Sharing Blue Gold: The 1997 UN Convention on the Law of the Non-Navigational Uses of International Watercourses Ten Years On

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Sharing Blue Gold: The 1997 UN Convention on the Law of the Non-Navigational Uses of International Watercourses Ten Years On

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ABSTRACT

This article discusses the relation between two key principles in the law of the non-navigational uses of international watercourses in light of the 1997 UN Convention on the Law of the Non-Navigational Uses of International Watercourses, namely the equitable and reasonable utilization of international watercourses and the no-harm rule. In addition, the paper investigates whether the Convention provides a clear definition of the contours, scope, and content of these two principles and the dynamic relation between them.

It is argued that the Convention clearly favors the principle of the equitable and reasonable utilization of international watercourses in the settlement of international disputes. However, it is also argued that the formula adopted in the Convention, whereby states are allowed to tolerate significant harm to their interests to achieve equitable apportionment, is not reflective of customary international law.

Instead, an alternative approach to the relation between the two principles has been advocated, predicated on the fact that both principles stand on equal footing. This approach provides a practical series of tests

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that States demanding an alteration of existing patterns of exploiting international watercourses must satisfy before such alterations are allowed. This approach also incorporates sufficient flexibility to allow for its application to the differing situations prevalent in different watercourse systems. Also, this methodology provides the requisite protection to existing uses of international watercourses that allow states to dedicate the usually large investments in water systems without fear that such investments will be readily disturbed in the future.

I. INTRODUCTION

Water is the spring of all life on our planet, it is the lifeblood of existence for all living beings; thus the Holy Koran declaims "... that We made every living thing from water ..." All around the world and throughout the history of human civilization, water has been revered, sanctified, worshiped and even dubbed "blue gold," thus "[r]ivers have been thoroughfares for the growth of civilisations and have been both shared and fought over throughout human history. Whether above or below ground, water is a singularly precious resource that is known in all cultures as the giver of life."\(^2\)

The sharing of this scarce, and essential, resource among numerous States is the topic of this paper. This is a multifaceted issue, with economic, political, hydrological, social, and legal implications; however, only the last perspective will be investigated here.

Commenting on the role of law in society, Oppenheim observed that law represents "a body of rules for human conduct within a community which by common consent of this community shall be enforced."\(^3\) The role of public international law is no different; it also constitutes a body of rules for the regulation of the conduct of inter-State relations. The import of international law for regulating the utilization of freshwater resources cannot be overstated, because "[w]ithout legal rules to govern their conduct, riparian states may be tempted to use as much water as possible in whatever means they see fit, without concern for the needs of others sharing the river."\(^4\) The fact that over fifty percent of the Earth's land and forty percent of its inhabitants are dependant on over 245

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international river basins gives greater potency and relevance to the
question of the legal regulation of the international utilization of these
resources.\(^5\)

Therefore, the international community has long been cognizant of
the need to arrive at a universal document to guide States in their
endeavour to apportion the fruits of international watercourses. The
culmination of this effort came during the convening of the 99\(^{th}\) Plenary
Meeting of the United Nations General Assembly when, on May 21
1997, it adopted the United Nations Convention on the Law of the Non-
Navigational Uses of International Watercourses (1997 Convention).\(^6\)

This year marks the first decade since the opening for signature of
the 1997 Convention, and thus a review of the effect that the Convention
has had on the law of the non-navigational uses of international
watercourses is warranted. Specifically, this paper will examine whether
the 1997 Convention contributed to settling the divisive issue of the
relationship between the two cardinal principles of this corpus juris: (1)
equitable and reasonable utilization of international watercourses, and (2)
the no-harm rule. As discussed below, the interplay between these two
principles and their application in disputes between the conflicting uses
of riparian States is the central tenet of the law of the non-navigational
uses of international watercourses. It is, therefore, not surprising that
these two principles and their scope and content have been, and remain,
the subject of impassioned debate between governments as they attempt
to apportion the waters of international watercourses.

This paper will first present a brief introduction to the 1997
Convention and its basic provisions, followed by a discussion of the two
aforementioned principles. Finally, the paper will examine whether the
Convention presents an agreed upon solution for the relation between
these principles, and if not, an alternative understanding of this relation
will be presented as well as a suggested methodology to reconcile the
two principles.


