Christopher Augustine Gabel
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Supervisor: Professor Viñuales
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The Rio with Two Masters

International boundaries can be found in areas which once were in the interior of a sovereign. A 1200 mile section of one particular river is an example. Even the duality of its name illustrates a history of differing views towards the river—the Rio Grande-Rio Bravo del Norte. The differing views regarding the river are significant because this watercourse is not only a boundary, but it is also a natural resource for both agrarian and municipal uses along both sides.

The river was once encompassed within the Spanish colony of the new World. When Mexico seceded from Spain, the river was still in the interior of a sovereign. The watercourse rose to prominence when the Tejas territory of Mexico seceded, and claimed, as they called it, the Rio Grande to be the southern border of the new nation of Texas.[1] Mexico contested the location of its northern border, and treated the Nueces River, 150 miles to the north of the Rio Bravo, as the Rio Grande is known in Mexico, as the Mexican-Texan border.[2]

Texas and Mexico displayed hostile relations. As such a young Republic, many Texans held grudges towards Mexico, and many Mexicans resented the Texans. Border skirmishes were frequent. The Republic of Texas, at its own leisure, eventually entered the Union of the United States of America in 1845.[3] The Rio Bravo del Norte officially became the northern border of Mexico at the conclusion of the Mexican-American War via the Treaty of Guadalupe Hidalgo of

[1] "American-Mexican Boundary Disputes and Cooperation," in R. Wolfrum (ed.), *The Max Planck Encyclopedia of Public International Law*, Oxford University Press, 2010, online edition, [www.mpepil.com].

[2] *Id.*
[3] *Id.*

1848, after failed diplomacy resulted in military intercession.[4] This also began a series of treaties which eventually governed several facets of the use of benefits of the watercourse.

An 1853 treaty modified the current boundary between the United States and Mexico. The International Boundary Commission was created in an 1889 convention to apply rules previously agreed upon by both sovereigns from earlier treaties including a treaty in 1884 (these rules dealt with monitoring the river and doing measurements). The 1906 Convention set the first water allocation for a brief stretch of the river.[5] Finally in 1944 a treaty established water distribution between the sovereigns for the remainder of the river all the way to the Gulf of Mexico[6]. This 1944 treaty also changed the Commission's name to the International Boundary and Water Commission (IBWC).

All of these treaties and conventions occurred before the formation of the United Nations. Keeping in mind Article 1.1 and Article 33 of the UN Charter, any disputes with the water allocation need to be settled peacefully, which has not always been the case for this river. Issues with the treaties regarding undefined terms exist, and these issues cause friction. While the IBWC can reach decisions regarding the treaties, stalemates occur. Neither state is a member of

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[4] *Id.*

[5] History of the International Boundary and Water Commission (May 30, 2014), *available at* http://www.ibwc.gov/About_Us/history.html. "The Convention of March 1, 1906… allocated the waters of the Rio Grande from El Paso to Fort Quitman [at an annual sum of 60,000 acre-feet], an 89-mile (143 km) international boundary reach of the Rio Grande through the El Paso-Juarez Valley."

[6] History of the International Boundary and Water Commission (May 30, 2014), *available at* http://www.ibwc.gov/About_Us/history.html.

> "'Of the waters of the Rio Grande, the Treaty allocates to Mexico: (1) all of the waters reaching the main channel of the Rio Grande from the San Juan and Alamo Rivers, including the return flows from the lands irrigated from those two rivers; (2) two-thirds of the flow in the main channel of the Rio Grande from the measured Conchos, San Diego, San Rodrigo, Escondido and Salado Rivers, and the Las Vacas Arroyo, subject to certain provisions; and (3) one-half of all other flows occurring in the main channel of the Rio Grande downstream from Fort Quitman. The Treaty allots to the United States: (1) all of the waters reaching the main channel of the Rio Grande from the Pecos and Devils Rivers, Goodenough Spring and Alamito, Terlingua, San Felipe and Pinto Creeks; (2) one-third of the flow reaching the main channel of the river from the six named measured tributaries from Mexico and provides that this third shall not be less, as an average amount in cycles of five consecutive years, than 350,000 acre-feet annually; and (3) one-half of all other flows occurring in the main channel of the Rio Grande downstream from Fort Quitman."

the UN Watercourse Convention of 1997, however this Convention might be useful to use as a gap filler where the Lex Specialis fails to cover. This could be done either by adopting provisions via a Minute, or by the States becoming members to the Convention.

