay down any straig-
htjacket rules. It has not adopted the rule that exist-
ting uses are sacrosanct which can be tampered with
only on payment of compensation. Both Nebraska v.
Wyoming and the Hinderliner, just like Wuttemberg and
Prussia v. Baden, affirm the opinion that private rights
in an interstate river under the domestic law of a state
are one thing, and the rights of a state in that river
under interstate law are another.174

174 The United States Supreme Court has generally encou-
raged states to enter agreements as the best means
of achieving an equitable utilization of the shared
water resources. In Colorado v. Kansas the Supreme
Court pointed out that "judicial caution" was nece-
ssary because such disputes "involve... complicated
and delicate questions..." and "necessitate expert
administration rather than judicial imposition of a
hard and fast rule. Such controversies may approp-
riately be composed by negotiation and agreement..."
320 U.S.393 (1943). From 1922 onwards most inter-
state rivers in the United States are regulated by
agreements. see for example, U.S. Dept. of State,
Documents on the Use and Control of the Waters of
Interstate and International Rivers (Washington,
D.C., 1956).
Two other municipal decisions considered the problem of transboundary injury resulting from acts done in another state. The first is the Leitha River case, a decision handed down by the Imperial Royal Administrative Court of Austria. It dealt with the complaints of Hungarians that a proposed diversion in Austria would deprive them of water and thus injure their usufructuary rights in the Leitha in Hungary. It was contended that the diversions were contrary to the rules of customary international law under which states are bound to respect existing right in rivers beyond their territorial jurisdiction. The Imperial Royal Court declined to accept this claim for two reasons: first, it had no jurisdiction to deal with an international claim; and, secondly, there was, in any case, no such settled rule of international law as the complainants relied on.

The second case is Societe Energie Electrique du Littoral Mediterraneen v. Compagnia Impresa Elettriche Luguri, decided by the Italian Court of Cassation. By treaty, France and Italy had agreed not to use or

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176 Annual Digest and Reports of Public International Law Cases, Vol. 47 (1938-1940), p. 120.
allow to be used the waters of the Roja River in a manner to "lead to a noticeable modification of the existing régime and of the natural flow of the water in the territory of the lower riparian state". When the defendants constructed new power-stations and plants on the Roja with the approval of the Italian government, the French plaintiff, alleging that it was adversely affected by them, filed a suit in the French Courts and, having won there, brought an action in the Italian Courts to enforce the judgement. The Italian Courts refused to entertain the claim, on the grounds that the French Courts had no jurisdiction since the dispute was to be settled by the permanent international commission as provided in the treaty. This aside, it did make some remarks about the international duty of states "not to impede or to destroy... the opportunity of the other states to avail themselves of the flow of water for their own national needs".\textsuperscript{177} This statement is so vague as to be of little practical value even if it were not \textit{opiter dicta}. To the extent that it suggests a natural flow theory, it is not in consonance with the overwhelming weight of contemporary authority.

\textsuperscript{177} Ibid., p.121.
weak evidence for the proposition advanced by some jurists in favour of the rule that compensation must always be paid for serious injury to existing uses. The experience with rivers, such as the Helmand, Indus, and the Nile is inconclusive; treaties and interstate agreements are not a sound basis for generalization; and the case law is against any rigid rule favouring primacy of prior uses, a view shared by the International Law Commission. The proposition that prior uses form but one of the factors among several others on the same plane in an equitable and reasonable utilization of shared water resources is supported by a large opinion of individual writers. The views of H. A. Smith and F. J. Berber, the two leading text writers on the subject have already been noted and need not be repeated. William W. Van Alstyne is of the persuasion that prior uses are one of the elements like any other "obviously relevant but not independently conclusive considerations in the equitable apportionment of an international river treated as an integrated whole". J. Lipper arrives at the conclusion that: "In international river

178 Smith, n.49.
179 Berber, n.55, 56.
180 Van Alstyne, n.23, p.335.
law, there is no doctrine of prior appropriation apply-
ing inflexibly the 'prior in time, prior in right'
concept as applied internally in some states''. Furthermore, in case of a conflict between existing uses, "the existing use factor is neutralized and thus loses its important role in equitable utilization". At most "it becomes but a factor among many, some of which may be of much greater significance".

A rigid application of the prohibition upon caus-
ing any serious damage to another state might entail that prior appropriation of water in more developed states could altogether prevent new utilizations in... the emerging needs of developing states. According to the policy of "equi-
table apportionment" the priority in utilization cannot confer a right which should be deemed sacrosanct; otherwise developed states would retain the lion's share of the available waters...

