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Abstract

This Note argues that article II of the Boundary Waters Treaty, when applied, has failed to resolve international water disputes between the United States and Canada. Part I of this Note examines the history of the negotiations and the text of the Treaty. Part II reviews the subsequent application of article II to international water disputes. Part III analyzes recent U.S. proposals to divert water from Lake Michigan to drought-stricken areas in the context of the Treaty and customary international water law. This Note concludes that article II of the Boundary Waters Treaty is inadequate to resolve water disputes between the U.S. and Canada and should be renegotiated to reflect customary principles of international water law.

NOTES

U.S.-CANADIAN RELATIONS REGARDING DIVERSIONS FROM AN INTERNATIONAL BASIN: AN ANALYSIS OF ARTICLE II OF THE BOUNDARY WATERS TREATY

INTRODUCTION

The Treaty Between the United States and Great Britain Relating to Boundary Waters Between the United States and Canada (the "Boundary Waters Treaty" or the "Treaty")[1] was designed to settle existing and future disputes between the United States and Canada over uses of boundary waters.[2] While the Treaty was designed to resolve all international water disputes between the United States and Canada,[3] it has been unable to resolve certain water conflicts that have arisen.[4] To resolve these conflicts, the United States and Canada have had to negotiate new treaties.[5]

In particular, the United States and Canada dispute whether article II of the Treaty, permitting unilateral and unlimited diversions of certain waters, is an appropriate formula for resolving international water problems. Although they have been dropped, recent U.S. proposals to divert waters from Lake Michigan to drought-stricken areas of the West and Southwest have focused attention on this controversy once again.[6]

This Note argues that article II of the Boundary Waters Treaty, when applied, has failed to resolve international water disputes between the United States and Canada. Part I of this Note examines the history of the negotiations and the text of the Treaty. Part II reviews the subsequent application of arti-

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1. Jan. 11, 1909, 36 Stat. 2448, T.I.A.S. No. 12, at 319 [hereinafter Boundary Waters Treaty].

2. *Id.* preamble, 36 Stat. at 2448, T.I.A.S. No. 12, at 319-20.

3. *See id.*; Johnson, *The Columbia Basin*, in THE LAW OF INTERNATIONAL DRAINAGE BASINS 182 (1967).

4. *See infra* notes 40-80 and accompanying text.

5. *Id.*

6. *See generally Fire and Water*, ECONOMIST, July 23, 1988, at 22-23 (discussing U.S. proposals to divert water from Lake Michigan).

cle II to international water disputes. Part III analyzes recent U.S. proposals to divert water from Lake Michigan to drought-stricken areas in the context of the Treaty and customary international water law. This Note concludes that article II of the Boundary Waters Treaty is inadequate to resolve water disputes between the United States and Canada and should be renegotiated to reflect customary principles of international water law.

I. *BOUNDARY WATERS PROBLEMS BETWEEN THE UNITED STATES AND CANADA*

The United States and Canada use the waters of the Great Lakes basin[7] for sanitary and domestic purposes, navigation, irrigation, and power production.[8] Controversies over the uses of shared waters frequently arose in the nineteenth century between the United States and Great Britain,[9] which ruled Canada at the time.[10] In 1905, the United States and Great

7. The Great Lakes basin consists of the five Great Lakes, the tributary and connecting rivers, and the watershed area drained by these waterways. Hough, *Geologic Framework*, in GREAT LAKES BASIN 3-4 (H. Pincus ed. 1962).

8. L. BLOOMFIELD & G. FITZGERALD, BOUNDARY WATERS PROBLEMS OF CANADA AND THE UNITED STATES 1 (1958).

9. *See* Bourne, *Canada and the Law of International Drainage Basins*, in CANADIAN PERSPECTIVES ON INTERNATIONAL LAW AND ORGANIZATION 468, 468-69 (1974).

> The harbinger of diversion disputes came in 1841 when the waters of the Allegash River in Maine were diverted from their natural channel by a canal built between Lake Telos on the Allegash River and Webster Pond on the Penobscot River; these waters used to flow into the Saint James River and thus into Canada, but by this canal they were made to flow . . . through Maine into the sea. Great Britain instructed its ambassador at Washington to protest this diversion, but there is no record that he did so . . . . Before many years had passed, diversions and proposed diversions for irrigation purposes of the waters of the St. Mary and Milk rivers in the state of Montana and the provinces of Alberta and Saskatchewan became a subject of conflict between the citizens and governments of the two countries. And in the 1890s diversions of Great Lakes waters which would affect the generation of hydroelectric power at Niagara Falls and the division of the waters of the Niagara River to be used for that purpose were matters of concern to persons on both sides of the boundary.

Id. at 469. Thus, by 1900, there was an increasing number of conflicts between the United States and Canada concerning the utilization of shared waters. *Id.* at 470.

10. *See* D. PIPER, INTERNATIONAL LAW OF THE GREAT LAKES 6 (1967). Canada did not enjoy full independence during the nineteenth century, and it was not until 1923 that Canada obtained full powers in treaty-making. *Id.* Until that time treaties were concluded by the United Kingdom on behalf of Canada. *Id.* Accordingly, many of the conventional rules relating to the Great Lakes and U.S.-Canadian relations in

Britain created the International Waterways Commission (the "IWC") to report on the conditions and uses of waters adjacent to the U.S.-Canadian boundary.[11] Although the IWC did valuable work, it was a purely investigative body and had no power to act upon or enforce its decisions.[12] Realizing its inability to resolve certain water disputes, the IWC in 1906, and again in 1907, recommended a permanent commission that could supervise and enforce decisions and rules.[13] As a result of these recommendations, the United States and Canada, during 1907 and 1908, entered into negotiations for a treaty.[14]

In negotiating the Boundary Waters Treaty, both the United States and Canada wanted a single treaty that would settle any water conflict that might arise between the two nations.[15] The major difficulties in the negotiations centered on the establishment of a mechanism for resolving disputes and on diversions of certain waters by territorial owners.[16] The Ca-

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general were concluded with the United Kingdom and passed to Canada following its attainment of full political independence. *Id.*

11. Bourne, *supra* note 9, at 470-71. The IWC was established as a result of a Rivers and Harbors Act passed by the United States in 1902, embodying a provision requesting the President of the United States to invite the British government to join in the formation of an international commission on boundary waters. *See* An Act Making Appropriations for the Construction, Repair, and Preservation of Certain Public Works on Rivers and Harbors, and for Other Purposes, Pub. L. No. 154, § 4, 32 Stat. 331, 373 (1902); *see also* L. BLOOMFIELD & G. FITZGERALD, *supra* note 8, at 8-10 (discussing creation of the United States-Canada International Waterways Commission).

12. *See* La Forest, *Boundary Waters Problems in the East*, in CANADA-UNITED STATES TREATY RELATIONS 33 (D. Deener ed. 1963).

13. *Id.* at 33-34. The IWC's recommendation came at a time when there were several ongoing water disputes between Canada and the United States: (i) a dispute concerning the Lake of the Woods had been pending since 1888; (ii) a conflict concerning the use of the waters of the St. Mary's River for power purposes required settlement; and (iii) discussions regarding the use of the waters of the St. Mary and Milk Rivers for irrigation purposes on either side of the boundary had been going on for some time. L. BLOOMFIELD & G. FITZGERALD, *supra* note 8, at 10.