II. INTRODUCING THE CONVENTION

Until the United Nations decided to examine the question of the non-navigational uses of international watercourses, this field remained the exclusive realm of non-governmental efforts or States attempting to settle disputes relating to the apportionment of international watercourses. In fact, it has been asserted that, until the mid-1950s, no international customary rules could be discerned in this area of the law. As one author states, “[t]he great diversity of opinion expressed by those [States] involved in these disputes about the relevant law made it impossible to assert with assurance that there was any customary international law governing international water resources at that time.”

Therefore, in an attempt to remedy this lacuna in international law, the UN General Assembly (UNGA) decided on December 8, 1970, through Resolution 2669, to request that the International Law Commission (ILC) consider the matter of the non-navigational uses of international watercourses. For the next twenty-four years and through the laborious efforts of five Special Rapporteurs, the ILC studied the non-navigational uses of international watercourses until it presented its draft articles on the matter. The draft articles were then considered by the UNGA’s Sixth (Legal) Committee in 1996 and 1997, and finally

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7. The International Law Association [ILA] and the International Law Institute dedicated numerous sessions to the elucidation of the principles of the non-navigational uses of international watercourses. See also Ludwik A. Teclaff, Fiat or Custom: The Checkered Development of International Water Law, 31 NAT. RESOURCES J. 45 (1991).


9. G.A. Res. 2669 (XXV), U.N. GAOR, 25th Sess., Supp. No. 28, at 127, U.N. Doc. A/8028 (Dec. 8, 1970). This resolution confirmed the view that this area of law remained largely underdeveloped until the General Assembly decided to refer the matter to the ILC: “Recalling that despite the great number of bilateral treaties and other regional regulations, as well as the Convention on the Régime of Navigable Waterways of International Concern, signed at Barcelona on 20 April 1921, and the Convention relating to the Development of Hydraulic Power affecting more than one State, signed at Geneva on 9 December 1923, the use of international rivers and lakes is still based in part on general principles and rules of customary law.” Id.


adopted by the Assembly on May 21, 1997.12

The text adopted by the General Assembly, the 1997 Convention, is "a framework instrument which sets forth general substantive and procedural provisions to be applied by all Parties irrespective of their specific geographical location, or position vis-à-vis other watercourse States, or level of development."13 The 1997 Convention’s chief contributions to the law of the non-navigational uses of international watercourses can be found in Articles 5, 7, 20, and 21.14 Discussion here will be limited to Articles 20 and 21, since Articles 5 and 7 relate to the principles of equitable utilization and no-harm respectively,15 which are exhaustively considered below.

Commencing with Article 20, Part IV of the 1997 Convention is dedicated to “Protection, Preservation and Management” of international watercourses.16 Article 21 prescribes that States shall prevent, reduce, and control the pollution of international watercourses that may cause significant harm to other watercourse States.17 This article also includes the obligation for riparian States to consult each other “with a view to arriving at mutually agreeable measures and methods to prevent, reduce and control pollution of an international watercourse."18 Generally, the articles relating to the protection of the ecosystems of international watercourses provide “an important starting point, and reflect minimum international standards below which states may not fall, indicating the basis upon which states can further their efforts to achieve co-operative arrangements with their neighbours in the use of shared freshwater resources."19

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14. UN Watercourses Convention, supra note 6, arts. 5, 7, 20, 21.
15. Id.
16. Id. art. 20.
17. Id. art. 21.
18. Id. art. 21(3).
III. TWO BASIC PRINCIPLES

Discussion will now turn to the two central tenets of the law of international watercourses, namely the principles of equitable and reasonable utilization and the no-harm rule, which are enumerated in Articles 5 and 7 of the 1997 Convention respectively. Concurrently with these principles, the series of factors to be taken into consideration when effectuating equitable and reasonable apportionment of international watercourses will be examined.

A. Equitable and Reasonable Utilization of International Watercourses

Article 5 of the 1997 Convention states:

1. Watercourse States shall in their respective territories utilize an international watercourse in an equitable and reasonable manner. In particular, an international watercourse shall be used and developed by watercourse States with a view to attaining optimal and sustainable utilization thereof and benefits therefrom, taking into account the interests of the watercourse States concerned, consistent with adequate protection of the watercourse.

