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Effect of Existing Uses on the Equitable Apportionment of International Rivers I: An American View

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EFFECT OF EXISTING USES ON THE EQUITABLE APPORTIONMENT OF INTERNATIONAL RIVERS I: AN AMERICAN VIEW

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The dispute between the United States and Canada regarding the apportionment of the Columbia River is not settled. In March 1959, pursuant to the 1944 reference, the International Joint Commission submitted to the governments of Canada and the United States a comprehensive engineering report on "Water Resources of the Columbia River Basin" prepared by the International Columbia River Engineering Board. This report contains three plans for utilizing the resources of the Columbia. Two of these plans include diversion of part or all of the Kootenay River into the Columbia at Columbia Lakes. All three plans would develop about the same amount of power and flood control benefits. Interestingly, none of them mentions the sometimes threatened diversion of the Columbia into the all Canadian Thompson and Fraser Rivers.

More recently, on December 29, 1959, the International Joint Commission reported to the respective governments of the United States and Canada on "Principles for Determining and Apportioning benefits from cooperative use of storage waters and electrical inter-connection within the Columbia River System." This 30-page report recommends a cooperative development of the river basin. It is divided into three parts, general principles, power principles, and flood control principles. Of particular interest is Power Principle Number 6 which recommends that the "power benefits determined to result in the downstream country from regulation of flow by storage in the upstream country should be shared on a basis such that the benefit in power to each country will be substantially equal." Flood Control Principle Number 4 recommends that the "upstream country should be paid one-half of the benefits" to the downstream country by the prevention of flood damage.

The above Engineering Board study and the I.J.C. apportionment recommendations have now been handed to special negotia-

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tors representing both nations. Presumably these representatives are considering the acceptability of one or another of these plans. These negotiations will probably culminate in recommendations for an appropriate treaty to be signed by the respective governments. When these recommendations might come is not now known. It is hoped that they might appear within a matter of weeks, or months.

You will recall that in 1955 the late Senator Neuberger said of the Columbia River dispute that it threatens the "gravest crisis in modern United States-Canadian relations."[1] Let us hope that the negotiations now taking place will end in a settlement that will permanently avert that crisis.

One of the important facts that these negotiators must consider is the tremendously disparate economic development in the river basin between the United States and Canada. In 1955, Mr. Len Jordan, then Chairman of the U.S. Section of the I.J.C. reported that the United States had "substantial investments in existing power plants in the Columbia Basin amounting to about one and one-half billion dollars; power plants under construction, another billion dollars; plus another estimated two billion dollars for power pants that will be built in the next ten years."[2]

The installations referred to by Mr. Jordan include nine dams presently completed or under construction and one additional dam authorized. A third of a million acres of highly fertile land in Central Washington is now being irrigated in the Columbia Basin Project from dams on the main stem of the river, and another two thirds of a million acres will be under irrigation soon. About 30 million dollars worth of crops are being taken annually from the land currently under irrigation — land that formerly could be used only for dry wheat production. By comparison with the United States, Canada presently has very little development on the river. There are no Canadian dams, hydroelectric or otherwise, on the main stem, and only three small dams on tributaries. A small amount of land is presently under irrigation in the Canadian portion of the basin, although I understand plans are eventually to irrigate about one-half million acres.

[1]Report of the Chairman of the Senate Committee on Interior and Insular Affairs, submitted by Senator Neuberger, 1955.
[2]Remarks of Len Jordan before the Pacific Northwest Trade Association, Vancouver, 1955.

It is against this background that we are asked to discuss the effect of existing beneficial uses on the equitable apportionment of an international river. We are not unmindful in this discussion of the existence of the Boundary Waters Treaty of 1909, and the sometimes heated debate that has warmed U.S.-Canadian relations during recent years about its applicability to the Columbia dispute. In spite of that treaty, however, there are at least two reasons why our present topic is pertinent to the Columbia River question; first, there may be a question whether the 1909 treaty really does apply to this situation, and secondly, even if applicable the two countries may for a number of reasons desire not to rely upon its limited provisions for settlement. If the treaty is deemed not to be controlling, then other principles of international law become germane to the dispute, such as the question now before us.