14. La Forest, *supra* note 12, at 34. Negotiations were conducted between James Bryce, the British Ambassador to the United States, and Elihu Root, the U.S. Secretary of State. Johnson, *supra* note 3, at 189. Mr. Bryce had the active assistance and participation of Mr. Gibbons, a Canadian member of the International Waterways Commission; William Pugsley, the Minister of Public Works in Canada; and Dr. W. F. King, a member of the International Boundary Commission. *Id.*

15. *See supra* notes 2-3 and accompanying text; *see also* L. BLOOMFIELD & G. FITZGERALD, *supra* note 8, at 11 (discussing negotiator's suggestion that one treaty be entered into to resolve all river disputes).

16. *See* Memorandum by G.C. Gibbons, Numerical File 1906-10 U.S. Dept. of State, Nat'l Archives 5934/31, at 1-6 (June 18, 1908) [hereinafter Memorandum by

nadian negotiators proposed a commission with broad administrative and judicial powers to decide all boundary waters questions in accordance with established principles.[17] Such a commission would be able to resolve international water disputes at a level below that of the two governments.[18] The United States opposed the Canadian suggestion and proposed an investigative commission that could act as a judicial body to decide certain cases referred to it by the two governments.[19]

With respect to diversions, the United States negotiators cited the Harmon Doctrine as support for their position.[20]

G.C. Gibbons]; *see* Bourne, *supra* note 9, at 471 (discussing major proposals submitted during negotiation of the Treaty).

17. Memorandum by G.C. Gibbons, *supra* note 16, at 1; *see also* Scott, *The Canadian-American Boundary Waters Treaty: Why Article II?*, 36 CAN. B. REV. 511, 514 (1958) (discussing Canadian proposal for an international commission).

18. Scott, *supra* note 17, at 514.

19. W. GRIFFIN, LEGAL ASPECTS OF THE USE OF SYSTEMS OF INTERNATIONAL WATERS, S. Doc. No. 118, 85th Cong., 2d Sess. 60 (1958).

20. *See id.* at 61; Austin, *Canadian-United States Practice and Theory Respecting the International Law of International Rivers: A Study of the History and Influence of the Harmon Doctrine*, 37 CAN. B. REV. 391, 408 (1959); Note, *Diverting Water from the Great Lakes: Pulling the Plug on Canada*, 20 VAL. L. REV. 299, 310 (1986) (discussing incorporation of Harmon Doctrine into the Treaty). The Harmon Doctrine gets its name from an opinion by Attorney General Judson Harmon in 1895 in regard to a complaint by Mexico claiming U.S. interference with the flow of the Rio Grande in violation of international law. Austin, *supra*, at 405-06. The opinion states in part:

> The fundamental principle of international law is the absolute sovereignty of every nation, as against all others, within its territory. Of the nature and scope of sovereignty with respect to judicial jurisdiction, which is one of its elements, Chief Justice Marshall said . . . :
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> "The jurisdiction of the nation within its own territory is necessarily exclusive and absolute. It is susceptible of no limitation not imposed by itself. Any restriction upon it, deriving validity from an external source, would imply a diminution of its sovereignty to the extents of that restriction, and an investment of that sovereignty to the same extent in that power which could impose such restriction.
>
> All exceptions, therefore, to the full and complete power of a nation within its own territories must be traced up to the consent of the nation itself. They can flow from no other legitimate source."
>
> The case presented is a novel one. Whether the circumstances make it possible or proper to take any action from considerations of comity is a question which does not pertain to this Department; but that question should be decided as one of policy only, because, in my opinion, the rules, principles, and precedents of international law impose no liability or obligation upon the United States.

Treaty of Guadalupe Hidalgo—International Law, 21 Op. Att'y Gen. 274, 281-83 (1895) (quoting Schooner Exchange v. McFaddon, 2 U.S. (7 Cranch) 478 (1812)).

Thus, the Harmon Doctrine states that there is no obligation or duty in international law on any state to restrain the use of its waters to meet the needs of another

Broadly speaking, this doctrine permitted each state to do as it pleased with the portion of an international river found within its borders, regardless of possible damage to the other riparian state.[21] The United States firmly adhered to the principles of the Harmon Doctrine as established international law.[22] For its part, Canada wanted the Treaty to permit either state to make diversions within its own territory only to the extent that public or private interests in the other state would not be injured.[23]

The critical issue during negotiation of the Treaty centered on article II, embodying the Harmon Doctrine of absolute territorial sovereignty.[24] Canada opposed the inclusion of article II into the Treaty because it would permit any diversion no matter how detrimental to the boundary waters or to the other riparian nation involved.[25] The United States, however, insisted upon its right to do as it pleased within its own territory.[26] Seeking some kind of fixed agreement with the United States respecting boundary waters generally,[27] Canada finally

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state. Austin, *supra*, at 408. Jurisdiction and control of a state over the waters of an international river wholly in its territory is absolute. *Id.*

21. *See supra* note 20; Johnson, *supra* note 3, at 168. A riparian nation is a nation whose land borders the bank of a river or stream. BLACK'S LAW DICTIONARY 1192 (5th ed. 1979).

22. *See* Austin, *supra* note 20, at 408; *see also* Bourne, *supra* note 9, at 472 (discussing U.S. adherence to Harmon Doctrine with respect to U.S. projects).

23. The Gibbons Papers, Public Archives of Canada, Letterbook 1, 490-92 [hereinafter Gibbons Papers]. The version of the article proposed by Canada stated:

> [N]othing in this article is intended to authorize diversions in one country which will seriously interfere with public rights . . . in boundary waters or waters at a lower level than the boundary in rivers flowing across the boundary; and while each of the High Contracting Parties reserves its sovereign right of dealing with such diversion, each recognizes that it is desirable that such right should not be unnecessarily exercised to the injury of public interests in such boundary waters or in waters at a lower level than the boundary in rivers flowing across the boundary.

Id. at 491; *see also* Bourne, *supra* note 9, at 471 (discussing Canadian proposal regarding diversions).

24. *See* Gibbons Papers, *supra* note 23, at 490-92; *see also* L. BLOOMFIELD & G. FITZGERALD, *supra* note 8, at 13 (discussing negotiations leading to the Treaty).

25. *See* Gibbons Papers, *supra* note 23, at 491; *see also* L. BLOOMFIELD & G. FITZGERALD, *supra* note 8, at 13 (discussing Canadian objections to article II).

26. *See* L. BLOOMFIELD & G. FITZGERALD, *supra* note 8, at 13; *see supra* notes 20-22 and accompanying text.

27. *See* L. BLOOMFIELD & G. FITZGERALD, *supra* note 8, at 13. Although the Boundary Waters Treaty was concluded with the United Kingdom and signed by the British Ambassador, it represented a crucial advance in Canada's attempt to achieve

agreed to the inclusion of article II embodying the Harmon Doctrine of exclusive jurisdiction.[28]

In the end, the United States accepted a permanent commission, and Canada reluctantly agreed to the U.S. position on diversions.[29] Thus, the Treaty as it was finally adopted provided for the establishment of the International Joint Commission (the "IJC" or the "Commission")[30] and incorporated the Harmon Doctrine of exclusive jurisdiction.[31]

The Treaty defines boundary waters as those along which the international boundary between the United States and Canada passes, but not including those tributary waters that flow into boundary waters.[32] Article III of the Treaty provides

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independent international status. D. PIPER, *supra* note 10, at 6-7. Canada welcomed the opportunity to negotiate directly with the United States because it believed that the United States would no longer dominate relations with Canada once Great Britain was out of the way. *Id.*

28. L. BLOOMFIELD & G. FITZGERALD, *supra* note 8, at 13. Sir Wilfred Laurier, Prime Minister of Canada, set out the reasons why Canada agreed to accept the Harmon Doctrine when it seemed to be a principle obviously harmful to its interests, permitting the United States to justify diversions from Lake Michigan and to interfere with the flow of rivers at other places:

> [W]hether we liked it or did not like it, the United States had taken the position that international law provides that . . . the upper power has the right to use the water within its own territory as it thinks best. What were we to do? They might do so, and if they did so, they might do it to our injury and we had no recourse whatever. Was it not wiser, then, under such circumstances, to say: Very well, if you insist upon that interpretation you will agree to the proposition that if you do use your powers in that way you shall be liable to damages to the party who suffers . . . . What wiser course could have been adopted?

