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Regional Cooperation: The Example of International Waters Systems in the Twentieth Century

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PROLOGUE

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ABSTRACT

The proposed rules of the International Law Commission reflect a clash between the established doctrine of equitable utilization and the rule of "no significant harm." The doctrine of equitable utilization developed out of water quantity allocations whereas the "no significant harm" rule has its origins in environmental protection.

The ILC rules attempt an accommodation of the two approaches, but in so doing, nonetheless, the concepts of reasonableness and the equitable consideration of all factors may be lost. This article suggests another alternative in order to preserve the idea of equitable balancing to some degree.

What have we accomplished in the twentieth century in developing legal norms for the cooperative use of international water systems? What do we need to do in the twenty-first century? Let us take a "helicopter tour" of the twentieth century to examine the highlights of the accomplishments in the cooperative use of international water systems during the century. Key phrases in this helicopter flight are: The Harmon Doctrine, absolute territorial sovereignty, Helsinki Rules, International Law Commissions, taming the dragon, and unfinished business.

Let us begin our tour exactly a century ago—in 1885. At that time, Mexicans downstream were complaining bitterly about water shortages on the Rio Grande. The Americans upstream were greatly increasing their diversions for irrigated agriculture.[1] As a result of these insistent Mexican complaints, the Attorney General of the United States, Judson Harmon, was asked what right the Mexicans had to these waters. His answer was that the United States was entitled to do as it pleased with the waters flowing into its territory, without regard to downstream

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1. James Simsarian, *The Diversion of Waters Affecting the United States and Mexico*, 17 TEX. L. REV. 27 (1939).

users.[2] Thus was born the famous Harmon Doctrine. We entered the twentieth century saddled with this nineteenth century concept of "absolute territorial sovereignty." In other words, absolute territorial sovereignty meant that a nation could do with the water as it pleases while it is in its territory. We have spent much of the twentieth century taming this dragon of absolute territorial sovereignty. In spite of the Harmon Doctrine, the United States soon reached an agreement with Mexico and, in the late 1906 Rio Grande Treaty, guaranteed to deliver a specific quantity of river water annually.[3]

Now we have an extensive treaty practice that rejects the absolute territorial sovereignty of the Harmon Doctrine.[4] We have well over 100 treaties, from every continent, in which the co-riparians, by mutual agreement, share the use of international rivers and limit their sovereignty. We see this type of agreement from the Columbia to the Colorado and on the Rio de la Plata, the Senegal, the Indus and the Mekong.[5] The treaty practice of the world community has opted for the doctrine of sharing the use of international waters rather than the Harmon Doctrine and absolute territorial sovereignty. Thus, one of the landmarks in the taming of the dragon has been the treaty practice of the world community.[6]

The next landmark was the Helsinki Rules of 1966.[7] After World War II, the need for an authoritative expression of the law of international water systems was urgently felt. Conflicts were rising between India and Pakistan on the Indus, between Egypt and Sudan on the Nile, and between Canada and the United States on the Columbia.[8] The International Law Association took on the task and established its Water Resources Committee in 1954. The most respected water lawyers from various countries of the world were selected to serve on the Committee. After 12 years of work, the Committee reached an agreement and reported on their work in 1966 at the ILA meetings in Helsinki. Thus, the Helsinki Rules were born. These rules are the most authoritative formulation of the law of international water systems. They are the expression most referred to by scholars and lending agencies and are the expression most cited by courts. The rules are built on the rock of

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2. 21 Op. Att'y Gen. 274 (1895).

3. Rio Grande Irrigation Convention, May 21, 1906, U.S.-Mex., 34 Stat. 2953.

4. *See generally* Albert E. Utton, *International Waters*, *in* 5 WATERS AND WATER RIGHTS 3 (Robert Beck ed., 1991).

5. *Id.*

6. *Id.*

7. Report of the Fifty-Second Conference of the International Law Association, Helsinki (1966).

8. *See* Charles B. Bourne, *The International Law Association's Contribution to International Water Resources Law*, 36 NAT. RESOURCES J. (forthcoming 1996).

equitable utilization—the reasonable sharing of the use of international water systems. No one nation is entitled to more than its fair share after considering factors such as climate, population, prior uses and alternative sources.

