



Summer 1996

Which Rule Should Prevail in International Water Disputes: That of Reasonableness or that of No Harm

Alrbert E. Utton

Recommended Citation

Alrbert E. Utton, *Which Rule Should Prevail in International Water Disputes: That of Reasonableness or that of No Harm*, 36 NAT. RES. J. 635 (1996).

Available at: <https://digitalrepository.unm.edu/nrj/vol36/iss3/7>

This Article is brought to you for free and open access by the Law Journals at UNM Digital Repository. It has been accepted for inclusion in Natural Resources Journal by an authorized editor of UNM Digital Repository. For more information, please contact disc@unm.edu.

ALBERT E. UTTON*

Which Rule Should Prevail in International Water Disputes: That of Reasonableness or that of No Harm?

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.

After 20 years of labor, the International Law Commission has promulgated its Draft Articles on the Law of Non-Navigational Uses of International Watercourses.¹ A central debate in the protracted deliberations of the Commission was whether to give precedence to the doctrine of equitable utilization with its long established roots in water quantity allocation or the rule of "no significant harm" with its transboundary pollution origins.² The Commission labored to reach an accommodation, and produced a compromise which will probably not please anyone - neither the downstream states and environmental community that pushed hard for a "no transboundary harm rule" nor the upstream states and international water law community which urged the retention of the doctrine of equitable utilization.

The articles are to be used by the U.N. as the starting point for a multilateral water treaty, so at this point it is uncertain what the final product will be. This paper will argue that the doctrine of equitable utilization should be maintained in water quantity matters so as to avoid

* Director of Transboundary Resources Center and Editor Emeritus of the Natural Resources Journal, University of New Mexico School of Law.

1. Report of the International Law Commission on the Work of its Forty-Sixth Session, U.N. GAOR, 49 Session, Supp. No.10 at 197, U.N. Doc. A/49/10 1994 (hereinafter 1994 ILC Report).

2. McCaffrey, Stephen C., *An Assessment of the Work of the International Law Commission*, 36 Nat. Resources J. 297, 307 (1996).

granting a veto to lower riparians and that the "no transboundary harm rule should be limited to cases of environmental damage".³

The Collision Between the Rules of Water Quantity and Water Quality

Article 5, 6 and 7 are the heart of the matter. Article 5(1) provides that "Watercourse states shall . . . utilize an international watercourse in an equitable and reasonable manner" and Article 6 contains a non-exhaustive list of factors to be considered in determining what is equitable and reasonable.

This list is consistent with the established practice enunciated by the Helsinki Rules and interstate judicial decisions going back to *Kansas vs. Wyoming*.⁴ Therefore Article 5 and 6 enunciate the classic equitable utilization idea of considering all relevant factors and balancing the costs and benefits of a proposed use of international waters. The first paragraph of Article 7 articulates a model "due diligence, no significant harm" water quality approach. Article 7 provides "Watercourse States shall exercise due diligence to utilize an international watercourse in such a way as not to cause significant harm to other watercourse States." Thus at this point we have a direct clash between the doctrine of "equitable utilization" of Article 5 and the "no significant harm" rule of Article 7.

This is a collision between the long established customary international law for allocation of water quantity⁵ and the "no significant harm" concept for the protection of water quality. Article 7(2) attempts an accommodation of these two clashing approaches. Articles 5 and 6 and Article 7 are a mixing of apples and oranges and to continue the metaphor Article 7(2) is an attempt to make Hawaiian Punch out of this mixing. Article 7(2) provides:

(2) Where, despite the exercise of due diligence, significant harm is caused to another watercourse State, the State whose use causes the harm shall, in the absence of agreement to such use, consult with the State suffering harm over:

- (a) the extent to which the use has proved equitable and reasonable taking into account the factors listed in Article 6;
- (b) the question of ad hoc adjustments to its utilization, designed to eliminate or mitigate any such harm caused, and, when appropriate, the question of compensation.

3. *Id.*

4. See Albert Utton, 5 *Water and Water Rights* ¶49.03(c) (Robert Beck ed., 1991).

5. *Id.*

The second paragraph of Article 7 provides a way out of the impasse—an accommodation which is one of process.⁶ A process of consultation and agreement, and if agreement cannot be reached of dispute resolution.