Austin, *supra* note 20, at 422 (quoting House of Commons Debates (Can.), Sess. 1910-1911, at 911-12).

29. Bourne, *supra* note 9, at 471.

30. Boundary Waters Treaty, *supra* note 1, art. VII, 36 Stat. at 2451, T.I.A.S. No. 12, at 323. The International Joint Commission, created under article VII of the Boundary Waters Treaty, is composed of six commissioners, three from Canada and three from the United States. *Id.* The Commission may, depending on the case referred to it, perform judicial, investigative, administrative, or arbitral functions. *Id.* arts. VI-X, 36 Stat. at 2451-53, T.I.A.S. No. 12, at 322-25. The Commission bases its decisions on general principles of international law, as well as the guidelines given in the Treaty. D. PIPER, *supra* note 10, at 81. Once the Commission has issued a decision, its conditions are binding on all parties involved, whether governmental or private. *Id.*

31. *See* Austin, *supra* note 20, at 421; Bourne, *supra* note 9, at 472-73.

32. Boundary Waters Treaty, *supra* note 1, preliminary art., 36 Stat. at 2448-49, T.I.A.S. No. 12, at 320. The preliminary article states:

> [F]or the purposes of this treaty boundary waters are defined as the waters from main shore to main shore of the lakes and rivers and connecting water-

that new diversions of boundary waters on one side of the line that affect the natural level or flow of boundary waters on the other side of the line can only be made with the approval of the IJC.[33] However, Lake Michigan, being wholly inside the United States, is not part of the boundary waters, but is considered a tributary water because it flows into boundary waters.[34] Under article II of the Treaty, each nation reserved the right to divert and control tributary waters within its territory, although the other nation had the right to seek legal remedies for any resulting injury.[35] Therefore, if article II were to be invoked, the United States could divert waters from Lake Michigan, wholly within its territory, without the approval of the IJC or Canada.

II. *THE SUBSEQUENT APPLICATION OF ARTICLE II TO INTERNATIONAL WATER DISPUTES*

Under article II of the Boundary Waters Treaty, no legal limits can be imposed on a nation's right to divert waters within its territory as it sees fit and no consideration need be given to downstream uses or prior appropriations of any

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ways, or the portions thereof, along which the international boundary between the United States and . . . Canada passes, including all bays, arms, and inlets thereof, but not including tributary waters which in their natural channels would flow into such lakes, rivers, and waterways . . . .

Id.

33. *Id.* art. III, 36 Stat. at 2449-50, T.I.A.S. No. 12, at 321. Article III states:

> [I]t is agreed that . . . no . . . diversions . . . of boundary waters on either side of the line, affecting the natural level or flow of boundary waters on the other side of the line, shall be made except by authority of the United States . . . or Canada . . . and with the approval . . . of . . . the International Joint Commission.

Id.

34. P. BALDWIN, LEGAL ISSUES RELATED TO DIVERSIONS OF WATERS FROM LAKE MICHIGAN TO THE MISSISSIPPI RIVER 2-3 (Cong. Res. Serv. Report for Congress No. 88-585A, Aug. 31, 1988).

35. Boundary Waters Treaty, *supra* note 1, art. II, 36 Stat. at 2449, T.I.A.S. No. 12, at 320-21; Baldwin, *supra* note 34, at 3. Article II states:

> [E]ach of the High Contracting Parties reserves to itself . . . the exclusive jurisdiction or control over the use and diversion . . . of all the waters on its own side of the line which in their natural channels would flow across the boundary or into boundary waters; but it is agreed that any intereference . . . resulting in any injury to the other side of the line . . . shall . . . entitle the injured parties to . . . legal remedies . . . .

Boundary Waters Treaty, *supra* note 1, art. II, 36 Stat. at 2449, T.I.A.S. No. 12, at 320-21.

sort.[36] Although the United States embraced the Harmon Doctrine and during negotiation of the Treaty stood firmly behind its position that international law imposed no duties upon it, in practice, it was not so inflexible in its attitude.[37]

In subsequent international river disputes, the United States and Canada realized that article II, embodying the doctrine of exclusive jurisdiction, was not a satisfactory means of dealing with their common water problems.[38] In each subsequent water dispute that could have been resolved by article II, the United States and Canada negotiated separate treaties to

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36. *See* Boundary Waters Treaty, *supra* note 1, art. II, 36 Stat. at 2449, T.I.A.S. No. 12, at 320-21. *See generally* Austin, *supra* note 20, at 439 (discussing Canada's legal right to divert Columbia River under article II).

37. *See* Austin, *supra* note 20, at 409. Although the United States insisted on incorporating the Harmon Doctrine into the Treaty, it has never, in practice, followed the Harmon Doctrine and did not, in fact, follow it even in the negotiations with Mexico when the doctrine is said to have originated. *See* Johnson, *supra* note 3, at 205-06.

Despite early adherence to the Harmon Doctrine, the Harmon Doctrine was never, in fact, a principle of international law. *See* Lipper, *Equitable Utilization*, in THE LAW OF INTERNATIONAL DRAINAGE BASINS 15, 22-23 (1967). *But see supra* text accompanying note 22. In making his pronouncement, Attorney General Harmon was simply stating that, in the absence of rules of international law applicable to this matter, the United States could do as it pleased. *See* Lipper, *supra*, at 22. His opinion stated only that "international law imposes no liability or obligation on the United States." *Id.*

A review of domestic U.S. water law cases also shows that the Harmon Doctrine was never accepted as a rule of domestic U.S. law. In the leading case of Kansas v. Colorado, 185 U.S. 125 (1902), Kansas sought to restrain Colorado, the upstream state, from diverting the waters of the Arkansas River for irrigation purposes. *Id.* at 143. The state of Colorado argued that since the sources of the Arkansas River are in Colorado, it could absolutely deprive Kansas of the right to use its share of the waters in that river. *Id.* Colorado compared the position it occupied toward Kansas with the position foreign states occupy toward each other. *Id.* Noting that the dispute in question was similar to one between sovereign nations, the Court stated that it was sitting as an international as well as a domestic tribunal. *Id.* at 146-47. The Court rejected the Harmon Doctrine advocated by Colorado for a doctrine of equitable apportionment. *See* Austin, *supra* note 20, at 433.

When the same case came before the Court again in 1907, the Supreme Court held that where the right to use waters flowing across state lines is in controversy, the dispute must be resolved on "the basis of equality of rights." Kansas v. Colorado, 206 U.S. 46, 100 (1907). A line of authority reiterates this theory. *See* Nebraska v. Wyoming, 325 U.S. 589 (1945); Hinderlider v. La Plata River & Cherry Creek Ditch Co., 304 U.S. 92 (1938); New Jersey v. New York, 283 U.S. 336 (1931); Connecticut v. Massachusetts, 282 U.S. 660 (1931). If the Supreme Court was, in deciding these cases, applying principles of international law, as it often does, it was not applying the strict principle of exclusive jurisdiction advocated by the United States in the negotiations of the Boundary Waters Treaty. *See* Austin, *supra* note 20, at 434.