On the delicate question of compensation in case of serious injury to prior uses, he maintains that a new user may proceed to utilize the water resources accor-
ding to its demands "even if in so doing it interferes

181 J. Lipper, "Equitable Utilization", in Garretson and others, n.27, p.57.
182 Ibid., p.58.
183 Ibid.
with existing uses in another state, provided it is within its equitable right. In such cases where the earlier user exceeded its equitable share "compensation to individual owners is a domestic matter to be settled by the state which has allowed an excessive utilization." Whether a developing state is under an obligation to pay compensation, he does not find a ready-made answer, for the matter will depend on the given circumstances. If that be the case, it may also be argued that to demand compensation from a new developing state may not be tenable as it would paralyse the development plans of that state.

Thus, individual authorities too reject the existence of prior appropriation as a rule of customary international law. They concur with the general opinion that prior uses or existing or historic rights, or by whatever name they may be termed, are only one of the many variables to be taken into consideration in an equitable apportionment of water resources of an international river.

185 Ibid.,
186 Ibid., p.197.
The preceding discussion has established the existence of two fundamental general principles governing the use of shared water resources. There is a majority opinion for the proposition that each state has a sovereign right to waters of an international river within its territory. However, since each riparian state has equal competence of access to shared water resources, this right must be applied in an equitable and reasonable manner. To put it differently, the use of an international river and its water resources falls under the principle of equitable utilization or apportionment.

The doctrine of equitable apportionment is a refutation of the traditional theories of absolute sovereignty rights as expressed in the Harmon doctrine. This notwithstanding, equitable apportionment should not be confused with the principle of community of interests. Though it recognizes inevitable interdependence of interests in shared water resources, it does not, unlike the latter, claim to extrapolate this factual relationship to the heights of jural idealism. On the contrary, it admits the existence of inherent
ipso jure rights of each state. Understood in this sense, the concept of equitable apportionment is an attempt at a synthesis of traditional doctrine and a bench-mark in the progressive development of law relating to international rivers.

As already noted elsewhere, the United States Supreme Court\(^{187}\) is credited with having given prominence to the doctrine of equitable apportionment as the applicable law in this field. On the international level none of the treaties examined has expressly defined the meaning of the term equitable apportionment or utilization. Nor could it be possible to define equity in such terms as to embrace all water resources systems and situations. What may constitute the indispensable elements of equitable apportionment in a given situation could be determined only if the relevant facts were available. This, of course, demands expert multidisciplinary approach which international law on its own can claim no competence, especially so in a problem area in which subjective considerations play an active role in arriving at what is objectively equitable. The contracting parties are generally in a position to have most of these facts and to apply them in establishing the

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criteria of equity in water resources allocation as they deem fit.\textsuperscript{188}

The view that equitable apportionment is a general principle of international law is shared by the majority of authority on the subject. H. A. Smith in his studies arrives at the conclusion that "The principle of equitable apportionment contains the essence of the international law upon the matter.\textsuperscript{189} Brierly is of the opinion that:

Where one state's exercise of its rights conflicts with the water interests of another, the principle to be applied is that each is entitled to the equitable apportionment of the benefits of the river system in proportion to their needs and in the light of all the circumstances of the particular river system.\textsuperscript{190}

\textsuperscript{188} By analogy the I.C.J.'s opinion is appropriate here since there are broadly speaking important similarities between the Continental Shelf physical circumstances and international rivers. The Court acknowledged in the Continental Shelf Cases the fact that in the application of the principle of equitable sharing an inexhaustible range of factors come into play and most importantly "The problem of the relative weight to be accorded to different considerations naturally varies with the circumstances of the case". And in addition "the criteria though not entirely precise, can provide adequate bases for decision adopted to the factual situation. I.C.J., Reports (1969), pp.51-52.

\textsuperscript{189} Smith, n.49, p.51.