This pragmatic accommodation of "equitable utilization" and "no significant harm" does not clearly indicate which concept is to be given priority. Professor Stephen McCaffrey, who was special rapporteur for the Commission during much of the decade of the 80s concludes that "while it is clear that this paragraph does not entirely solve the problem of which rule take precedence, it at least strongly suggests that if a state's use is equitable it should be allowed to continue, even if it causes significant harm to another state. In the latter event, the reformation suggests that the harming state would be obligated to minimize that harm to the extent possible and to compensate the other state for any unavoidable harm."⁷ The Commission in its commentary to the Draft Articles posits that "the fact that an activity involves significant harm would not of itself necessarily constitute a basis for barring it."⁸

Dr. Wouters after reviewing the Helsinki Rules and Articles 5 & 7 of the ILC Draft Articles concludes that the 1994 ILC Draft adopts "the no significant harm rule as the governing norm of watercourse law."⁹ She elaborates that the ILC's requirement "not to cause significant harm remains the governing rule of the entire draft."¹⁰

Thus we have two competing approaches contending for acceptance by the international community. That of the Helsinki Rules arising from the customary international law of the allocation of water quantity, and that of no significant harm with its historical roots in transboundary pollution. Which approach is followed would make a difference in determining the legality of a proposed new use by upstream states. If the proposed use is evaluated under the doctrine of equitable utilization all relevant factors including significant environmental harm would be considered in the balancing of costs and benefits to determine if the new use was equitable and reasonable or not.¹¹ Under the ILC approach of Draft Article 7, the requirement that a state exercise due diligence so as not to cause significant harm to other riparian states

6. McCaffrey *supra* note 2 at 309.

7. *Id.*

8. Paragraph 21 of the Commentary to Article 7, 1994. ILC Report at 244.

9. Wouters, Patricia, *An Assessment of Recent Developments in International Watercourse Law Through the Prism of the Substantive Rules Governing Use Allocation*. 36 Nat. Resources J. 417, 424 (1996).

10. *Id.* at 423

11. International Law Association Report of the Fifty-Second Conference held at Helsinki, 1966, Art. V(2)(k).

would be the base rule, with the question of whether the use is equitable and reasonable being a secondary factor to be considered in regard to "mitigation" and "the question of compensation" in the event "despite the exercise of due diligence, significant harm is caused to another watercourse state"¹²

The end result is that we now have two concepts competing for the bedrock position-equitable utilization of the ILA and the Helsinki Rules and the "due diligence not to cause significant harm" of the I.L.C. Draft Articles. The United Nations may resolve this conflict in the projected convention on non-navigational uses of international watercourses.

A Historical Perspective

From the perspective of history we can see that the concept of "equitable utilization" and its predecessor "equitable apportionment"¹³ grew out of the requirement to share equitably the use of the waters of an international watercourse. Thus, it is principally a water quantity doctrine.¹⁴ This doctrine originated as a middle position of reasonableness between the two extremes of the absolute territorial sovereignty assertions of upstream states and absolute territorial integrity claims of downstream states. An upstream state under the Harmon Doctrine would assert that it could use and consume the waters of an international or interstate river as it wished within its sovereign territory without regard to co-riparians downstream.¹⁵ A downstream state would assert that it was entitled to the full undiminished flow of an international river due to its right of "absolute territorial integrity."¹⁶

The middle position of equitable apportionment or equitable utilization rejected both extremes and required equitable sharing of the use of an international or interstate river. What was equitable or reasonable is determined by considering all the relevant factors such as prior uses, climate, and alternative sources. Thus equitable utilization allowed the fair sharing of the river by all co-riparians. It prevented the preemptive use of the river by the upper riparian just because it was upstream, and it likewise prevented the downstream state from exercising a veto over any upstream diversion or use of the river.¹⁷ It allowed the development and use of the river, but in a fair and reasonable manner.

12. Article 7(2).

13. Utton, *supra* note 4.

14. *Id.*

15. *Id.* at §49.01.

16. *Id.* at §49.03(a).

17. *Id.* at §49.05.

Adopting the later and parallel concept of "no significant harm" originating from transboundary pollution concerns and superimposing it on the question of water quantity allocations as the base principle of international water law would come close to again giving a veto power to downstream states over proposed uses of international streams by upstream states, in contrast to the concept of reasonable or equitable sharing of international water resources required by the doctrine of equitable utilization.

The ILC in its commentary to Article 7 does say that "the fact that an activity involves significant harm would not of itself necessarily constitute a basis for barring it."¹⁸ However the ILC Commentary does confirm that "the obligation of due diligence contained in Article 7 sets the threshold for lawful state activity."¹⁹ And further a state would violate this due diligence obligation "if it knew or ought to have known that a particular use . . . would cause significant harm to other water-course states."²⁰ In fact Article 21 does deal directly with pollution and requires due diligence to prevent, reduce and control pollution.²¹ Article 21(2) is explicitly referred to in the commentary as "a specific application of the general principles contained in Articles 5 and 7."²² Thus the drafters seemingly made clear that the responsibility to exercise due diligence to prevent significant harm was not confined to water quality questions but was intended to apply to "significant damage" more broadly i.e. water quantity questions as well.