The United States-Mexico Treaty Series of the Boundary Waters

The treaty series between Mexico and the United States began in 1848 regarding the demarcation of the Rio Grande. The treaties concerning water allocation began with the Convention of March 1, 1889.[7] This convention established the International Boundary Commission (IBW). The IBW initial purpose, according to the convention, was to govern issues dealing with changes in the watercourse involving the riverbed[8]. Article II states the IBC is to be composed of a Mexican and an American Commissioner appointed by each State's president. Article VII of the Convention gives the IBW powers to requests papers and information from the other country, and the ability to summon witnesses; in the event a witness doesn't come, the local courts are used to procedurally compel the witness.[9] Article VIII depicts the authority of the IBW, "[i]f both commissioners shall agree to a decision, their judgment shall be considered binding upon both Governments…[10]"

The 1906 Convention, titled "Equitable Distribution of the Waters of the Rio Grande," creates an obligation on the United States to deliver 60,000 acre feet (acf) of water per year to

[7] Convention to Avoid the Difficulties Occasioned by Reason of the Changes Which Take Place in the Beds of the Rio Grande and Colorado River, Dec. 12-15, 1898, U.S.-Mex., 26 Stat. 1512, TS 232.

[8] Article I. All differences or questions that may arise on that portion of the frontier between the United States of America and the United States of Mexico where the Rio Grande and the Colorado rivers form the boundary line, whether such differences or questions grow out of alterations or changes in the bed of the aforesaid Rio Grande and that of the aforesaid Colorado River, or of works that may be constructed in said rivers, or of any other cause affecting the boundary line, shall be submitted for examination and decision to an International Boundary Commission, which shall have exclusive jurisdiction in the case of said differences or questions. *Id.* at art. 1.

[9] *Id.* at art. 7.

[10] Unless the Government revokes the decision within 30 days, it becomes binding. *Id.* at art. 8.

Mexico from a dam in New Mexico to the Mexican Canal (located near the most western edge of the southern border of Texas)[11]. This was the first instrument of the treaty series to deal with an obligatory water allocation from one sovereign to the other. However it only governs a brief portion of the over 1200 mile river border[12]. Mexico in return for the 60,000 acf per year agrees to waive all claims to the waters in the river from the head of the Mexican Canal and all the way downstream to Fort Quitman, Texas.[13]

A reservation exists in Article II stating:

> In case, however, of extraordinary drought or serious accident to the irrigation system in the United States, the amount delivered to the Mexican Canal shall be diminished in the same proportion as the water delivered to lands under said irrigation system in the United States.[14]

Interestingly the term "extraordinary drought" is not defined. The rest of the 1906 Convention is explicit as illustrated in Article II's chart of how much water will be delivered each month in different quantities to equal 60,000 acf. Even Article V explicitly states that no legal basis will arise for damage to Mexican landowners due to diverted waters of the Rio Grande by Americans, and that this convention applies only to the stretch of river between the Mexican Canal and Fort Quitman but nowhere else. The ambiguity of "extraordinary drought" conditions eventually became an issue.

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[11] Convention Providing for the Equitable Distribution of the Waters of the Rio Grande for Irrigation Purposes, Dec. 26, 1907- Jan. 5, 1907, U.S.-Mex., art. 9, 34 Stat. 2953, TS 455.

[12] *Id.* at art. 4.

[13] Article IV "…Mexico waives any and all claims to the waters of the Rio Grande for any purpose whatever between the head of the present Mexican Canal and Fort Quitman, Texas, and also declares fully settled and disposed of, and hereby waives, all claims heretofore asserted or existing, or that may hereafter arise, or be asserted, against the United States on account of any damages alleged to have been sustained by the owners of land in Mexico, by reason of the diversion by citizens of the United States of waters of the Rio Grande." *Id.*

[14] *Id.* at art. 2.

The term "extraordinary drought" also appears in the 1944 treaty, titled, Utilization of Waters of Colorado and Tijuana Rivers and of the Rio Grande.[15] This 1944 treaty and protocol established the water allocation regime to be used for the remainder of the Rio Grande from the downstream limit of the 1906 Convention (Ft. Quitman) to the Gulf of Mexico. The Treaty of 1944 modified the commission's name from the International Boundary Commission to the International Boundary and Water Commission (IBWC).[16]

Article 25 of the 1944 Treaty incorporates articles three and seven of the Convention of March 1, 1889. Those articles order that the Commission cannot make any action unless the both commissioners are present, and that the Commission is allowed to make investigations, and it may obtain court papers and information from the other state.[17] Article 25 also directs the Commission to create internal procedural rules and regulations which do not violate the Treaty of 1944. Article 25 also creates a provision for the decisions of the Commission to be recorded in "Minutes" which are approved by the Commission— unless revoked by the government within 30 days, the Minutes are deemed approved by the government.