\textsuperscript{190} J. L. Brierly, n.10, p.231.
Sauser-Hall in discussing the doctrine of equitable apportionment asserts that:

We are confronted with a remarkable illustration of an international practice not based originally in precise rules, but which has moved so consistently toward a consensus of concordant unilateral acts that it ultimately served as a basis for a treaty manifesting the idea of a community of interests founded on good neighbour relations entirely subject to international law.191

Van Alstyne, drawing analogy from the United States Supreme Court decisions, believes that the concept of equitable apportionment has since been assimilated into the general corpus of international law. He states: "The international law rule which commands a consensus is the same rule which the Supreme Court of the United States will apply in apportioning the economic use of interstate rivers when there is no overriding federal statute or congressionally approved interstate compact - the rule of equitable apportionment".192 It seems that this is also the essence of Richard Falk's thesis that fairness is a basic component of reasonableness and that "fairness is a perspective useful to give


192 Van Alstyne, n.23, p.307.
shape to patterns of reciprocal assertion and non-
assertion of legal authority, as states seeking to
receive fair treatment for their interests must be will-
ing to accord it in exchange.¹⁹³

Leaving aside individual works, it was the Inter-
national Law Association that attempted for the first
time to outline the juridical content of what constitu-
tes equitable apportionment. In 1956,¹⁹⁴ at the Dubro-
vnik Conference, the International Law Association made
a beginning in formulating principles in equitable
apportionment in which it recommended that riparian
states and tribunals in resolving disputes should "weigh
the benefit to one state against the injury done to the
other..." and enumerated the following factors as
guidelines:

(a) The right of each state to a reasonable use
of the water.

(b) The comparative social and economic gains
accruing to each and to entire river community.

¹⁹³ R. Falk, "International Jurisdiction : Horizontal
and Vertical Conceptions of Legal Order", Temple

¹⁹⁴ International Law Association, Report of the
Forty-Seventh Conference, 26 August-1 September 1956,
(c) The extent of dependence of each state upon the waters of that river.

(d) Existing agreements among the states concerned.

(e) Pre-existent appropriation.\textsuperscript{195}

After a period of ten years, the Association, at its fifty-second Conference held in 1966\textsuperscript{196} at Helsinki, adopted the Helsinki Rules which it considered a statement of the existing rules of international law on the subject. It was a refinement of the Dubrovnik Resolution. Relevant in the particular context under discussion is Chapter 2 of the Helsinki Rules which is specifically devoted to the doctrine of equitable apportionment. Because of the importance attached to it and the decisive influence it has exerted in subsequent thinking on the development of applicable rules in the field of economic uses of international rivers, it is reproduced in full here:

\textbf{Article LV:}

Each basin state is entitled, within its territory, to a reasonable and equitable share in the bene-

\textsuperscript{195} Ibid., p.x.

\textsuperscript{196} Ibid., n.29.
ficial uses of the waters of an international drainage basin.

**Article V:**

1. **What is a reasonable and equitable share**
   within the meaning of Article IV is to be determined in the light of all the relevant factors in each particular case.

2. Relevant factors which are to be considered include, but not limited to:

   (a) The geography of the basin, including in particular the extent of the drainage area in the territory of each basin;
   
   (b) The hydrology of the basin, including in particular the contribution of water by each basin state;
   
   (c) The climate affecting the basin;
   
   (d) The utilization of the water, including in particular existing utilization;
   
   (e) The economic and social needs of each basin state;
   
   (f) The population dependent on the waters of each basin state;
   
   (g) The comparative costs of alternative means of
(h) The availability of other resources;
(i) The avoidance of unnecessary waste in the utilization of waters of the basin;
(j) The practicability of compensation to one or more of the co-basin as a means of adjusting conflicts among uses; and
(k) The degree to which the needs of a basin state may be satisfied, without causing substantial injury to a co-basin state.

3. The weight to be given to each factor is to be determined by its importance in comparison with that of other relevant factors. In determining what is reasonable and equitable share, all relevant factors are to be considered together and a conclusion reached on the whole.

Since then the Helsinki model rules have gained currency as a fair statement of the guiding principles, or at least, as a point of departure of this branch of law. Thus when in 1967,\textsuperscript{197} the Asia-African Legal Consultative Committee (AALCC) took up the topic of non-

navigational uses of international rivers, it adopted the Helsinki Rules as a basis of discussion. In 1973, at its Fourteenth Session held in New Delhi, the Committee put forward Draft Proposition III which differed with the Helsinki check-list i.e., Article 5, only in style of presentation. Draft Articles 7 and 8 of the International Law Commission are similar in form and identical in content with Articles 5 and 6 of the Helsinki Rules. Article 7 calls for the development of water resources of an international river "in a reasonable and equitable manner on the basis of good faith and good-neighbourly relations...." Article 8 lists eleven policy elements to be taken into consideration when deriving what is reasonable and equitable in any given situation. It is, however, emphasized in Article 8(3) that "In determining... whether a use is reasonable and equitable the system states concerned shall negotiate..." so as to resolve any matters resulting for the use of the water resources.