38. *See infra* notes 40-80 and accompanying text.

resolve their differences, because article II was unable to provide effective solutions.[39]

A. *Early Application of the Harmon Doctrine*

Article II of the Boundary Waters Treaty expressed the view that diversions from purely national portions of international waters are strictly matters of domestic concern.[40] But, in the Lake of the Woods Convention,[41] the United States and Canada agreed to place non-boundary waters on an equal footing with boundary waters.[42]

Since 1888, riparian owners in the United States had been complaining that their lands were being flooded as a result of a dam built at the outlet of the Lake of the Woods in Canada.[43] In 1912, rather than rely on the Boundary Waters Treaty, which would have permitted unilateral diversions of the tributary waters of this lake, the United States and Canada referred their problem to the IJC.[44] The two governments asked the IJC to investigate and report on the practicability and desirability of regulating the level of the lake during different seasons of the year.[45]

The IJC recommended that, as a matter of sound international policy, neither nation should permit the permanent or temporary diversion of any waters within its jurisdiction that are tributary to the boundary waters under consideration, without first referring the proposed diversion to the Commission for recommendation.[46] Based on the Commission's recommendation, the two governments requested that the Commission draft a separate treaty.[47] Accordingly, the United States and Canada side-stepped the Harmon Doctrine by

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39. *Id.*

40. Boundary Waters Treaty, *supra* note 1, art. II, 36 Stat. at 2449, T.I.A.S. No. 12, at 320-21; *see* Austin, *supra* note 20, at 425.

41. Treaty and Protocol Between the United States and Great Britain in Respect of Canada to Regulate the Level of the Lake of the Woods, Feb. 24, 1925, 44 Stat. 2108; T.I.A.S. No. 6, at 14 [hereinafter Lake of the Woods Treaty].

42. *See infra* notes 48-50 and accompanying text; Bourne, *supra* note 9, at 484.

43. Bourne, *supra* note 9, at 470.

44. INT'L JOINT COMM'N, IJC DOCKET NO. 3, LAKE OF THE WOODS LEVELS (1912), *reprinted in* L. BLOOMFIELD & G. FITZGERALD, *supra* note 8, at 72-75.

45. *Id.*

46. INT'L JOINT COMM'N, FINAL REPORT ON THE LAKE OF THE WOODS REFERENCE 38 (1917).

47. *See* L. BLOOMFIELD & G. FITZGERALD, *supra* note 8, at 74-75.

agreeing, under article XI of the Lake of the Woods Treaty of 1925,[48] to prohibit diversion of any water from the lake's basin without the approval of the IJC.[49] By placing both boundary and tributary waters under the jurisdiction of the IJC, the United States and Canada departed significantly from the Boundary Waters Treaty.[50] It is evident from this early convention that the United States and Canada could not rely on article II of the Treaty. Rather, the onerous terms of the Harmon Doctrine forced the parties to negotiate a separate treaty.

At the same time, the United States was changing its view of the Harmon Doctrine with respect to river disputes involving Mexico. In 1922, Secretary of Commerce Herbert Hoover requested an opinion from the State Department as to Mexico's rights to the waters of the Colorado River.[51] In the opinion, Secretary of State Charles Hughes stated that the United States could build projects within its own territory even though this might interfere with the flow of the Colorado River.[52] As authority, he cited the opinion of Attorney General Harmon.[53] But Secretary Hughes also stated that the United States had never stood rigidly on its legal rights but had always taken into consideration matters of equity and comity.[54] According to Secretary Hughes, such matters required that the interests of Mexico be taken fully into consideration.[55]

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48. Lake of the Woods Treaty, *supra* note 41, art. XI, 44 Stat. at 2111, T.I.A.S. No. 6, at 18.

49. *Id.* Article XI of the Lake of the Woods Treaty states: "No diversion shall henceforth be made of any waters from the Lake of the Woods watershed to any other watershed except by authority of the United States or . . . Canada within their respective territories and with the approval of the International Joint Commission." *Id.*; *see also* Austin, *supra* note 20, at 425-26 (discussing early application of Harmon Doctrine in context of the Lake of the Woods problem).

50. *Compare* Lake of the Woods Treaty, *supra* note 41, art. XI, 44 Stat. at 2111, T.I.A.S. No. 6, at 18 *with* Boundary Waters Treaty, *supra* note 1, art. II, 36 Stat. at 2449, T.I.A.S. No. 12, at 320-21; *see* Bourne, *supra* note 9, at 483-84.

51. REPORT OF THE AMERICAN SECTION OF THE INTERNATIONAL WATER COMMISSION UNITED STATES AND MEXICO, H.R. DOC. No. 359, 71st Cong., 2d Sess. 261 (1922) [hereinafter REPORT OF THE INTERNATIONAL WATER COMMISSION]; *see also* Austin, *supra* note 20, at 426-27 (discussing Herbert Hoover's request for an opinion from State Department).

52. REPORT OF THE INTERNATIONAL WATER COMMISSION, *supra* note 51, at 262-63.

53. *Id.*

54. *Id.* at 263.

55. *Id.*

In 1927, Congress authorized the President to cooperate with Mexico in the study of the Colorado, Tijuana, and Lower Rio Grande Rivers,[56] and negotiations proceeded through the 1930s for an agreement concerning the distribution of these waters.[57] In 1944, the United States and Mexico signed the Treaty of Washington (the "Treaty of 1944"),[58] bringing to rest over sixty years of disagreement between these two nations over their shared water resources.[59] Here, the United States, for the first time in a formal agreement, was willing to put limits on the extent to which an upstream nation might divert waters so as not to injure interests downstream.[60] This represented a significant departure from the earlier U.S. position that there is no duty in international law on any state to restrain its use of the waters within its territory.[61]

B. *The Columbia River Controversy: A Reinterpretation of Article II?*

In 1951, the United States applied to the IJC for approval to build the Libby Dam to develop the waters of the Columbia

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56. Joint Resolution Amending the Act of May 13, 1924, ch. 381, 44 Stat. 1403 (1927).

57. *See* Austin, *supra* note 20, at 428.

58. Treaty of Washington, Feb. 3, 1944, 59 Stat. 1219, T.I.A.S. No. 9, at 1166; *see also* Austin, *supra* note 20, at 428-31 (discussing treaty document).

59. *See* Austin, *supra* note 20, at 428. As early as 1880, the United States and Mexico were disputing diversions of the Rio Grande, a boundary water that makes up approximately 60% of the border between the two nations. *Id.* at 405. In 1895, the Mexican Minister in Washington complained to the U.S. Secretary of State about U.S. diversions from the upper Rio Grande river at a point wholly within U.S. territory. *Id.* at 405-06. It was in this context that Attorney General Harmon issued his famous opinion. *Id.* at 406.

A controversy between the United States and Mexico also arose over the development of the Colorado River. *Id.* at 410. In 1898, Mexico objected to large projects for irrigation being planned or undertaken by the United States because it feared that such projects would exhaust the flow and disrupt the free navigation of the Colorado River. *Id.* Controversies over the Colorado River continued during the 1920s and 1930s, and it was not until 1944 that the United States and Mexico were finally able to reach an agreement concerning the disposition of these waters. *Id.* at 411.

60. *Id.* at 429.