The Columbia River dispute is the one closest to us. We are very aware of it. But the question before us is not the status of existing uses on the Columbia alone, but the status of existing uses in the apportionment of any international river. By far the greater portion of the international rivers of the world are yet undeveloped, and unapportioned. Even a casual examination of a world map shows at least 59 nations that share one or more rivers. This count includes nearly every major world power other than those completely surrounded by the sea, such as England. The South American Continent is laced with international rivers — rivers that will some day require apportionment as technological advances create greater demands. The Amazon River is essentially Brazilian, and yet substantial tributaries may be found in Columbia, Ecuador, Peru, and Bolivia. The Parana River, which empties into the South Atlantic at Buenos Aires, has large tributaries winding into Bolivia, Paraguay, and Brazil. The Uruguay River is riparian to Uruguay, Argentina, and Brazil.

The Orinoco starts in Columbia, and debouches into the Atlantic through Venezuela. Africa also is crisscrossed by rivers that traverse national boundaries — in addition to the Nile. The Niger has tributaries in French West Africa, and French Equatorial Africa, and empties into the sea through Nigeria. The Congo goes through or touches Belgian Congo, Angola, French Equatorial Africa and North Rhodesia. The Zambesi is fed by rivers flowing in Angola, South and North Rhodesia, and finally flows into the sea through Mozambique. In other parts of the world the same is true. Thailand is riparian to the same river systems as are

Burma and Indochina; the tremendous Ganges River is shared by India, Nepal, Bhutan and Pakistan; the Tigris-Euphrates River system is found in Iraq, Iran, Syria and Turkey; Europe has a network of such rivers, including the Rhine, the Meuse, and the Danube, among others. This brief cataloguing of some of the international rivers of the world is still only illustrative. A complete list of such rivers would run into many pages, and would include many hundreds, if not thousands, of rivers and streams.

The relationship of these many countries to the various international rivers that cut or touch their boundaries is infinitely varied. No two rivers present the same economic, social, political, or hydrological facts. It, therefore, becomes apparent that any legal method, principle, or doctrine, that might hope to be generally useful must be adaptable to these many situations.

In our search for such methods and principles, we are fortunate that in the past few years there have been prepared and published a number of very fine studies of past international river disputes and their settlements.[3] An examination of them by this writer has led to the conclusion that there is no single, controlling "rule" for apportionment that has attained general pre-eminence. Certainly it cannot be said that the prevailing rule is the Harmon Doctrine, derived from the rule of absolute sovereignty. Although this doctrine has cropped up in international disputes on occasion, it has not been generally accepted, and currently is in disfavor by nations as well as by most international groups and writers.

What is apparent by a study of past disputes and settlements is a distinct tendency for nations to turn for solution toward the concept of "equitable apportionment".

A significant distinction must be noted between equitable apportionment on the one hand, and the Harmon Doctrine on the

[3]The most helpful of these are: Smith, The Economic Uses of International Rivers (1931); United Nations Document, E/ECE/136, Legal Aspects of Hydro-electric Development of Rivers and Lakes of Common Interest (1952); United Nations Document, E/3066, Integrated River Basin Development (1958); Witmer (U.S. Dept. of Int.) Documents on the Use and Control of the Waters of Interstate and International Streams. Compacts, Treaties, and Ajudications (1956); Berber, Rivers in International Law (1959); Resolution Adopted by the International Law Association at its Conference Held in August 1956 at Dubrovnik, Yugoslavia, together with Reports and Commentaries Submitted to the Association; Statement of Principles of Law and Recommendations with a Commentary and Supporting Authorities Submitted to the International Committee of the International Law Association by the Committee on the Uses of Waters of International Rivers of the American Branch (1958); Resolution Adopted by the Inter-American Bar Association at its Tenth Conference Held in November, 1957, at Buenos Aires, Argentina, together with Papers Submitted to the Association.

other. "Equitable apportionment" is really more of a method of approach to a dispute rather than a rule for deciding it. If the Harmon doctrine is applied to a controversy the parties will usually come up with a positive, rather definite answer concerning their respective rights — probably an undesirable answer, but definite. If the principle of equitable apportionment is applied the parties are told merely to gather all of the relevant data and then make a "just and reasonable" apportionment of benefits. "Equitable apportionment" does not tell us the criteria for "just and reasonable".