2. Watercourse States shall participate in the use, development and protection of an international watercourse in an equitable and reasonable manner. Such participation includes both the right to utilize the watercourse and the duty to cooperate in the protection and development thereof, as provided in the present Convention.

This article is only the latest expression of the principle of equitable and reasonable utilization. Earlier, the International Law Association (ILA) had formulated a similar provision, stating in Article IV of the 1966 Helsinki Rules, "[e]ach 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." The right of each State to an equitable and reasonable share of the beneficial uses of an international watercourse is grounded in the sovereign equality of all riparian States. The ILC recognizes this, stating:

20. UN Watercourses Convention, supra note 6, arts. 5, 7.
21. Id. art. 6.
22. Id. art. 5.
There is no doubt that a watercourse State is entitled to make use of the waters of an international watercourse within its territory. This right is an attribute of sovereignty and is enjoyed by every State whose territory is traversed or bordered by an international watercourse. Indeed, the principle of the sovereign equality of States results in every watercourse State having rights to the use of the watercourse that are qualitatively equal to, and correlative with, those of other watercourse States. This fundamental principle of “equality of right” does not, however, mean that each watercourse State is entitled to an equal share of the uses and benefits of the watercourse. Nor does it mean that the water itself is divided into identical portions. Rather, each watercourse State is entitled to use and benefit from the watercourse in an equitable manner.24

Referring to the above quoted Article 5 of the 1997 Convention, Stephen McCaffrey notes, “[t]his article sets forth what many regard as the cornerstone of the law of international watercourses—namely, the principle that a state must use an international watercourse in a manner that is equitable and reasonable vis-à-vis other states sharing the watercourse.”25

Jurisprudence on the utilization of international watercourses re-affirms the centrality of the equitable and reasonable utilization principle in international law. In the Case Concerning the Gabcikovo-Nagymaros Project,26 the International Court of Justice (ICJ) agreed with

24. ILC 1994 Report, supra note 11, at 221 (emphasis added). This statement confirms earlier pronouncements on the matter by the U.S. Supreme Court, which ruled in Kansas v. Colorado that “[o]ne cardinal rule, underlying all the relations of the States to each other, is that of equality of right. Each State stands on the same level with all the rest. It can impose its own legislation on no one of the others, and is bound to yield its own views to none. Yet, whenever . . . the action of one State reaches through the agency of natural laws into the territory of another State, the question of the extent and the limitations of the rights of the two States becomes a matter of justiciable dispute between them, and this court is called upon to settle that dispute in such a way as will recognize the equal rights of both and at the same time establish justice between them.” Kansas v. Colorado 206 U.S. 46, 97–98 (1907) (emphasis added).

25. Stephen McCaffrey, The UN Convention on the Law of the Non-Navigational Uses of International Watercourses: Prospects and Pitfalls, in INTERNATIONAL WATERCOURSES, supra note 5, at 17, 19 (emphasis added) [hereinafter McCaffrey, Prospects and Pitfalls]. The ILC corroborates McCaffrey’s view: “Article 5 sets out fundamental rights and duties of States with regard to the utilization of international watercourses for purposes other than navigation. One of the most basic of these is the well-established rule of equitable utilization. . . . [T]here is overwhelming support for the doctrine of equitable utilization as a general rule of law for the determination of the rights and obligations of States in this field.” ILC 1994 Report, supra note 11, at 218–22.

the fundamental nature of the right to an equitable and reasonable share of the beneficial uses of an international watercourse:

The Court considers that Czechoslovakia, by unilaterally assuming control of a shared resource, and thereby depriving Hungary of its right to an equitable and reasonable share of the natural resources of the Danube— with the continuing effects of the diversion of these waters on the ecology of the riparian area of the Szigetköz—failed to respect proportionality which is required by international law.\(^\text{27}\)

Moreover, in considering the matter of reparation for damages incurred, the Court stated:

Reparation must, "as far as possible", wipe out all the consequences of the illegal act. In this case, the consequences of the wrongful acts of both Parties will be wiped out "as far as possible" if they resume their cooperation in the utilization of the shared water resources of the Danube, and if the multi-purpose programme, in the form of a co-ordinated single unit, for the use, development and protection of the watercourse is implemented in an equitable and reasonable manner.\(^\text{28}\)