The 1944 Treaty's equitable allocation of the rest of the waters of the Rio Grande gives America the rights to 100% of the waters of these particular tributaries on the American side which enter the stream.[18] The United States also gets one-third of the waters that enter the stream from a particular list of tributaries to the Rio Grande.[19] The amount of water from these tributaries that America is entitled to is not to go below 350,000 acf per year.[20] The rest of the

[15] Treaty Relating to the Utilization of Waters of the Colorado and Tijuana Rivers and of the Rio Grande, Nov. 1-Oct. 16, 1945, U.S.-Mex., 59 Stat. 1219, TS 994, 3 UNTS 313.

[16] *Id*. at art. 2.
[17] *Supra*, note 4, art 3, 7.
[18] Treaty Relating to the Utilization of Waters, at art. 4.B.a.
[19] *Id.* at art. 4.B.c.
[20] *Id.*

waters in the Rio Grande are split in half and allocated to each country.[21] The term "extraordinary drought" is used again to allow a delay of duties to perform by the state.[22] However the term "extraordinary drought" once again was not defined.

The Binational Rio Grande Summit of 2005 created recommendations about legal and institutional issues.[23] One of the recommendations was to create an interpretation of the term "extraordinary drought" within the meaning of the 1944 Treaty.[24] The summit also gave recommendations regarding the river (e.g. better water availability, and better exchange of information) but always to keep the actions in accordance to the provisions of the 1944 Treaty.[25] This summit meeting came from Minute 308 of the IBWC (June 28th, 2002).[26] Section G.2 of the Minute, titled Sustainable Management of the Basin, recommends a binational summit meeting be held. The term sustainable management occurs frequently in Minute 308 and in subsequent Minutes. Currently no agreement exists regarding the term "extraordinary drought" in the treaty.

The Convention on the Law of the Non-navigational Uses is of International Watercourses

The United Nations watercourse convention of 1997 is a document which creates a general instrument pertaining to the non-navigational use is up international watercourses. It has no protocol, and parties are urged to apply it as needed or merge it with current treaties—it is void of any *Jus Cogens*.[27] It deals with topics such as equitable distribution of resources ecological and environmental protection, the exchange of data and information, emergency

[21] *Id.* at art. 4.A.d., 4.B.d.
[22] *Id.* at art. 4.
[23] Recommendations Work Group on Legal and Institutional Issues Binational Rio Grande Summit (Nov. 17-18, 2005), *available at* http://www.ibwc.gov/Files/Legal_Institutional_Issues.pdf.
[24] *Id.*
[25] *Id.*
[26] Minute 308 of the International Boundary and Water Commission: United States allocation of Rio Grande waters during the last year of the current cycle, June 28, 2002, U.S.-Mex., TIAS 02-628.

[27] STEPHEN C. MCCAFFREY, THE LAW OF INTERNATIONAL WATERCOURSES 361 (2d. 2007)

situations and dispute settlement[28]. It requires 35 members in order to enter into force. Currently there only 35 members neither of which is Mexico or the United States.[29]

The convention consists of 37 articles and an annex regarding arbitration. The convention recalls "the principles and recommendations adopted by the United Nations Conference on Environment and Development of 1992 in the Rio Declaration and Agenda 21."[30] Article two defines "international watercourse" as a watercourse, parts of which are situated in different states.[31] Article two also has a term called the "regional economic integration organization (REIO)" which is an entity given complete competence over the matters in the convention which is authorized by the sovereign states to oversee the convention's applications.[32] The IBWC duties include having exclusive jurisdiction over the Rio Grande, similar to a REIO.

Article three provides that the treaties currently in force on the date of entry of becoming a party to the convention will not be affected by the convention absent an agreement otherwise.[33] However article three does suggest that the States should "consider harmonizing such

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[28] Convention on the Law of the Non-Navigational Uses of International Watercourses, 36 ILM 700 (1997), G.A. Res. 51/229, U.N. GAOR, 51st Sess., 99th mtg., UN Doc A/RES/51/229 (1997). [hereinafter UNWC].

Article 1. Scope of the present Convention

1.The present Convention applies to uses of international watercourses and of their waters for purposes other than navigation and to measures of protection, preservation and management related to the uses of those watercourses and their waters.

2.The uses of international watercourses for navigation is not within the scope of the present Convention except insofar as other uses affect navigation or are affected by navigation

[29] Vietnam became a party to the Convention in May 2014. This satisfies the required number of members to put the convention into force. It will come into force during August 2014. UN Watercourse Convention (May 30, 2014), *available at* http://wwf.panda.org/what_we_do/how_we_work/policy/conventions/water_conventions/un_watercourses_convention/.