Implicit in the application of the principle of equitable apportionment is the gathering of all relevant data. Comprehensive studies of the hydrology of a river basin are expensive and time consuming. However, they are essential if the goal of equitable apportionment is to be achieved, i.e., the maximum economic development of the basin. If, because of insufficient data, or because of too aggressive nationalism, a plan is adopted calling for less than maximal utilization of basin resources the loss to mankind usually is irreparable. Seldom can hydro-electric and irrigation facilities be changed once they are installed. If the bargaining relationship of the two nations is such that the plan for maximum utilization would, because of geographical location, give to one an "excessive" share of benefits then the answer is not to alter the master plan for a less efficient one, but to negotiate for the transfer of power or other benefits to the deficit nation.

What criteria are to be used to decide when an apportionment is "just and reasonable"? In 1948 the Committee on the Uses of Waters of International Rivers of the American Branch of the I.L.A. recommended that

> "In determining what is just and reasonable account is to be taken of rights arising from agreements, judgments and awards, and from *lawfully established beneficial uses*, and of such considerations as the potential development of the system, the relative dependence of each riparian upon the waters of the system, and the comparative social and economic gains accruing from the various possible uses of the waters, to each riparian and to the entire community dependent upon the waters."

Our concern here is particularly with the underlined clause above, "from lawfully established beneficial uses". The question posed is: What status should be given these beneficial uses in the deliberations of the decision makers?

The above noted committee of the I.L.A., in supporting its recommendations, made quite a comprehensive report on prior treaties, court decisions, arbitrations, writings, and statements of representatives of governments, dealing with the status of existing beneficial uses. Based upon this study the committee observed:

> "As a rule, the protection of uses, lawful when they came into existence, so long as they remain beneficial, has been treated as an absolute first charge upon the waters. If, for example, a nation has, without objection by other riparians, built a multi-purpose dam and is operating a hydro-electric plant upon an international river, it will hardly be suggested that a study of potential uses of the river should be approached as though the dam were still in the planning stage and the economic and population development dependent upon it had not yet taken place.[4]

The committee report supports the above statements by a number of widely drawn illustrations. Support is found in the arbitral award on the Helmand River, traversing Afghanistan and Persia, where Sir Frederick Goldsmid stipulated that "no works are to be carried out on either side calculated to interfere with the requisite supply of water for (existing) irrigation on the banks of the Helmand", and in the history of the Nile negotiations, which was said to be "replete with statements and agreements by upper riprains recognizing the entitlement of Egypt to the flow necessary to manitain its established irrigation." Support was also found in the negotiations between the U.S. and Mexico concerning the Rio Grande, and in the negotiations between France and Spain, and between Palestine, Syria and Lebanon in connection with the Jordan.

In hearings held in 1945 before the Senate Committee on Foreign Relations on Treaty with Mexico Relating to the Utilization of the Waters of Certain Rivers, and particularly the Rio Grande, the counsel of the United States Section of the Mexican-United States International Boundary Commission testified

> "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 seems 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 to make provision for expansion in both countries, both upper and lower, within the limits of the available supply."

[4]Appendix D.
[5]79th Cong. 1st Sess. Part. 1, 97-98, 1945.