Separating the Apples and Oranges

Perhaps the confusion caused by the apparent conflict between these two contending approaches could have been reduced if the principle of equitable utilization had been used for water quantity matters and the "due diligence to avoid significant harm" rule had been used in water quality matters.²³ Dr. Wouters concludes that the proposed ILC Article 7 "reduces the principle of equitable utilization to a mere factor to be considered in considerations where significant harm has oc-

18. Paragraph 21 of Commentary to Article 7, 1964 Helsinki Report at 244.

19. Paragraph 2(1)(2) to Article 7.

20. Paragraph 5 to Article 7.

21. See Wouters, *supra* at note 9, at 424.

22. Paragraph 3, Commentary to Article 21(2).

23. Admittedly it is not easy to separate quantity from quality scientifically; for example, diversions and consumptive use may reduce the quantity of water available for the dilution of salts thus affecting the salinity and thus quality of water. Also the environmental community would not likely be confident that environmental factors would be valued sufficiently in the balancing of the equities of the Helsinki Rules.

curred."²⁴ Thus raising the specter of a downstream veto power. She goes on to say, however, that "the ILC's position with respect to pollution harm is more stringent than in the general rule in Article 7" and cites Article 21.²⁵ McCaffrey recognizes that "the critics of equitable utilization, as the prevailing doctrine are concerned principally . . . about its use in the field of pollution (water quality), rather than that of allocation (water quantity)."²⁶

Perhaps the contradiction caused by mixing the apples and oranges of water quantity and water quality doctrines could be clarified by having water quantity issues governed by Articles 5 and 6 as drafted in the ILC Articles and by amending Article 7 to read as follows:

7 (1) Watercourse States shall exercise due diligence to utilize an international watercourse in such a way as not to cause significant harm to the environment or ecosystems of other watercourse States.

(2) Where, despite the exercise of due diligence, significant harm is caused to the environment or ecosystems of another watercourse State, the State whose use causes the harm shall, in the absence of agreement to such use, consult with the State suffering harm over:

- (a) the extent to which the use has proved equitable and reasonable taking into account the factors listed in Article 6;
- (b) the question of ad hoc adjustments to its utilization, designed to eliminate or mitigate any such harm caused, and, when appropriate, the question of compensation.²⁷

This would decouple Article 5 and 6 a bit from Article 7, making it clear that in water quantity issues the doctrine of equitable utilization would have precedence so that a water project could go forward if on balance the benefits outweighed the costs. However, if the project or any other activity caused significant adverse changes in water quality or harm to ecological systems, then the upstream State would be obliged to exercise due diligence to avoid the harm, and if nonetheless significant harm would result, then it would be required to consult with the downstream State and hopefully reach agreement over the questions of reasonableness, mitigation and compensation.

This would be consistent with Articles 20 and 21²⁸ and would provide protection, for example, for minimum stream flows required for

24. Wouters *supra* note 9, at 424.

25. *Id.*

26. McCaffrey, *supra* note 2, at 308.

27. New material is underlined.

28. Article 20 provides that "Watercourses States shall, individually or jointly protect and preserve the ecosystems of international watercourses."

riverine ecosystems and the ecosystems of estuaries. Non-environmental harm such as the reduction of quantities of water available to a downstream user would be governed by the concept of reasonableness after considering all relevant factors. Significant environmental or ecological harm would be subject to the obligation of due diligence to avoid the harm and if harm nonetheless occurred consultations regarding mitigation and "where appropriate, the question of compensation." This subtle change might be said to be much ado about nothing, but it would make clear that the rule of reasonableness governs water quantity allocations in the absence of significant environmental harm. For example, in the case of the reduction in flow due to a diversion for an irrigation project, the reduction might not have significant detrimental environmental impacts and thus would be judged on the basis of equity or reasonableness after balancing the costs and benefits. However, if the reduction significantly affected water quality by raising salinity levels, or threatened endangered species by reducing available water quantities below ecologically necessary minimum stream flows, then the obligations of due diligence, and mitigation would come into play.

This may be only a nuanced change from the ILC draft, but it would make clear to the parties that equitable utilization is the base rule in water quantity questions and the due diligence rule comes into play only in the case of significant environmental harm. This would tidy up the present ILC Draft which seems to try apply "due diligence" obligations (and its echoes of best available technology to clean up pollution) to water quantity issues. McCaffrey wisely counsels that "it is indeed difficult, and perhaps impossible, to apply the same rule to all kinds of problems relating to the non-navigational uses of international water-courses . . ."²⁹

In this way an approach could be preserved in water quantity allocations which is founded upon equity and reason and based upon a balancing of all factors, including detrimental effects. This would provide important guidance to the parties and third party decision makers-to the parties negotiating an equitable apportionment treaty, and to courts, arbitrators and other third parties decision makers if the parties could not reach agreement under the excellent consultation and dispute resolution provisions of the ILC Draft.³⁰

29. McCaffrey, *supra* note 2, at 308.

30. See discussion of McCaffrey, *supra* note 2, at 318.