61. *Id.* Mr. John G. Laylin, in a document submitted to the International Law Association at its Dubrovnik Conference in 1956, argues that the United States, by this treaty, had abrogated the Harmon Doctrine. *See* Laylin, *The Uses of the Waters of International Rivers*, in PRINCIPLES OF LAW GOVERNING THE USES OF INTERNATIONAL RIVERS 1, 7-8 (1956).

River system.[62] The Columbia River flows from Canada across the international boundary into the United States.[63] When the United States refused to meet Canadian demands for sharing the downstream benefits associated with the construction of the dam, Canada considered the possibility of diverting water from the Columbia River within its territory into other rivers.[64] Such a diversion would have damaged hydroelectric facilities in the United States[65] and frustrated the U.S. plans for development.

The Canadians argued that article II of the Boundary Waters Treaty, embodying the Harmon Doctrine, clearly gave Canada the legal authority to carry out diversions of the Columbia River.[66] The State Department denied that the Boundary Waters Treaty incorporated the Harmon Doctrine and argued that Canada had no legal right to divert under such circumstances.[67] The United States argued that article II was

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62. INT'L JOINT COMM'N, IJC DOCKET NO. 65, LIBBY DAM (1951), *reprinted in* L. BLOOMFIELD & G. FITZGERALD, *supra* note 8, at 190-92. The dam was to be constructed on the main portion of the Kootenay River, near Libby, Montana, where the river extends into the United States. Johnson, *supra* note 3, at 198. The dam would have raised the water level at the border 150 feet and would have formed a large storage reservoir extending 42 miles into Canada. *Id.*

63. Bourne, *The Columbia River Controversy*, 37 CAN. B. REV. 444, 446 (1959).

64. *See* A. McNaughton, Statement to the House of Commons Committee on External Affairs 17-40 (Mar. 9, 1955) (available at the *Fordham International Law Journal* office); *see also* Johnson, *supra* note 3, at 201-09 (discussing Canadian threats to divert water from Columbia River into Fraser River).

65. *See* Lipper, *supra* note 37, at 25-26.

66. *See* A. McNaughton, *supra* note 64, at 17; *see also* Johnson, *supra* note 3, at 203 (discussing Canadian view of Canada's legal right to divert without U.S. consent). One of the principal proponents of the Canadian view was Mr. J. Austin, who argued as follows: "In the light of the history of [article II] it is abundantly clear that no legal limits can be set to Canada's right to divert the waters of the Columbia as she sees fit and that no regard need be had to downstream uses or prior appropriations of any sort." Austin, *supra* note 20, at 439. In preface to his argument Austin wrote:

> [I]n actual fact, the rights and obligations of the two nations do not rest on the general principles of international law, which are irrelevant to the matter, but on the definitive Boundary Waters Treaty of 1909 which was agreed to by both states in order to set out the principles which would bind them in the regulation of disputes concerning their international water resources. It is to this treaty then that we must turn.

Id. at 438.

67. W. GRIFFIN, *supra* note 19, at 59. In a State Department memorandum, Griffin argued that neither the United States nor Canada had seriously urged the Harmon Doctrine in the negotiations over the Boundary Waters Treaty, and he supported this position by claiming that the disputes over the Milk and St. Mary's Rivers (which were settled in the Treaty) were approached by both sides and resolved on the

simply an expression of customary international law, embodying the doctrine of limited territorial sovereignty.[68] Limited territorial sovereignty restricts the principle of absolute sovereignty so that riparians can share in the use and benefits of a system of international waters on a just and reasonable basis.[69]

The United States and Canada requested the IJC to carry out investigations and make recommendations for further uses and developments of the waters of the Columbia River system.[70] In the two references having to do with the Columbia River, however, the IJC was unable to reach decisions.[71] To break the stalemate, the Commission was requested in 1959 to submit a special report on the question of determination and apportionment of benefits resulting from the cooperative use of water storage and electrical generation.[72] In making its decisions, the IJC relied on a report submitted by the International Columbia River Engineering Board, appointed in 1944 to research the problem of development of the Columbia River.[73] The Board regarded electrical power and flood control as the primary benefits of the basin and emphasized the advantage of joint development between the two nations.[74] The IJC, in turn, recommended joint development of the basin

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basis of equitable apportionment. *Id.* at 59-60. He also argued that the Treaty provisions permitting the downstream injured party to use the courts of the upstream country to seek compensation for injuries suffered as a result of a diversion was not a confirmation of the Harmon Doctrine but a denial of it. *Id.* at 61-62. In many cases, because of the different legal systems used in the two countries, no legal redress would be available to the injured party. *Id.* at 61. In such instances, the intent of the Treaty was that the question should be referred to the IJC for report and recommendation in line with general principles of international law; these principles, he claimed, supported "equitable apportionment," not the Harmon Doctrine. *Id.* at 62; *see also* Johnson, *supra* note 3, at 203-04 (discussing U.S. view on Canada's legal right to divert under article II).

68. *See* W. GRIFFIN, *supra* note 19, at 59-62; *see also* Lipper, *supra* note 37, at 26 (discussing State Department's interpretation of article II).

69. *See* Lipper, *supra* note 37, at 18.

70. INT'L JOINT COMM'N, IJC DOCKET NO. 69, LIBBY DAM AND RESERVOIR (1954), & INT'L JOINT COMM'N, IJC DOCKET NO. 51, COLUMBIA RIVER (1944), *reprinted in* L. BLOOMFIELD & G. FITZGERALD, *supra* note 8, at 164-70, 192-95.

71. *See generally* L. TECLAFF, WATER LAW IN HISTORICAL PERSPECTIVE 439 (1985) (discussing deliberations of the Commission as well as diplomatic negotiations).

72. *See id.*; Johnson, *supra* note 3, at 217.

73. *See* L. TECLAFF, *supra* note 71, at 439. For a discussion of the Engineering Report and reaction to the report, see Johnson, *supra* note 3, at 211-16.

74. *See* L. TECLAFF, *supra* note 71, at 439.

and an equal sharing of benefits.[75] The Harmon Doctrine, expressed in article II, was rejected as an inappropriate solution to this or any other international water dispute.[76]

After the IJC submitted its report, the United States and Canada, rather than rely on article II as a way to resolve the dispute, decided to proceed with negotiations of a new treaty.[77] On January 17, 1961, the United States and Canada signed the Columbia River Basin Treaty,[78] which prohibited a unilateral diversion of certain waters within the Columbia River basin[79] and called for an equal sharing of the downstream power benefits between the two nations.[80] Application of article II would have made joint planning and development an impossibility. Once again, realizing the inadequacy of the Boundary Waters Treaty to solve the complex problems associated with development of an international river system, the United States and Canada negotiated a separate water treaty to settle their differences.

C. *Principles of Customary International Law Governing Systems of International Waters*

In negotiating the Lake of the Woods Treaty and the Columbia River Treaty, the United States and Canada realized that article II of the Boundary Waters Treaty was not the best vehicle for resolving water disputes and, instead, relied on emerging principles of international water law.[81] These concepts include: (i) consulting with co-riparian nations before beginning water projects or diversions that will affect them;[82] (ii) planning the development of drainage basins through international or joint commissions instead of nations acting indi-

75. *See* Johnson, *supra* note 3, at 217.

76. *Id.* at 168.

77. *See* L. TECLAFF, *supra* note 71, at 440; Johnson, *supra* note 3, at 218-19.