One way of describing the status of existing beneficial uses is to say that they impose a burden akin to a servitude upon the other nations riparian to the same river. The existence of the use imposes a burden upon the other riparian nations not to alter the flow so as to impair such use. It may be urged that the existence and nature of servitudes in international law is an arguable point. Yet illustrations can be found where nations including the United States, have acted on the assumption of their existence. For example, in an exchange of notes in 1941, Canada requested permission of the United States temporarily to raise the level of Lake St. Francis. The United States granted this permission, but made it clear that it attached "importance to the understanding that this agreement authorizing the raising of the level . . . is temporary, and that this action shall not be deemed to create any vested . . . right" for the future.[6]

The most extensive body of cases on the status of existing uses in the equitable apportionment of "international rivers" emanates from the United States Supreme Court. Although it is true that the states of this federation have agreed, through the constitution, to submit their disputes to the Supreme Court for decision, that does not destroy the relevance of that Court's opinions to the subject at hand. Furthermore, the Supreme Court has made it quite clear in those opinions that it was considering and applying international as well as Federal and state law. Starting in 1906 with *Kansas v. Colorado*[7] and running through to *New York v. New Jersey*[8] that court has consistently given a special, preferred status to existing beneficial uses. This is not to say that existing uses have been given absolute priority — but where they have been established without objection of the other state or states, and were established as beneficial, the court has placed a great burden on the complaining state to prove their inequitableness. Typical of the court's approach to this problem is *Colorado v. Kansas*.[9] Kansas, the lower riparian on the Arkansas River, sought by way of cross bill to enjoin certain diversions by Colorado residents which were allegedly interfering with Kansas' existing uses. The Supreme Court denied relief to Kansas on the ground that its uses were not being impaired. The court then commented on the decree for affirmative relief sought by Kansas, saying:

[6]Un. Nat. Doc. BCE 136, p. 105.
[7]206 U.S. 406.
[8]347 U.S. 995 (1954).
[9]320 U.S. 383 (1943).

> "On this record there can be no doubt that . . . (such a decree) . . . would inflict serious damage on existing agricultural interests in Colorado . . . it might indeed result in the abandonment of valuable improvements and actual migration from farms. Through practice of irrigation, Colorado's agriculture in the basin has grown steadily for fifty years. With this development has gone a large investment in canals, reservoirs, and farms. The progress has been open. The facts were of common knowledge . . .
>
> Even if Kansas' claims of increased depletion and ensuing damage are taken at face value, it is nevertheless evident that while improvements based upon irrigation went forward in Colorado for twenty-one years, Kansas took no action until Colorado filed the instant complaint in 1928.
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> These facts might well preclude the award of the relief Kansas asks. But in any event, they gravely add to the burden she would otherwise bear, and must be weighed in estimating the equities of the case."[10]

To stop at this point would be error. The burden of the foregoing discussion has been that international law presently recognizes a special, preferred status for existing beneficial uses. There are, however, several very apparent exceptions to this position. One such exception is illustrated by the Chicago diversion litigation.[11] Starting as early as 1892 and continuing into the 30's Chicago diverted substantial quantities of water from Lake Michigan into the Mississippi watershed to carry away city sewage. The result was a lowering of the levels of Lakes Michigan and Huron six inches, Lakes Erie and Ontario five inches, and the St. Lawrence River, about five inches. Wisconsin, Michigan, Minnesota, Ohio, Pennsylvania, and New York all filed complaints in the Supreme Court, alleging injury by the lowering of these lake levels and asked that Chicago be enjoined from further diversions beyond a certain minimum quantity. This relief was granted.[12] The point worth noting in this controversy is that the use being made by Chicago of these waters was not absolutely essential to the purpose being accomplished, i.e., sewage disposal. Undoubtedly this was, in the short run, the cheapest method of waste disposal for the city, but it was not the only method. The cost of building an adequate waste disposal system was not so great as to destroy

[10] 320 U.S. 383 at p. 394. (See also *Nebraska* v. *Wyoming*, 325 U.S. 589 (1945); *Wyoming* v. *Colorado*, 259 U.S. 419 (1922), 286 U.S. 494 (1932), 298 U.S. 573 (1936), 309 U.S. 495 (1922). *Connecticut* v. *Massachusetts*, 282 U.S. 660 (1930); *New Jersey* v. *New York* 283 U.S. 336 (1930); *New York* v. *New Jersey*, 347 U.S. 995 (1954); *Washington* v. *Oregon* 297 U.S. 517 (1936).

[11] See article, *Chicago Diversion Controversy*, 30 Marquette Law Review 149, 228, 1946, and 31 Marquette Law Review 28, 1947.