[30] UNWC, at the preamble.
[31] UNWC, at art. 2.b.
[32] *Id.* at art. 2.d.
[33] *Id.* at art. 3.1.

agreements with the basic principles of the present Convention."[34] The IBWC has either through its Minutes or on its own motion begun to follow newer legal concepts such as sustainable management and doing environment impact assessments.[35]

Equitable and reasonable utilization is discussed in part to of the watercourse convention (and in great detail later). This basic principle is that watercourse States are required to use the watercourse in an "equitable and reasonable manner."[36] Further the water States should sustainably utilize the watercourse in an optimal manner in order to provide the watercourse adequate protection.[37] This part of the UN Convention could conflict with the current treaty series between Mexico and United States. In particular the IBWC has expressed explicitly it wishes any further changes to be done in accordance to the 1944 treaty provisions. If it was found that the current water division and use scheme is not equitable the IBWC would still not want to change it. Article six has a non-exhaustive list of all relevant factors of equitable and reasonable utilization.[38] The 1944 treaty could be viewed as equitable and reasonable, and as a

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[34] *Id.* at art. 3.2.

[35] Reports and Studies (May 30, 2014), *available at* http://www.ibwc.gov/EMD/reports_studies.html.

[36] UNWC, at art. 5.1.

[37] *Id.*

[38] *Id.* at art. 6. *Factors relevant to equitable and reasonable utilization*

1. Utilization of an environmental watercourse is in equitable and reasonable manner within the meaning of article five requires taking into account all relevant factors and circumstances, including;
   (a) Geographic, hydrographic, hydrological, climactic, ecological and other factors of national character;
   (b) To the social and economic means of a watercourse states concerned;
   (c) The population depending on the watercourse then each watercourse state;
   (d) The facts of the use or uses of the water courses and one watercourse state on other watercourse states;
   (e) Existing and potential uses of the watercourse;
   (f) Conservation, protection, development and economy of use of the water resources of the watercourse and the costs of measures taken to that effect;
   (g) The availability of alternatives, of com-parable value, to a particular plan or existing use.
2. In the application of oracle five or paragraph one of this article, watercourse states concerned shall, when the need arises, enter into consultations in a spirit of cooperation.
3. The way 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 a reasonable and equitable use, all relevant factors are to be considered together and a conclusion reached on the basis of the whole.

lex specialis it would supersede the UN Watercourse Convention, as stated in article 3.1 of the UN Watercourse Convention mentioned earlier.

Article 8 deals with obligations not to cause significant harm. In this article it requires watercourse states to take measures to avoid it causing significant harm.[39] In the event that a watercourse state does cause significant harm, absent a provision otherwise, that watercourse state has to give compensation.[40] This article echoes the no-harm principle which is discussed later and compared to the IBWC.

Article 8 provides provisions for cooperation. Focusing on "sovereign equality, territorial integrity, mutual benefit and good faith" States should cooperate in order to best utilize the watercourse and to provide "adequate protection."[41] To assist in the carrying out of this duty commissions should be used to oversee the activities on the international watercourse; the article even provides for current commissions already experienced in managing the river to be used as the commission.[42] Here the IBWC fits well to meet this description of a commission.

The duty to have a regular flow and exchange of information is the topic of article nine. The watercourse State has a duty to maintain and provide data and information about the water quality of the river, especially "that of a hydrological, meteorological, hydrogeological and ecological nature."[43] A watercourse State is also required to promptly give information concerning the river requested by the different watercourse state.[44] These provisions mirror the duties of the IBWC pursuant to the 1944 treaty and the subsequent Minutes.[45]

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[39] *Id.* at art. 7.1.
[40] *Id.* at art. 7.2.
[41] *Id.* at art. 8.1.
[42] *Id.* at art. 8.2.
[43] *Id.* at art. 9.1.
[44] *Id.* at art. 9.2.
[45] *Supra*, at n.4. Article VII of the Convention of March 1, 1889 gives the IBW powers to requests papers and information from the other country. This provision applies to the 1944 treaty, and the current IBWC.

Part V of the UN Convention deals with harmful conditions of urgency situations. Watercourse States are supposed to take measures in order to prevent harm to other watercourse States by mitigating conditions even if those conditions result from "natural causes or human conduct, such as… drought or desertification."[46] The term "emergency" is defined as "a situation that causes, or poses an imminent threat of causing, serious harm to the watercourse states… and that results suddenly from natural causes… or from human that conduct."[47]

In the event of an emergency the Watercourse State in which the emergency is occurring is to notify the other watercourse States.[48] The Watercourse State in whose territory the emergency is occurring is to take "all practicable measures necessitated by the circumstances to prevent, mitigate and eliminate harmful effects of emergency."[49] Watercourse States should jointly create contingency plans to respond to emergencies which will potentially affect other watercourse States.[50]