The next legal landmark of this century is the promulgation, in 1994, by the International Law Commission of its Draft Articles on the Law of the Non-navigational Uses of International Water Courses.[9] They largely follow the Helsinki Rules and reinforce them and the doctrine of equitable utilization.

These are the legal benchmarks of the twentieth century that mark the taming of the nineteenth century Harmon Doctrine and absolute territorial sovereignty. In addition, with the treaties, many international river commissions have been created which are the vehicles for regional cooperation in the use of these international water systems—those green ribbons of life. The twentieth century has been one of great achievement. But what of the twenty-first century? The key phrase here would have to be unfinished business. The dragon is not completely tamed and still cowers in some river basins.

Many important water systems remain without treaties and, at the same time, are facing dramatic population increases. For example, on the Tigris and Euphrates, the population of Iraq is projected to more than double by 2025 (from 18 million to 40 million), by the United Nations' low estimate.[10] The population of Syria is projected to more than double by 2025 (from 12 million to 30 million), by the United Nations' low estimate. Jordan's population is predicted to nearly triple by 2025, by the United Nations' low estimate.[11]

On the Nile, the population of Egypt is growing by nearly one million people per year and is projected to grow from around 60 million to nearly 90 million by 2025.[12] Egypt has used the Nile for more than 5,000 years. Ninety-seven percent of Egypt's water comes from the Nile and ninety-five percent of the flow originates outside Egypt.[13] Upstream, for example, Sudan is projected, by the United Nations' low estimate, to double its population by 2025 (from 24 to 56 million) and to triple its population by 2050 (to nearly 75 million).[14] On the Nile, there is an agreement between Sudan and Egypt, but there is no agreement with the other seven countries.

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9. International Law Committee, 46th Sess., U.N. Doc. A/CN.4/L492 (June 1994).

10. UNITED NATIONS POPULATION DIVISION, SUSTAINING WATER: AN UPDATE 4 (1955).

11. *Id.*

12. *Id.* at 2.

13. Peter H. Gleick, *Water, War and Peace in the Middle East*, 36 ENVIRONMENT 6, 14 (1994).

14. International Law Committee, *supra* note 9, at 6.

On the Ganges, Bangladesh is projected to nearly double by 2025 (from 108 million to 181 million), by the United Nations' low estimate. By the United Nations' medium estimate, it is projected to reach 196 million people.[15] India is projected to increase by 50 percent (from 850 million to 1.2 billion) by 2025, by the United Nations' low estimate.[16]

The population of Brazil, in which the Parana River is partially located, is predicted to increase from 150 million to over 200 million by 2025.[17] Brazil and Argentina have an agreement governing hydroelectric power and the use of Rio de la Plata, but population growth of this magnitude will challenge the existing institutional arrangements.[18]

These examples illustrate that there is an urgent need to reach agreement on rivers such as the Tigris, Euphrates and Jordan before population pressures make agreement more difficult. Similarly, there is a need to strengthen and expand existing agreements on the Ganges and the Nile.

The twentieth century has been one of great achievement in taming the dragon of absolutely territorial sovereignty. The landmarks of the century are treaty practice, the Helsinki Rules and the International Law Commission Draft Articles. But there is urgent unfinished business to reach agreement or expand existing agreements on many important river basins and ground water basins given the greatly increasing demands being placed on them. Even more fundamental is the crucial need to slow population growth rates dramatically.

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15. *Id.* at 2.

16. *Id.* at 4.

17. *Id.* at 2.

18. For a general discussion of the treaty and institutional arrangements, *see* Lillian del Castillo de Laborde, *Legal Regime of the Rio de la Plata*, 36 NAT. RESOURCES J. (forthcoming 1996); Guillermo J. Cano, *Argentina, Brazil, and the de la Plata River Basin: A Summary Review of Their Legal Relationship*, 16 NAT. RESOURCES J. 863 (1976).