Decisions of federal courts in many States have also adopted this principle in adjudicating inter-State disputes on the apportionment of watercourses traversing their boundaries. In a dispute between the cantons of Aargau and Zurich, the Swiss Supreme Court observed:

The starting point of the court's reasoning is that riparians do not own the water and, because of the sovereign equality of riparians, none may exercise its sovereign rights within its territory in such a way as to invade the sovereign right of its co-riparians. The ruling rests essentially upon the principle of "equitable apportionment of benefits."\(^\text{29}\)

The principle of equitable utilization, however, does not mean that international watercourses should be divided among basin States and exploited blindly. Instead, the objective of the principle is to attain optimal and sustainable utilization thereof. As the ILC observes, the principle of equitable and reasonable utilization implies attaining maximum possible benefits for all watercourses States and achieving the greatest possible satisfaction of all their needs, while minimizing the detriment to, or unmet needs of,

\(^{27}\) Id. ¶85 (emphasis added).

\(^{28}\) Id. ¶150 (emphasis added).

each. . . . This goal must not be pursued blindly, however. The concluding phrase of the second sentence [of Article 5] emphasizes that efforts to attain optimal utilization and benefits must be "consistent with adequate protection" of the international watercourse.30

A close reading of the aforementioned pronouncements of the principle, however, shows that the objective is not an equal division of the waters of the international watercourse among watercourse States. Rather, the principle recognizes the

'basic right to an equitable and reasonable sharing of the resources of an international watercourse.' These 'resources' include not only the water, per se, but also e.g. the capacity of the water to produce hydroelectric power—flowing water's 'motive force'—and the ecological integrity of the watercourse system. Thus each State has an equal right to an equitable share of the uses and benefits of the stream.31

Concurrently with the aforementioned rights, States are under an obligation to continuously examine their utilization of an international watercourse to ensure that it complies with equitable and reasonable apportionment. That is, "States must take into account, in an ongoing manner, all factors that are relevant to ensuring that the equal and correlative rights of other watercourse States are respected."32 However, this right extends beyond the obligation of a State to ensure that its use is consonant with equitable and reasonable utilization. The obligation also "includes the duty to prevent others, for whose acts it is responsible under international law, from violating the legal rights of the other riparian States."33

From the foregoing analysis it is clear that equitable and reasonable utilization can only be attained through an examination and consideration of all the relevant factors to a particular watercourse and the differing needs of the riparian States. This, therefore, necessitates the continuous sharing of information and cooperation on all matters relating to the management of an international watercourse among the watercourse States. The general obligation to cooperate was included in Article 8 of the 1997 Convention which states: "Watercourse States shall cooperate on the basis of sovereign equality, territorial integrity, mutual benefit and

33. Griffin, supra note 29, at 75.
good faith in order to attain optimal utilization and adequate protection . . . .”\textsuperscript{34}

As an application of the general obligation to cooperate, the 1997 Convention provides a detailed regime for continuous notification by all basin States of planned measures which might cause a significant adverse effect on other co-riparian States.\textsuperscript{35} In this regard, McCaffrey concludes from “the available evidence, including claims of states, the manner in which disputes between states have been resolved, state treaty practice, instruments adopted in intergovernmental fora, the work of expert bodies, and the writings of commentators that prior notification is required by customary international law.”\textsuperscript{36}

It is noteworthy, however, that the obligation to notify does not rest solely on the shoulders of upstream States; instead, the obligation is reciprocal in nature. Downstream States must also notify upstream States of projects and planned measures that they intend to commence in their portions of the watercourse. This is primarily because “[b]y implementing a water development project, a downstream state is creating ‘facts on the ground’ which will often alter the equitable balance of uses between the upstream and downstream states and could thus effectively foreclose future uses by the upstream state.”\textsuperscript{37}

Having shown above that the equitable and reasonable utilization and exploitation of international watercourses is a fundamental tenet of the relevant corpus juris, it is necessary now to address the factors used to determine equitable and reasonable use.

\textit{1. Weighing the Factors of Equitable Utilization}

Before examining the different factors employed to determine equitable and reasonable utilization, it is necessary to note that most international scholars have agreed that uses that cause significant pollution harm are deemed unreasonable. As one scholar states, it is “in effect an absolute rule, that a use of the waters of an international watercourse that causes significant pollution harm or any harm to the ecosystem is \textit{ipso facto} unlawful; it is unlawful not because it is in fact

\textsuperscript{34} UN Watercourses Convention, \textit{supra} note 6, art. 8.