All this amounts to this: The doctrine of equitable apportionment attempts to give a formula within which each riparian state gets the maximum benefits

198 Ibid., n.28, p.100.
199 n.72, pp.164-165.
from the use of a river's resources and minimizing adverse effects to each arising from such uses.

Up to this stage where it can be concluded that equitable apportionment is a general principle of international law applicable to the non-navigational uses of international rivers, the secondary rules to be distilled from it are still unclear, thus rendering its utility uncertain and unpredictable. Because of this it has been said that "the signal difficulty with the doctrine of equitable apportionment is... that the same platitudinous quality which makes it agreeable also makes it disturbingly vague and uncertain." Equitable apportionment has been criticized as being nothing more than an appeal to the general international conscience; that it is an essentially subjective doctrine in which the line between equity as a legal principle on one side, and political considerations on the other, is but a nebulous distinction.

In spite of its having been studied by learned bodies, individual commentators and the International Law Commission, many questions concerning the doctrine

remain unanswered. What, for instance, are the circumstances that give a state proximate interest which must be considered in determining the acceptability of a proposed use of an international watercourse? In what manner are the priorities of uses to be determined? And who can determine what use is beneficial to a state? These are all issue areas that the doctrine of equitable apportionment renders no mathematical guide. It merely provides a general policy standard by which the concerned states could predict the probable decision of an impartial tribunal deciding an international water resource dispute.

The dilemma lies in the manner in which abstract ideal of equitable apportionment can be given positive legal meaning and acceptability by the states. This is because states may share common perspectives but viewed from different observational points. Both an upstream state and a downstream state would necessarily interpret equitableness from their respective positions; and a developed state would conceive what is equitable in that context, while an underdeveloped riparian sees equitable apportionment as means of redressal and rectification of past or historic injustices. Thus, to interfuse the dialectical interplay of these competing notions of equity in order to accommodate different
sensitivities of sovereignty as to what the equities as to the shares to be regarded as just and fair, makes equity in relation to international rivers a difficult phenomena that international law offers no magic answers.

These apparent inadequancies of equitable apportionment have been recognized in treaty practice, municipal decisions and in the Draft Convention by the International Law Commission, all of which acknowledge the complexity of water resources problems. Each water-course has its own peculiarities - political, economic, social and physical. It is with the full appreciation of these special circumstances within a given basin that the International Law Commission proposes to formulate a framework convention containing primary principles which leave the states a wide latitude to work out either basin-wide or subsystem agreements responsive to the specific characteristics of each particular case. States would be encouraged to establish continuous nego-

201 see particularly Draft Art.4, n.72, p.160; see also First Report of the Special Rapporteur Where it was stressed that the nature of the topic required formulation of a framework convention setting out general, residual principles of law with the purpose of facilitating states to enter into more detailed agreements on individual watercourses or subsystems of rivers. Yearbook... 1976, Vol.11 (Part Two), p.162, Doc.A/31/10.
tivating fora in form of joint commissions whose authority varies from situation to situation.

Considered from this vantage point, the notion of equitable apportionment or utilization points to the need to separate the underlying and distinctive ingredients relevant to uses of water resources of an international river; and in this respect it serves as the methodological approach to the juridical rights of the riparian states concerned. Of itself, it does not claim to offer a tailor-made answer to the actual scope or kind of rights in question, but is restricted to the requirement that the right should not be but is restricted to the requirement that the right should not be exercised beyond the legitimate interests of the possessor of the right. 202

This reasoning flows from the fact that international rivers constitute a typical instance where sovereign rights are correlative and interdependent and, therefore, liable to reciprocally operating restraints.

202 This appears to be the view expressed in the International Law Commission commentary to Draft Articles 7 and 8. It is there pointed out that "the framework agreement should recognize the right of each state to use its share of water, as well as the international watercourse system within its territory, in accordance with its own policies, programs and principles," Ibid. GAOR, 1983, Thirty-eighth Sess., Supp. No.10(A/38/10), p.165. See also commentary to Helsinki Rules, in Garretson, p.783.
In this sense, the doctrine of equitable apportionment is a recognition of this factual background against which the various factors - economic, social, environmental - are modulated to determine the specific rights of each riparian state. As a broadly formulated and stretchable structure of substantive law, it takes into account all these considerations which would otherwise not be possible under a set of rigid rules. To a certain extent, it is admittedly true that "the prime weakness of the principle of equitable utilization is not the generality of the concept, but the primitive institutions to apply it." While adaptability is an advantage since it can be applied to a wide range of water resources disputes, it also raises major handicaps when the principle is applied to specific water resources disputes.