78. Jan. 17, 1961, 15 U.S.T. 1555, T.I.A.S. No. 5638.

79. *Id.* art. XIII, para. 1, 15 U.S.T. at 1565, T.I.A.S. No. 5638, at 11.

80. *Id.* art. V, 15 U.S.T. at 1560, T.I.A.S. No. 5638, at 6.

81. *See supra* notes 40-80 and accompanying text.

82. *See* Bourne, *Procedure in the Development of International Drainage Basins: The Duty to Consult and to Negotiate*, 10 CAN. Y.B. INT'L L. 212, 233 (1972); Caponera, *Patterns of Cooperation in International Water Law: Principles and Institutions*, in L. TECLAFF, TRANSBOUNDARY RESOURCES LAW 1, 7-9 (1987).

vidually;[83] and (iii) dividing available water for use among nations according to the principle of equitable apportionment.[84] A survey of the traditional sources of international law[85] shows

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83. *See* Caponera, *supra* note 82, at 10-25; Ely & Wolman, *Administration*, in THE LAW OF INTERNATIONAL DRAINAGE BASINS 124, 124-25 (1967).

84. Bourne, *supra* note 9, at 475; *see* Caponera, *supra* note 82, at 4-7.

85. According to the Statute of the International Court of Justice, the basic sources of international law are:

> a. international conventions, whether general or particular, establishing rules expressly recognized by the contesting states;
> b. international custom, as evidence of a general practice accepted as law;
> c. the general principles recognized by civilized nations;
> d. . . . judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.

Statute of the International Court of Justice, June 26, 1945, art. 38, 59 Stat. 1055, 1060, T.I.A.S. No. 3, at 1187.

It is generally accepted that agreement and custom are major sources of international law. Hayton, *The Formation of the Customary Rules of International Drainage Basin Law*, in THE LAW OF INTERNATIONAL DRAINAGE BASINS 842 (1967).

> That existing general international law in a given field may be traceable to the rules of a universally, or virtually universally adhered to "law-making" multilateral treaty is known to all. It is usually conceded that such "international legislation" makes a quite direct contribution to general international law. In addition, a widely adhered to treaty might openly purport to be merely, or primarily declaratory of the existing customary law. Such formal codification, or restatement may be limited legally speaking to the role of "some evidence" in the process of the proof of the law; however, sociologically speaking, the individual and collective state activity that brought forth the declaratory treaty is itself state practice, reinforcing (in this instance) the customs—not just providing proof of them. Even bilateral agreements can serve these functions of evidencing and strengthening the customary rules, by manifesting the intention of the framers to affirm, on the whole, the existing law.

Id. at 861-62.

It also has been generally stated and accepted that unwritten, informal norms may reflect binding rules and principles of international law. *Id.* at 843.

> Custom in its legal sense means something more than mere habit or usage; it is a usage felt by those who follow it to be an obligatory one. There must be present a feeling that, if the usage is departed from, some form of sanction will probably, or at any rate ought to, fall on the transgressor. Evidence that a custom in this sense exists in the international sphere can be found only by examining the practice of states; that is to say, we must look at what states do . . . and attempt to understand why they do it, and in particular whether they recognize an obligation to adopt a certain course or, in the words of Article 38 [of the Statute of the International Court of Justice], we must examine whether the alleged custom shows "a general practice accepted as law."

J. BRIERLY, THE LAW OF NATIONS 59-60 (6th ed. 1963).

Judicial decisions and opinions may also reflect customary international practice. Hayton, *supra*, at 845.

that these concepts are becoming part of general international law.[86]

1. The Duty to Consult with a Co-Riparian Nation

International law imposes a duty on a riparian nation to consult with co-riparian nations before beginning a project or diversion that would affect shared waterways.[87] This obligation has become recognized during the twentieth century by international tribunals.[88] For example, the International Court of Justice, in the *Lake Lanoux Arbitration*[89] and *North Sea Continental Shelf*,[90] has held that an obligation to consult and negotiate arises out of customary international law.[91]

> Decisions and opinions by courts and quasi-judicial bodies of a particular state frequently are the most accessible and legally sufficent manifestations of that state's legal position on many technical international, or foreign relations matters and are often resorted to. . . .
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> . . . .
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> International tribunal "precedent" and legal grounds announced by international tribunals for their decisions may themselves be admissible as some evidence of customary state practice, at least in the absence of widespread state criticism of, or objection to the Court's or other tribunal's formulations.

Id. at 845-54.

Commentators of international law treatises have always been relied on and cited with frequency in the international legal community. *Id.* at 857-58.

> The actual influence of any given writer aside, what justifies use of commentators . . . is the assistance their works can render in analysis of the problem, in making available more of the voluminous, equivocal and inaccessible record of state practice, and in articulating concisely the recognized or developing legal principles and rules involved.

Id. at 860.

86. *See supra* notes 82-84 and accompanying text.

87. *See supra* note 82 and accompanying text.

88. *See* Bourne, *supra* note 82, at 218-20.

89. (Fr. v. Spain), 24 I.L.R. 101 (Arb. Trib. 1957).

90. (W. Ger. v. Den.; W. Ger. v. Neth.) 1969 I.C.J. 3 (Judgment of Feb. 20).

91. In *Lake Lanoux*, the Court concluded:

> International practice reflects the conviction that States ought to strive to conclude . . . agreements: there would thus appear to be an obligation to accept in good faith all communications and contracts which could, by a broad comparison of interest and by reciprocal good will, provide States with the best conditions for concluding agreements.

Lake Lanoux, 24 I.L.R. at 130.

Similarly, in the North Sea Continental Shelf Cases, the court held that the parties were under an obligation to delimit the areas of the North Sea continental shelf by negotiating in good faith with a view to reaching an agreement in accordance with equitable principles. *North Sea Continental Shelf*, 1969 I.C.J. at 46-47, 53-54.

The obligation to consult with co-riparian nations is designed to ensure that a nation will not utilize the waters of an international drainage basin without knowledge of all relevant facts.[92] By consulting with other states, a nation can realize the maximum efficient use of shared resources or, at the very least, ascertain the legal ramifications of its proposed actions.[93]

2. Drainage Basin Development—the Community Theory

Drainage basin development, or the community approach to international waters, stresses mutual development of a river's waters by all riparian nations.[94] This approach derives from the practical consideration that the geography of a river often has little if any relationship to the political frontiers that separate it, and in order to make maximum use of its waters, it is often necessary to develop an integrated program for the whole drainage basin.[95] Under this theory, the joint efforts of the participating states are utilized to best develop the basin for their joint benefit without regard to state borders.[96]

International commissions are able to bring representatives of interested nations together to cooperate in joint planning for comprehensive river development.[97] Joint or international commissions may also have the power to organize investigations, undertake studies, and issue recommendations regarding development of shared waterways.[98] Thus, such commissions may play an important role during the beginning stages of the development process, when unified planning is most needed.[99]

The extent of cooperation that exists along the U.S.-Canadian boundary and the importance of an international commission in that relationship were evident in the Lake of the Woods Convention and Columbia River dispute. There is little doubt

92. *See* Bourne, *supra* note 82, at 230.
93. *See id.*
94. *See* D. LEMARQUAND, INTERNATIONAL RIVERS: THE POLITICS OF COOPERATION 13 (1977).
95. *See* Lipper, *supra* note 37, at 38.
96. *See id.* at 39.
97. Ely & Wolman, *supra* note 83, at 137.
98. *Id.*
99. *Id.*

that an impartial commission and a treaty that endorses equality have been important ingredients to the success that the United States and Canada have achieved in their relations concerning international waters.[100]