The convention of 1906 and the Treaty of 1944 have a jointly develop contingency plan. In the event of "extraordinary drought" or "serious accident to the irrigation system" all available water will be reduced proportionately according to the allotments in each instrument for each State.[51] Remember that the term "extraordinary drought" is not defined in any of the instruments and remains unresolved by the IBWC even as Texas goes through one of the worst droughts in the past 500 years.[52]

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[46] UNWC, at art. 27.
[47] *Id.* at art. 28.1.
[48] *Id.* at art. 28.2.
[49] *Id.* at art. 28.3.
[50] *Id.* at art. 28.4.
[51] Treaty Relating to the Utilization of Waters, at art. 4.
[52] Scott Huddleston, *Drought Among the Worst in Texas in Past 500 Years*, SAN ANTONIO EXPRESS-NEWS, May 15, 2014, http://www.chron.com/about/article/Drought-among-the-worst-in-Texas-in-past-500-years-5478601.php.

The dispute settlement section of the UN Convention could enhance the IBWC. Article 33 of part VI of the convention is a settlement dispute section. It states that in the event of the dispute in regards to an interpretation of the convention, without an agreement between the States, a peaceful settlement will be reached using the following techniques laid out in the article.[53] If an agreement cannot be reached by the parties via negotiation then together the States may contact a third party "of any joint watercourse [established] institutions," either for mediation or conciliation, or the International Court of Justice (ICJ) may dispute the arbitration or if the parties wish to submit to the ICJ.[54]

An interesting mechanism is found in one clause of the article which states that if after six months from the time of the negotiation that bodies cannot resolve the situation than the dispute shall be submitted to an impartial fact finding.[55] This is done so by a fact-finding commission created for the dispute; it is a tribunal with one member from each state and a Chairman of a neutral nationality selected jointly by the other two members nominated by the states.[56]

If the members nominated by the States cannot select the chairman within three months of establishment of a fact-finding commission then any party concerned is allowed to request the Secretary-General of United Nations "to appoint the Chairman who shall not have the nationality of any of the parties to the dispute or of any riparian State of the watercourse concern."[57] However a single member commission will occur in a situation when it one of the parties fails to

[53] UNWC, at 33.1.
[54] *Id.* at art. 33.2.
[55] *Id.* at art. 33.3.
[56] *Id.* at art. 33.4.
[57] *Id.* at art. 33.5.

delegate the end of the two the fact-finding commission; in this situation the Secretary-General may be requested to appoint a person following the same criteria of appointing a Chairman.[58]

The concerned parties must provide any information requested by the commission and also allow the commission access to inspect certain sites inside the territory of either party.[59] By a majority vote the commission will submit a report to the parties which presents its findings in reasons for the recommendations that it "deems appropriate for an equitable solution of the dispute."[60] The concerned parties have to consider the findings in good faith.[61]

This dispute settlement section of the UN Convention would be useful to the IBWC because there is no arbitration process established for the IBWC other than internally. In the event that the commissioners of the IBWC cannot reach an agreement on a particular issue it would be useful for alternative outlet to resolve the dispute. One such example is the issue with defining the term "extraordinary drought." The term has been in use since at least the 1906 Convention, yet it remains undefined. As highlighted in the 2005 Binational Annual Summit, defining the term "extraordinary drought" remains a key issue.

If there is a stalemate within the IBWC to define the term because of mixed interests on either the Mexican or the American side, or both, it would be prudent to use a mechanism to resolve that. If either Mexico or the United States became a party member to the UN Convention then the settlement dispute mechanism could be triggered, and used to help alleviate the frustration of defining the term. It would at least give a third party non-binding perspective of

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[58] *Id.* at art. 33.5. Article 33.6 states "the Commission shall determine its own procedure." Also, "the expenses of the Commission shall be born equally by the parties concerned," (Article 33.9)
[59] *Id.* at art. 33.7.: "… (P)ermit the Commission to have access to the respective territories and to inspect any facilities, plants, equipment, construction or natural feature relevant for the purpose of its inquiry."
[60] *Id.* at art. 33.8.
[61] *Id.*

how the term might be defined which can be used by the IBWC to make its decision, while respecting the exclusive jurisdiction of the IBWC.

One alternative route would be for the IBWC to adopt the dispute settlement clause section of the UN Convention via an agreed Minute. In this manner the IBWC would have an alternative dispute settlement mechanism, and the IBWC could direct the fact-finding commission to keep in mind that, while determining an equitable solution to the dispute, the provisions of the 1944 Treaty and 1906 Convention must be respected.

The following two sections discuss the main international cases for equitable utilization as well as the development of the doctrine. These sections will illustrate that equitable utilization is well founded. It will demonstrate that the IBWC need not be hesitant to adopt provisions from the UN Convention because the exclusive jurisdiction of the IBWC will be respected by international courts.