Given the knottiness of the balancing exercise involved, recourse to the doctrine of equitable apportionment by the interested parties themselves is unlikely to resolve a conflict that has arisen precisely

203 Utton, "International Water Quality Law", Natural Resources Journal, Vol.13 (1973), p.299; Lipper, "Equitable utilization", in Garretson and others ed., n.27, p.41; International Law Commission, n.72, p.166 where it was commented that Draft Article 8 did not give much guidance for solving problems as it was too long, complicated and repetitive and mixed both subjective and objective factors.
because of differing interpretations of what constitutes "reasonable" and "equitable" in the circumstances of the case at issue. Third party intervention either in the form of good offices or judicial and arbitral agencies would therefore seem desirable to make the doctrine an effective device of determining each state's equitable rights.

In view of the interests usually at stake in a case of water resources utilization together with the generality of the principle of reasonableness an equitableness which gives a deciding forum a large measure of discretion, a decision on the legal validity of

204 The Indus Water Dispute illustrates to a certain extent the advisability of this method, but it may not be appropriate in all cases. Its success may as well depend on various other factors not directly connected with water resources.

205 The International Court of Justice squarely addressed itself to the controversial application of principles of equity in the Continental Shelf Cases. In agreeing with the West German claim for equitable share the Court said "... just and equitable share did not in any way involve asking the Court to give a decision ex aequo et bono... for the principle of the just and equitable was one of the recognized general principles of law... which entered into all legal systems...." ICJ., Reports (1969), p.22. For details, see, Judge Ammoun's Separate Opinion, Ibid., pp.132ff. see, further, The Case Concerning the Continental Shelf (Tunisia, Libya), ICJ., Reports (1982), pp.29, 60. The Fisheries Jurisdiction Case (United Kingdom v. Ireland), ICJ., Reports (1974), pp.30-35.
a particular use by definition is of a very sensitive nature. The sensibility of states relative to aspects of their territorial sovereignty is well known. On the whole, states have displayed singular apprehensiveness and disinclination to submit these kind of disputes to an independent agency for a definitive solution based on their merits. Witness in this context the authority conferred on joint river commissions. In the majority of the cases these agencies do not enjoy independent decision-making powers in that they function merely as advisory, recommendatory and consultative organs.

In spite of all these, the principle of equitable apportionment does at least provide important guidance to relevant policy considerations. Its merit lies in its flexibility. It encourages states to cooperate rather than tying them down by insisting on traditional doctrines of sovereignty rights. Viewed in this broader context, the doctrine of equitable apportionment or utilization is a preferrable approach to the problem of international rivers.

III. SUMMARY

A major premise of this enquiry rests on the proposition that each riparian state has a right under customary international law to utilize the water resou-
rces of an international watercourse provided the exercise of this right is not inconsistent with international law. This statement then presupposes the existence of regulatory principles regarding the sharing of water resources of an international river, the nature of which forms the central theme of this text. Among the key issues identifiable is the question of the status of prior uses or existing uses in a watercourse shared by two or more states. Some authorities are of the opinion that a prior use creates a legal right and, therefore, takes precedence over all subsequent uses.

In the course of the discussion, a sample of treaties have been examined, including international and municipal decisions; the authority of associations of learned bodies and individual commentators has equally been considered; and lastly, the work of the International Law Commission has been examined. The majority of authority supports the major premise of this inquiry which is reducible to the doctrine of equitable apportionment as a principle of substantive law governing the uses of international rivers. Equitable apportionment provides that each riparian has equal competence of access to the water resources of an international river and to exercise its right in an equitable and reasonable manner. In determining a state's equitable right several
factors have to be taken into consideration. Priority of uses forms but one of the several factors in an equitable determination. It is not, therefore, a customary rule of international law, but only an element standing in the same scale with all the other relevant factors under consideration. Thus an existing use which exceeds a state's equitable right can be substantially affected without compensation unless otherwise agreed upon by the concerned states. In short the problem of international rivers needs to be approached contextually.

The generality of the principles on the law of non-navigational uses of international rivers is bound to be so, given the embroinic stage of its evolution and the complexity of the subject matter it seeks to regulate.

It is against this background that Part II of this enquiry reviews the Nile regime which forms the subject of the next discussion.