3. Limited Territorial Sovereignty—the Equitable Utilization Theory

The United States has interpreted article II of the Boundary Waters Treaty as embodying the principle of limited territorial sovereignty.[101] The limited territorial sovereignty principle, also known as equitable utilization, recognizes the equal rights of co-riparian nations.[102] Under this theory, each nation has an equal right to utilize shared waterways in accordance with its needs.[103] Thus, each state riparian to a river that borders upon or crosses two or more states has an equality of right with every other co-riparian state to use the waters of the river in a reasonable and beneficial manner.[104] The doctrine of equitable utilization has attracted overwhelming support and is now considered an established principle of customary international law.[105]

The limited sovereignty principle was expressed in the *Lake Lanoux Arbitration*.[106] In significant dictum, the tribunal concluded that not only does current international practice require the safeguarding of the riparian rights of a neighboring

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100. *See* U.N. DEP'T OF TECHNICAL CO-OPERATION FOR DEVELOPMENT, EXPERIENCES IN THE DEVELOPMENT AND MANAGEMENT OF INTERNATIONAL RIVER AND LAKE BASINS at 284, U.N. Doc. ST/ESA/120, U.N. Sales No. E.82.II.A.17 (1981).

101. *See supra* notes 67-68 and accompanying text.

102. Lipper, *supra* note 37, at 44-45.

103. *Id.*

104. *Id.* at 63.

105. *See* Bourne, *supra* note 9, at 475. The U.S. Supreme Court first announced the doctrine in 1907 in Kansas v. Colorado, 206 U.S. 46 (1907). Since then, the Supreme Court has elaborated and refined the doctrine in Wyoming v. Colorado, 259 U.S. 419 (1922), and Nebraska v. Wyoming, 325 U.S. 589 (1945).

The doctrine of equitable utilization reached a firm place in international law when it was embodied into the Helsinki Rules adopted by the International Law Association in 1966. *See* Bourne, *supra* note 9, at 475. Article IV of the Helsinki Rules formulates as a rule of general international law that "each basin state is entitled, within its territory, to a reasonable and equitable share in the beneficial uses of the waters of an international drainage basin." INT'L LAW ASS'N, REPORT OF THE FIFTY-SECOND CONFERENCE 484 (Aug. 14-20, 1967) (held at Helsinki).

106. (Fr. v. Spain), 24 I.L.R. 101, 138 (Arb. Trib. 1957); *see* Lipper, *supra* note 37, at 29.

state, but account must be taken of *all* interests that might be affected by the proposed projects, even if those interests do not correspond to a right.[107] The opinion went further, requiring notice of proposed diversions and good-faith negotiations toward agreement as requisite to the utilization of an international watercourse where such utilization might impair the interests of another riparian state.[108]

Perhaps the best known of the international decisions involving the doctrine of limited territorial sovereignty is the *Trail Smelter Arbitration*.[109] In deciding how to remedy the injury caused to U.S. interests by deleterious fumes being carried over the border by air currents from Canadian factories, the tribunal in the *Trail Smelter Arbitration* stated in dictum that under customary principles of international law, a state could not use or permit the use of its territory in such a way as to adversely affect by fumes the territory of another state.[110] An analogy can be drawn here between allowing the escape of harmful fumes across a border causing injury, and diverting waters to the injury of a co-riparian state.[111] The tribunal would most likely have reached the same conclusion if stored waters were released by Canada causing severe flood damage in the United States.[112]

Both the United States and Canada acknowledged the limited territorial sovereignty principle when they signed the Columbia River Treaty, which embodied the fifty-fifty principle and mutual development ideas advocated by the IJC.[113]

III. *APPLICATION OF ARTICLE II TO RECENT U.S. PROPOSALS TO DIVERT*

The five Great Lakes, which, with the exception of Lake

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107. *Lake Lanoux*, 24 I.L.R. at 138.

108. *Id.* at 119, 127-28.

109. Trail Smelter Arbitration Between the United States and Canada Under Convention of April 15, 1935, Decision of the Tribunal Reported March 11, 1941, *reprinted in* 35 AM. J. INT'L L. 684 (1941) [hereinafter Trail Smelter Arbitration].

110. *Id.* at 716.

111. *See* Lipper, *supra* note 37, at 30.

112. *Id.*; *cf.* North Dakota v. Minnesota, 263 U.S. 365 (1923) (concluding that relief is available where one state floods an interstate stream to the detriment of another state).

113. The Columbia River Basin Treaty, *supra* note 78; *see* Johnson, *supra* note 3, at 219; *supra* notes 63-80 and accompanying text.

Michigan, straddle the boundary between Canada and the United States, contain ninety-five percent of the fresh water in the United States.[114] As water demand becomes more acute in this nation, greater attention will be directed to the Great Lakes,[115] which form the largest body of fresh water in the world, containing 5,439 cubic miles of water.[116] With little precipitation, an increasing population, the drying up of underground waters sources (aquifers), and an important agricultural sector to support, states in the West and Southwest have been troubled by severe water shortages.[117] While there are no immediate proposals to divert water from the Great Lakes basin to these troubled areas, large out-of-basin diversions may be suggested in the future.[118]

Recent U.S. proposals to divert water from Lake Michigan to the Mississippi River have been suggested to relieve the extreme drought conditions of 1988, which resulted in record low water levels in the Mississippi River.[119] These proposals

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114. *Fire and Water*, *supra* note 6, at 22.

115. *See* Poston, *Great Lakes Water Supply—the Years Ahead*, in GREAT LAKES BASIN 293 (H. Pincus ed. 1962); *see also* Quade, *Water Wars Predicted in a Thirsty Nation*, 68 A.B.A. J. 1066 (1982).

116. THE WORLD ALMANAC AND BOOK OF FACTS 520 (120th ed. 1988).

117. *See* Quade, *supra* note 115, at 1066-67; Shapiro, *First Volleys of New Water Wars*, U.S. NEWS & WORLD REP., May 30, 1988, at 20; Taylor, *Water: The Nation's Next Resource Crisis*, U.S. NEWS & WORLD REP., Mar. 18, 1985, at 64; Note, *supra* note 20, at 300-02; Frazier & Schlender, *Running Dry: Huge Area in Midwest Relying on Irrigation is Depleting its Water*, Wall St. J., Aug. 6, 1980, at 1, col. 6. These states are included in the Reclamation Act of 1902, 43 U.S.C. § 391 (1982): Arizona, California, Colorado, Idaho, Kansas, Montana, Nebraska, Nevada, New Mexico, North Dakota, Oklahoma, Oregon, South Dakota, Utah, Washington, and Wyoming. *Id.*

118. *See* Quade, *supra* note 115, at 1066.

119. *See* Baldwin, *supra* note 34, at 1. With the support of Senator Robert Dole, the Senate minority leader, and Senator Paul Simon, among others, James Thompson, the governor of Illinois, argued that such a diversion was necessary, because the low water levels of the Mississippi were having a serious impact on commercial barge operators. *See Fire and Water*, *supra* note 6, at 22.