International Environmental Law Cases about Equitable Utilization

The *River Oder* case is about a dispute between Germany and Poland settled at the Permit Court of International Justice.[62] The dispute arose over the use of navigable parts of the river from the Treaty of Versailles.[63] The reasoning of the court's decision support that each State sharing an international watercourse has a common legal right to the non-navigational uses.[64] This common legal right is known as "equitable utilization;" however, it does not mean all that each riparian State has the same legal right of use. [65] One must look at the totality of

[62] STEPHEN C. MCCAFFREY, supra note 9, at 204
[63] *Id.* at 205. "This community of interests in a navigable river becomes the basis of a common legal right, the essential features of which are the perfect equality of all riparian States and the user of the whole course of the river and the exclusion of any preferential privilege of any one riparian State in relation to the others." *Id.*

[64] *Id.*
[65] *Id.*

circumstances to see what rights each State will have.[66] This is known as the "community of interest" of the riparian States.[67]

The *Corfu Channel* case is not an international environmental law, per se. However the court's findings say that "every State's obligation not to allow knowingly its territory to be used for acts contrary to the rights of other states" is a "general and well-recognized principle."[68] This obligation is akin to the maximum "Sic utere tuo ut alienum non laedas." [69] While a State would be international wrongful "to knowingly allow its territory to be used contrary to the rights of other States," the rights regards a riparian State to a watercourse for non-navigable use have to be established in order to apply the Corfu Channel finding.[70]

The *Gabcikovo-Nagymaros Project* case,[71] brought to the ICJ in 1993, gave a chance for the Court to confirm the second part of Principle 21 of the Stockholm Declaration[72] as part of customary international law by citing a from an ICJ advisory opinion.[73] This created a right applicable to the use of water that could be applied as a right of the obligation stated in the *Corfu Channel* case. The Court used the "community of interest" reasoning to find that one State may not "unilaterally assume control" of a "shared resource" even if the control and use of the

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[66] *Id.*
[67] *Id.* at 206.
[68] *Id.* at 209.
[69] *Id.* at 210. "So use your own as not to harm that of another" *Id.* at 415.
[70] *Id.* at 210.
[71] The project was a series of dams to be built on the River Danube which flows between Hungary and modern Slovakia. As times changed and Slovakia became independent, Slovakia proceeded with the project from a 1977 treaty. Czechoslovakia built a bypass canal as stated in the treaty to construct one of the dams. Slovakia gained independence, and took over the project. Hungary said Slovakia's actions and would cause harm to the watercourse. *Id.* at 210-213.
[72] Principle 21: "States have, in accordance with the charter of the United Nations and the principles of international law, the sovereign right to exploit their own resources pursuant to their own environmental policies, and a responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other States or of areas beyond the limits of national jurisdiction." *Id.* at 214-215 n.44.
[73] "The environment is not an abstraction that represents the living space or, to quality of life and the very health of human beings, including generations unborn. The existence of the general obligation of states to ensure that activities within their jurisdiction and control respect the environment of other States or of areas beyond national control is now part of the corpus of international law relating to the environment. (Legality of the Threat of Use of Nuclear Weapons, Advisory Opinion, ICJ Reports 1996, pp. 241-242, para 29.)" *Id.* at 214.

resource mirrors a treaty agreement with other riparian States.[74] Pertaining to the 1944 Treaty, the United States cannot unilaterally reduce the flow of the Rio Grande in accordance with the treaty provision of proportional reduction in times of "extraordinary drought," unless a bilateral agreement with Mexico clarifies the term "extraordinary drought," even if what amounts to an "extraordinary drought" condition exists.

The Court pointed out that newly developed environmental norms would not override treaty provisions which predate the norms. It did urge to consider incorporating the norms into the carrying out of a treaty.[75] In paragraph 141 of the *Gabcikovo* case the Court says that the purpose of the court is not to determine the final result of negotiations regarding a treaty; the parties must reach an agreement on their own, keeping in mind "the objectives of the treaty… as well as the norms of international environmental law and the principles of the law of international watercourses." [76] The court also cited article five, paragraphs two, of the UN Convention which lays out the concept of "equitable participation." [77] This line of reasoning could assist the United States and Mexico in negotiating a bilateral definition for the term "extraordinary drought."

The *Pulp Mills* case confirmed that the principle of prevention (a no-harm related principle) is a customary rule.[78] The Court said a State is to refrain from causing significant

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[74] *Id.* at 217.
[75] "112….[T]he Court wishes to point out that newly developed norms of environmental law are relevant for the implementation of the treaty and that the parties could, by agreement, incorporate them to the application of articles 15, 19 and 20 of the treaty…" *Id.* at 218.
[76] *Id.* at 219.
[77] *Id.* at 220.
[78] *Pulp Mills on the River Uruguay (Argentina v. Uruguay), Provisional Measures, Order of 13 July 2006, I.C.J. Reports 2006*, p 101.