\textsuperscript{35} Part III of the UN Watercourses Convention. \textit{Id.} arts. 11–19.


\textsuperscript{37} McCaffrey, \textit{The Law of International Watercourses}, \textit{supra} note 31, at 407.
unreasonable and inequitable but because it is deemed to be so."

Beyond this point, however, it is agreed that the practical application of an equitable and reasonable apportionment of an international watercourse requires the examination of all the relevant conditions of the watercourse and its riparian States.

An approach that considers the specificities of each watercourse recognizes the fact that "[n]o two rivers present the same economic, social, political, or hydrological facts. It, therefore, becomes apparent that any legal method, principle, or doctrine, that might hope to be generally useful must be adaptable to these many situations." Therefore, in the endeavour to develop a corpus juris that accommodates these inherent differences among international watercourses, scholars and international organizations have presented lists of factors that should be considered in determining equitable and reasonable utilization.

In Nebraska v. Wyoming, the United States Supreme Court recognized the necessity of examining a multitude of factors in apportioning shared watercourses:

*Apportionment calls for the exercise of an informed judgement on a consideration of many factors.* Priority of appropriation is the guiding principle. But physical and climatic conditions, the consumptive use of water in the several sections of the river, the character and rate of return flows, the extent of established uses, the availability of storage water, the practical effect of wasteful uses on downstream areas, the damage to upstream areas as compared to the benefits to downstream areas if a limitation is imposed on the former—these are all relevant factors. They are merely an illustrative, not an exhaustive catalogue.

40. Nebraska v. Wyoming, 325 U.S. 589, 618 (1945) (emphasis added). The International Law Commission and the International Law Association concur with the opinion that these factors are an illustrative list of issues that should be taken into consideration when reaching an equitable and reasonable utilization of an international watercourse: "The wide diversity of international watercourses and of the human needs they serve makes it impossible to compile an exhaustive list of factors that may be relevant in individual cases. Some of the factors listed may be relevant in a particular case while others may not be, and still other factors may be relevant which are not contained in the list. No priority or weight is assigned to the factors and circumstances listed, since some of them may be more important in certain cases while others may deserve to be accorded greater weight in other cases." ILC 1994 Report, *supra* note 11, at 232.
In elaborating this catalogue of factors, the 1997 Convention stated in Article 6:

1. Utilization of an international watercourse in an equitable and reasonable manner within the meaning of article 5 requires taking into account all the relevant factors and circumstances, including:
   a. Geographic, hydrographic, climatic, ecological and other factors of a natural character;
   b. The social and economic needs of the watercourse States concerned;
   c. The population dependant on the watercourse in each watercourse State;
   d. The effects of the use or uses of the watercourses in 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 comparable value, to a particular planned or existing use.\(^4\)

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\(^4\) UN Watercourses Convention, *supra* note 6, art. 6. The Helsinki Rules also provided another catalogue of factors to be considered in the determination of equitable and reasonable utilization:

“(1) What is a reasonable and equitable share within the meaning of Article IV is to be determined in the light of all the relevant factors in each particular case. (2) Relevant factors which are to be considered include, but are not limited to:
   a) the geography of the basin, including in particular the extent of the drainage basin area in the territory of each basin State;
   b) the hydrology of the basin, including in particular the contribution of water by each basin State;
   c) the climate affecting the basin;
   d) the past utilization of the waters of the basin, including in particular existing utilization;
   e) the economic and social needs of each basin State;
   f) the population dependant on the waters of the basin in each basin State;
   g) the comparative costs of alternative means of satisfying the economic and social needs of each basin State;
   h) the availability of other resources;
   i) the avoidance of unnecessary waste in the utilization of waters of the basin;
   j) the practicability of compensation to one of more of the co-basin
In addition to the aforementioned article, paragraph 1 of Article 10 states, "[i]n the absence of agreement or custom to the contrary, no use of an international watercourse enjoys inherent priority over other uses." 42

Notwithstanding, during the discussions on the ILC Draft Articles in the General Assembly 6th Committee, many States attempted to amend and add or delete factors from the list. Among these attempts were failed proposals "to add references to: the contribution to the watercourse by each watercourse state (India); the availability of other water resources (Egypt); and sustainable development and the needs and interests of future generations (Finland)." 43