In a letter to the President of the United States dated July 8, 1988, 13 U.S. senators urged that the President order an emergency diversion of water from the Great Lakes to prevent economic devastation and potential health hazards to the nation's heartland, which is served by the Mississippi River:

> These record low water levels are literally bringing barge traffic on the Mississippi to a halt . . . . While some passages of the river have been cleared, as many as 3,000 barges have been blocked on the Mississippi because of low water levels.
>
> The economic impact of this natural disaster is staggering. Several large barge companies are forecasting losses in the range of $1 million to $7

are controversial in that they involve the unilateral transfer of water from a major international basin, would affect lake levels and commerce, and could affect Canadian interests as well.[120] The United States has defended any proposed diversion from Lake Michigan under article II of the Boundary Waters Treaty, arguing that Canadian approval is not needed, because Lake Michigan is surrounded by U.S. territory.[121]

During negotiations of the Boundary Waters Treaty, the United States insisted upon the principle that a state can do as it pleases with the waters in its territory and eventually obtained the embodiment of this principle in article II.[122] However, as past events indicate, article II is inadequate and fails to provide a workable solution to international water disputes between the United States and Canada.[123]

Whenever an international water dispute between the United States and Canada could have been resolved according to article II, the parties disregarded article II and, instead, entered into a new treaty to settle their differences.[124] For example, rather than rely on article II in the Lake of the Woods dispute, the United States and Canada requested the IJC to

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million per month of the drought. The American Waterways Operators estimates that the total loss to the barge and towing industry due to the drought will exceed $60 million.

Moreover, steadily declining water levels in the Mississippi pose potential health threats to many communities. Several communities face the prospect of their drinking water being rendered unusable as the drought continues . . . .

Expeditious action on this request could help avert further economic and health problems associated with the drought in our nation's heartland.

Letter to the President of the United States 1-4 (July 8, 1988).

120. *See* Baldwin, *supra* note 34, at 1. Any significant diversion from Lake Michigan would have profound implications for Canada with respect to navigation, recreation, and commercial interests. *House of Commons, Question Period* (July 7, 1988) (Can.) (statement of T. McMillan). Arguments have been made that such a diversion would have a serious impact on water levels in Lake Huron and in Lake Erie as well as in Lake St. Clair and would affect all the communities along the Canadian side of those lakes. *House of Commons, Question Period* (July 7, 1988) (Can.) (statement of S. Langdon).

121. *See Fire and Water*, *supra* note 6, at 22. Article II gives each nation the exclusive right to divert and control its own tributary waters. Boundary Waters Treaty, *supra* note 1, art. II, 36 Stat. at 2449, T.I.A.S. No. 12, at 320-21; *see* Baldwin, *supra* note 34, at 2-3.

122. Austin, *supra* note 20, at 421; *see supra* notes 20-31 and accompanying text.

123. *See supra* notes 40-80 and accompanying text.

124. *See supra* notes 38-50 and 77-80 and accompanying text.

draft the Lake of the Woods Treaty to prohibit unilateral and unlimited diversions from the lake's basin.[125] Article XI of this treaty modifies the provision of article II of the Boundary Waters Treaty by requiring the approval of the IJC for any diversion out of the lake's basin.[126] As early as 1925, both nations seem to have realized the ineffectiveness of the doctrine of absolute territorial jurisdiction in article II and recognized the importance of resolving conflicts through an international joint commission.

Article II also failed to resolve the Columbia River controversy.[127] By signing the Columbia River Treaty of 1961, the United States seems to have put its faith in general international law to protect itself against the possibility of unilateral diversions out of an international waterway.[128] Although most in the United States as well as Canada agreed that article II embodied the doctrine of absolute territorial jurisdiction, they also concluded that it was wholly inadequate as a solution to international river conflicts.[129] The Harmon Doctrine expresses an absolute sovereign philosophy more in tune with the pre-industrial revolution era of the eighteenth and nineteenth centuries rather than with the close economic, social, and political ties that characterize our present world.[130]

During the Columbia River controversy, the United States interpreted article II of the Treaty as embodying a principle of limited territorial sovereignty.[131] The U.S. position appears to be that each state has absolute sovereignty over its territory including any waters flowing through it.[132] However, interference by one nation that would affect the use of the waters of a shared basin by another nation may constitute an interference with the latter's sovereignty and, thus, violate international

125. *See supra* notes 38-50 and accompanying text.

126. Lake of the Woods Treaty, *supra* note 41, art. XI, 44 Stat. at 2111, T.I.A.S. No. 6, at 18; *see* L. BLOOMFIELD & G. FITZGERALD, *supra* note 8, at 75; *supra* notes 48-50 and accompanying text.

127. *See supra* notes 66-80 and accompanying text.

128. *See* L. TECLAFF, *supra* note 71, at 441 (discussing U.S. acceptance of international law with respect to Columbia River Treaty).

129. *See* Johnson, *supra* note 3, at 168.

130. *See id.* at 235.

131. *See supra* note 68 and accompanying text.

132. *See* Lipper, *supra* note 37, at 26.

law.[133] In other words, the sovereignty of each nation acts reciprocally to restrict the actions of each nation toward the other.[134] An amended article II that recognizes this principle of limited territorial sovereignty would be more effective in resolving international water disputes.

Additionally, in both the Columbia River and Lake of the Woods disputes, the United States and Canada submitted references to the IJC for review and recommendation,[135] rather than depend on article II as a way to resolve their problems. The use of a joint commission to resolve disputes that could have been resolved according to article II and without a commission is another implicit recognition of the inadequacy of article II. Article II of the Boundary Waters Treaty should be renegotiated and rewritten to reflect the limited territorial sovereignty or equitable utilization theory, which has become the most widely advocated by the international legal community.[136] This established principle of international law, adhered to by the United States in the Columbia River controversy[137] and advocated by Canada in the negotiations leading to the Boundary Waters Treaty,[138] would permit use of boundary waters only to the extent that no injury was done to other riparian nations.[139] At the very least, article II should be amended to prohibit a nation from making unilateral diversions without first consulting with other affected nations or submitting its proposal to an international commission for review. Only in this way can international water disputes between the United States and Canada be effectively resolved.

CONCLUSION

In the regulation of international waters, as in many other areas of human conduct, the harmony of mankind depends on the mutual recognition of needs and a cooperative effort to

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133. *Id.*

134. *Id.*

135. INT'L JOINT COMM'N, IJC DOCKET NO. 69, LIBBY DAM AND RESERVOIR (1954) & INT'L JOINT COMM'N, IJC DOCKET NO. 51, COLUMBIA RIVER (1944) & INT'L JOINT COMM'N, IJC DOCKET NO. 3, LAKE OF THE WOODS LEVELS (1912), *reprinted in* L. BLOOMFIELD & G. FITZGERALD, *supra* note 8, at 72-194.

136. D. LEMARQUAND, *supra* note 94, at 13.

137. *See supra* notes 66-80 and accompanying text.

138. *See supra* note 23 and accompanying text.

139. *See* D. LEMARQUAND, *supra* note 94, at 13.

find a solution that most closely meets those needs. Article II of the Boundary Waters Treaty is not a solution that meets the needs of the United States and Canada in resolving their international water disputes.

Although recent U.S. proposals for large-scale diversions out of Lake Michigan have been dropped, the prospect for significant diversions from the Great Lakes basin persists, as the population continues to move to more arid regions of the United States and water shortages reach crisis levels. Any future plan by the United States to divert significant amounts of water from Lake Michigan will again focus attention on the application of article II.

There is fairly strong evidence that both the U.S. and Canadian governments accept the doctrine of equitable utilization as a rule of international law. Article II, however, is still in the Boundary Waters Treaty and if invoked in a legal contest, would displace this customary rule. As long as it exists, article II will be used in arguments in controversial cases. To avoid potential water conflicts in the future and to provide a better mechanism for resolving international water disputes, article II of the Boundary Waters Treaty should be amended to incorporate customary principles of international water law.

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