[12] *Wisconsin et al* v. *Illinois et al*, 278 U.S. 367 (1929).

the city, or even substantially impair its growth and activity. This case illustrates the principle then that an existing use, such as Chicago's, will not be given a priority status where it does substantial harm to others, and where that harm can be avoided by a reasonable financial expenditure. The result in the Chicago litigation might well have been different if the water had been diverted into a huge irrigation project, upon which many people had come to depend, and for which there was no other feasible source of supply.

Another exception to the preferred status of existing uses is illustrated by the Indus River dispute between Indian and Pakistan.[13] This dispute came near to exploding into open hostilities in 1948, shortly after partition, when the Indian state of East Punjab shut off the flow of water into all of the irrigation canals running into West Pakistan. Most, but not all of this water supply was later restored. However, the disagreement was not resolved, and India continued to claim the right to additional waters. Tense and unfruitful negotiations were carried on until 1952 when these countries agreed to negotiate through the good offices of the World Bank. Subsequently, the Bank caused extensive engineering studies to be made, and a master plan was drawn up for the overall utilization of the waters of the basin. Following extensive negotiations, it now appears that a treaty will be signed shortly, putting into effect this master plan. Pakistan's claim throughout the negotiations has been that by long continued beneficial use it acquired a vested right to the continued flow of the water. The importance of this water to Pakistan can hardly be overstated. A total of 37 million acres of land in India and Pakistan are irrigated from the Indus system of rivers. 31 million acres of this land lie in West Pakistan. This is an area almost five times that irrigated from the Nile River and is 35% larger than the total area irrigated in the United States. Most of West Pakistan's 34 million people live in the Indus basin, and are dependent either directly or indirectly upon the Indus for their livelihood. One can imagine the fervor with which the Pakistan peoples argued their

[13]See facts reported in: "Statement of Principles of Law and Recommendations with a Commentary and Supporting Authorities Submitted to the International Committee of the International Law Association by the Commitee on the Uses of Waters of International Rivers of the American Branch (1958); The Indus Basin Irrigation Water Dispute, Government of Pakistan (1953); Memorandum On the Indus Water Dispute, Government of Pakistan (1959); Proposal by the International Bank Representative for a Plan for the Development and Use of the Indus Basin Waters (1954)."

case of vested rights. However, the sticky point in the disagreement arose from the fact that much of the Pakistani irrigation was highly inefficient — was really just the open flooding of lands without adequate or any controls. India's position was that even if Pakistan had a right to enough water to irrigate a certain amount of land, it, in effect, lost its entitlement to that water because of wastefulness. Pakistan must either install weirs and other controls or lose whatever rights it had. India thus argued that the extent of Pakistan's right to continued use was measured by the benefit derived from the water, not merely by the amount of water that previously had been received. On this issue even John Laylin, Counsel for the Government of Pakistan, has admitted that in such a case "adjustments may sometimes be required in order to permit realization of the full potential value of the river to all of the nations concerned."[14]

The same basic principle, of measuring right by actual beneficial use, runs throughout the municipal law of the United States, and, so far as I can ascertain, of Canada. As for U.S. law, one of the leading authorities, Weil, in his work, Water Rights in the Western States, summarizes this principle as follows:

> "To secure protection in the diversion and use of the waters of a stream for irrigation, or any other purpose, there must be an economic, beneficial and reasonable use thereof, so as to prevent waste. An excessive diversion of water for any purpose cannot be regarded as a diversion for a beneficial use."[15]

The same principle is found in the Riparian doctrine.[16]

CONCLUSION

The material collected and anlyzed above leads to the conclusion that existing beneficial uses are generally — in international law — accorded a special, preferred status in the apportionment of an international river. The precise quality of that status necessarily depends upon the economic, political, and hydrological facts pertinent to the particular apportionment. However, this status is distinctly limited or even non-existent where there are feasible alternate sources of water, or where the use is not in fact beneficial.

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[14]Address delivered to the Inter-American Bar Association, Nov., 1957, Appendix D.
[15]p. 504, 1911.
[16]See, for example, Restatement of Torts, Chapter 41, Topic 3.