2. Understanding the Factors

It remains to be seen how these factors will be interpreted and applied by the courts in adjudicating disputes between different riparian states. In this section, the content of some of the factors outlined in the Convention is discussed in conjunction with other factors that have been put forward by States.

i. Social and Economic Needs of Watercourse States

In clarifying the notion of "social and economic" needs of watercourse States, scholars have noted that this should not be construed as meaning the level of economic or social development of watercourse States. As one scholar asserts, "the relative economic poverty of the States concerned should not be admitted to affect the result. In other words, the question about the needs of the parties is a question about degrees of dependence and not stages of economic development." 44 This conclusion is corroborated by that fact that although a criteria referring to

States as a means of adjusting conflicts among uses; and
(k) the degree to which the needs of a basin State may be satisfied, without causing substantial injury to a co-basin State; . . . " Helsinki Rules, supra note 24, art. V.

42. UN Watercourses Convention, supra note 6, art. 10(1). This paragraph recognizes that "[n]avigation was once thought to enjoy such a priority on navigable watercourses, but Article 10 makes clear that neither navigation nor any other kind of use (e.g. irrigation, hydroelectric power production, industrial uses) automatically takes precedence over other uses. It recognizes, however, that an agreement or custom to the contrary would change this result." McCAFFREY, THE LAW OF INTERNATIONAL WATERCOURSES, supra note 31, at 311.


the stage of economic development of watercourse States was included in the report of ILC Special Rapporteurs Evensen and Schwebel, it was deleted from the final version adopted by the ILC in the Draft Articles and the 6th Committee in the 1997 Convention.

While it is clear that the economic dependence on the watercourse, not the relative economic development of the watercourse State, should be factored into apportioning international watercourses, questions have surfaced as to the territorial extent of this dependence. It has been argued in numerous tribunals that the needs of basin area should have priority over non-basin areas, within the territory of the watercourse State. A close examination of the Helsinki Rules, the ILC Draft Articles, and the 1997 Convention demonstrates that watercourse States are entitled to utilize an international watercourse throughout their territories without giving special priority to the basin area. This is evidenced by references such as “each State is entitled within its territory . . .”; “[w]atercourse States shall in their respective territories utilize an international watercourse . . .”; and “[w]atercourse States shall, in utilizing an international watercourse in their territories . . .” Furthermore, the Krishna Waters Disputes Tribunal rejected a claim by States of Maharashtra and Mysore that the interests of basin areas should be afforded priority over needs emanating from non-basin areas, stating:

The need for diversion of water to another watershed may be a relevant factor in equitable apportionment . . . Thus, the relevant consideration is the interest of the State as a whole and all its

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49. UN Watercourses Convention, supra note 6, art. 5.

50. Id. art. 7.
inhabitants and not merely the interest of the basin areas of the State.  

ii. Dependence of the Population on the Watercourse

Another factor of crucial importance in determining the extent of a watercourse State’s dependence on an international watercourse is the population dependent on the watercourse. It is noteworthy that the ILA and the ILC concur\(^\text{52}\) that the degree of dependence of the population, and not solely the size of the population, should be the relevant factor in equitable and reasonable apportionment. This view is confirmed by the judgment of the Argentine Supreme Court in the water dispute between the provinces of La Pampa and Mendoza. The court “observed that 100,000 inhabitants in Mendoza were almost completely dependant on agriculture and, hence, on the waters of the Atuel river, while only 3,024 inhabitants in the province of La Pampa could have benefited from those waters.”\(^\text{53}\) This should not, however, be construed to suggest that the size of the population should not be considered as a factor, instead it is contended here that the \textit{size and degree of dependence} are the relevant factors in determining equitable utilization.\(^\text{54}\)

iii. Dependence of the General Economy

While not included in the ILC Draft Articles, the 1997 Convention, or the Helsinki Rules, the dependence of the general economy was included in the 1956 ILA Dubrovnik Resolution Statement of Principles on the non-navigational uses of international watercourses. Specifically, the Resolution stated that “[f]or this purpose, the following factors, among others, should be taken into consideration: . . . (b) The extent of the dependence of each State upon the waters of that river.”\(^\text{55}\) This factor was considered by the Krishna tribunal in its adjudication of the water dispute between the Maharashtra and Mysore and Andhra provinces:


\(^{52}\) Article V of the Helsinki Rules, Article 6 of the 1994 Draft Articles and Article 6 of the 1997 Convention all refer to the “population dependent on the watercourse.” Helsinki Rules, \textit{supra} note 23, art. V; ILC 1994 Draft Articles, \textit{supra} note 49, art. 6; UN Watercourse Convention, \textit{supra} note 6, art. 6.