> 101. The Court points out that the principle of prevention, as a customary rule, has its origins in the due diligence that is required of a State in its territory… A State is thus obliged to use all the means at its disposal in order to avoid activities which take place in its territory, or in any area under its jurisdiction, causing significant damage to the environment of another State.

environmental damage to another State or jurisdiction.[79] This narrows the scope to environmental harm. So while the previous cases discussed and the discussion about equitable utilization may conflict with the Pulp Mills decision if the legal right which is harmed also causes significant environmental damage.

The Development of Equitable and Reasonable Utilization

Equitable and reasonable utilization is now a fundamental norm. It developed in the early 20th century from the United States Supreme Court decisions. It can also be found in the UN Watercourse Convention. The equitable utilization doctrine is mainly used for water allocation issues when States share an international watercourse. It is also tied to the no-harm principle within a certain scope.[80]

Justice Oliver Wendell Holmes, of Supreme Court of the United States, stated, "a river is more than an amenity, it is a treasure [;] it offers a necessity of life that must be rationed among those who have power over it."[81] Holmes discusses that when a river flows between States it should be rationed by the sovereigns. One sovereign may neither cut off all power to water nor be required to give up all power over the water.[82]

Priority of use is not decisive without further considerations. Equitable apportionment is flexible, and it requires considering all relevant factors when dealing with shared water resources.[83] *Kansas v Colorado* demonstrates the equitable utilization principle and the no-harm doctrine in application to water apportionment. Kansas had been using waters from the Arkansas

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[79] *Id.*
[80] McCaffery, at 385.
[81] Quote form the case *New Jersey v New York*, decided by the United States Supreme Court 1931. *Id.* at 386.
[82] *Id.*
[83] North Platte River decision by SCOTUS. *Id.* at 387.
The author explains, "thus the lodestone is not simply who got to the river first, or who is upstream and who downstream, but what is equitable and reasonable under the circumstances. But no state has an inherently superior claim. The doctrine is "flexible" in this sense and also in a temporal sense: what is an "equitable apportionment" may change over time." *Id.* at 388.

River. Colorado withdrew water to use for irrigation. Kansas claimed that caused "perceptible injury to portions of the Arkansas valley in Kansas…."[84]

The issue became a distinction between factual harm and legal injury. There must be an injury to a legally protected right.[85] Harm as a consideration means a legal harm. Absent a treaty or agreement, the legal right which can be harmed is that each State has an equitable share to the waters, and it is prohibited for one state to deprive another State of its share.[86] Regarding reasonable use violations, a cause of action is created if a State unreasonably exceeds its riparian rights; this would include actions such as selling water from the watercourse, removing excess amounts of water from the basin and serious pollution.[87] Thus the "equitable and reasonable standard" address both water quantity and actions of the use of the water by the state.[88]

Equitable share is obtained through equality of right. The ICJ confirmed this principle in *Gabcikovo*—the principle comes from the *River Oder* case.[89] Equality of right means no State has an inherent superior claim to shared resources.[90] Equality of right does not mean an equal share of the resource. The right is for "an equitable and reasonable sharing of the resources of an international watercourse."[91] It applies to not only the physical water but also the auxiliary uses of water, e.g. to power a hydroelectric dam. The equal right for each State is that both have an

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[84] *Id.* at 388.
[85] *Id.*
[86] *Id.* at 389.
[87] The list is not exhaustive, only a few international jurisprudence cases deal with this topic of unreasonable use of freshwater. *Id.*
[88] *Id.*
[89] *Case concerning the Gabcikovo-Nagymaros Project (Hungary/Slovakia)*, Judgment of 25 Sept. 1997, 1997 ICJ 7, para. 85, p. 56. "[the] community of interest in a navigable river becomes the basis of a common legal right, the essential features of which are the perfect equality of all riparian States in the use of the whole course of the river and the exclusion of any preferential privilege of any one riparian State in relation to the others…. Modern development of international law has strengthened this principle for non-navigational uses of international watercourse as well…" *Id.* at 389-390.
[90] *Id.* at 391.
[91] From the Gabcikovo case. *Id.*

"equitable share of the uses and benefits of the stream."[92] Established uses are not completely protected nor are they left bare by international law. If a State can show it has or might suffer harm due to another State's actions with an international watercourse, the burden then shifts to the accused State to show it is not harming.[93]

The No-harm principle[94] does not place an absolute prohibition on significant harm when dealing with international watercourses. It becomes a factor of equitable utilization in that during the balances test of relevant factors, if it is found to be equitable for one State, then the significantly harmful activity will be allowed assuming it does not violate *Jus Cogens*. The issue is of harm done towards a legally protected interest, not factual harm. One must determine what those legally protected interest are in order place weight behind the no-harm principle with equitable utilization.[95]

There is no international tribunal or court with exclusive jurisdiction over watercourse issues. The UN Watercourse Convention does have provisions for fact-finding tribunals. It is up to States to work these issues out based on the principle of equitable utilization. Also commissions established on watercourses avoid most disputes by internally negotiating. The ICJ or other third parties could be used at the States' requests.[96] States are encouraged to resolve the issues peacefully themselves, and to not be told how to decide a negotiation.

Conclusion

A claim was filed at the International Centre for Settlement of Investment Disputes by various public and private entities in Texas against Mexico regarding a NAFTA violation by

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[92] *Id.*
[93] *Id.* at 399.
[94] N.B. No-harm principle, outside the relationship it has with equitable utilization, is beyond the scope of this paper. However it is mentioned in the UN Watercourse Convention, and I wanted to depict its relationship with equitable utilization.
[95] *Id.* at 408.
[96] *Id.* at 400.

Mexico's alleged expropriation of water that was supposed to go to the Rio Grande. The case was denied jurisdiction in 2007.[97] This illustrates the current friction along the border of Texas and Mexico concerning water utilization. Given the combative history between Texas and Mexico and the United States and Mexico, the IBWC needs to resolve these growing water issues in order to comply with the United Nations Charter provisions about peaceful settlement.

The IBWC has consistently reported that any changes must preserve the original provisions of the 1944 treaty. However the IBWC has adopted international environmental law norms which have developed after the treaty series was complete. Examples of this harmonizing of international environmental law norms includes the environment impact assessments the IBWC currently conducts,[98] akin to the environmental impact assessments required under the prevention and no-harm doctrines. This illustrates that it is not uncommon for the IBWC to adapt the manner the treaty is enforced while still balancing the specific provisions for water allocation set by the treaties. The UN Watercourse Convention could be adopted and used in conjunction with the 1944 Treaty without violating the unique division of resources.

The exclusive jurisdiction of the IBWC would not be violated if either country joined the UN Convention. Most of the provisions in the UN Convention are already conducted by the IBWC including the exchange and free flow of information from either country regarding the watercourse. The equitable and reasonable utilization, as the case-law demonstrates, is not decided by an international court, and equitable utilization does not mean an equal share. The

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[97] Bayview Irrigation District et al. v. Mexico, ICSID Case No. ARB (AF)/05/1 (NAFTA), Reasons for Judgment on Application for Set Aside.

[98] Reports and Studies (May 30, 2014), *available at* http://www.ibwc.gov/EMD/reports_studies.html.

court looks at several factors, but leaves the task of settling the negotiations to the States regarding water allocation. A certain a State may consent to waive a certain right even if the distribution is not equitable—the equitable allocation of the 1944 Treaty and related instruments would not be altered due to membership of the UN Convention.

The equitable allocation of the Rio Grande waters in the 1944 Treaty and other instruments complies with equitable utilization principles. While this aspect may not need to be adjusted, the term "extraordinary drought" should be defined. Without that term defined, the trigger mechanism to proportionally reduce the water allocation on a temporary basis cannot occur. If one of the five most severe droughts in the past 500 years for Texas[99] is not sufficient to reach the level of extraordinary drought, what is the standard? Factually Texas may be at the level of an extraordinary drought, but the United States cannot unilaterally enact the reduction mechanism.[100] In this instance a fact-finding commission or a neutral third party could assist in resolving negotiations for a legal definition of the term "extraordinary drought" as it applies to the 1944 Treaty.

The IBWC has harmonized its functions and duties to reflect the adaptations of international environmental law. The UN Convention is the next adaptation. If either the state of Mexico or the state of United States is hesitant to become a party member to the UN Convention due to obligations on different watercourses, the IBWC could incorporate the settlement dispute section of the UN Convention via an agreed Minute.

The IBWC conducts itself in harmony with most of provisions of the UN Convention. Currently the water needs of people on both sides of the river are troublesome. Since the IBWC

[99] Scott Huddleston, *supra* at n.42.

[100] Recall the *Gabcikovo-Nagymaros Project* case: one State may not unilaterally take control of a shared resource even if the control is akin to a treaty provision.

has exclusive jurisdiction over a river, it needs to figure out how to meet the needs of the present while protecting the rights of future generations. The IBWC should continue to adjust the law of Mexico and the United States by adapting the bilateral treaty series.