\(^{53}\) Fuentes, \textit{supra} note 44, at 347.

\(^{54}\) The ILC confirms this by noting “the importance of account being taken of both the size of the population dependent on the watercourse and the degree or extent of their dependency.” ILC 1994 Report, \textit{supra} note 11, at 232–33.

The State of Andhra Pradesh presented less population and irrigable land than the States of Maharashtra and Mysore. According to Mysore, 31.1% of the population of the three States and 33.9% of the population directly dependent on the Krishna basin lived in Andhra Pradesh. As regards cultivable area, only 26.6% of the cultivable land lay in Andhra Pradesh’s territory. In spite of that, Andhra Pradesh was able to prove that its economy was highly dependent on the waters of the river and, therefore, it was allocated almost 39% of the disputed water resources.56

Furthermore, in the aforementioned case of La Pampa v. Mendoza, the fact that Mendoza’s economy was dependent on irrigation from the Atuel River was decisive in the court’s decision to allot Mendoza the entire waters of the watercourse.57

iv. Availability of Alternative Resources

The availability of alternative resources was included as a factor in the ILC Draft Articles,58 the 1997 Convention,59 and the Helsinki Rules.60 This implies that “priority should be given to the satisfaction of the water requirements which cannot be met by other water supplies”61 in situations where certain needs and uses of international watercourses can be satisfied by alternative resources. The Krishna tribunal confirmed this view in the aforementioned dispute between Maharashtra and Mysore and Andhra Pradesh. The tribunal noted that a project that can be satisfied through alternative water sources—rainfall in this case—could not be counted as part of the general water requirements of a watercourse State in relation to the watercourse in dispute.62 In addition the ILC noted that alternatives need not be water-based; rather, substitute options should be of “generally comparable feasibility, practicability and cost-effectiveness.”63

v. Geographical, Hydrological, and Hydrographic Characteristics of the Watercourse

In elucidating the nature of these factors, the ILC noted that geographic factors included the “extent of the international watercourse

56. Fuentes, supra note 44, at 349.
57. Id.
58. ILC 1994 Report, supra note 11, at 222.
59. UN Watercourses Convention, supra note 6, art. 6.
60. Helsinki Rules, supra note 23, article 5.
61. Fuentes, supra note 44, at 350.
62. Id.
in the territory of the State, while hydrographic characteristics related to the “measurement, description and mapping of the waters of the watercourse.” Hydrological factors were defined as pertaining “inter alia, to the properties of the water, including water flow, and to its distribution, including the contribution of water to the watercourse by each watercourse State.”

These factors are of special importance in the case of the Nile since Ethiopia maintains that contribution to the watercourse should be a major factor in determining equitable and reasonable utilization. In a statement issued by the Ethiopian Imperial Government in 1957, it asserted that:

Ethiopia alone supplies 84% of those waters, as well as the immense volume of alluvium fertilizing the lower reaches of the Nile. In view of this fact and the overwhelming importance which such waters and soils represent with reference to the total water and other resources of Ethiopia, . . . . The Imperial Government must, therefore, reassert and reserve now and for the future, the right to take all such measures in respect of its water resources and in particular, as regards that portion of the same which is of the greatest important to its welfare, namely, those waters providing so nearly the entirety of the volume of the Nile . . . . Under these circumstances, Ethiopia, alone the source of nearly the entirety of the waters involved, must, once again, make it clear that the quantities of waters available to others must always depend on the ever-increasing extent to which Ethiopia, the original owner, is and will be required to utilise the same for the needs of her expanding population and economy.

However, as noted above, the theoretical underpinnings of the principle of equitable and reasonable utilization of international watercourses reside in the concept of equality of right and the prohibition of extending sovereign or absolute powers over an international watercourse. Therefore, the contribution of water, or the extent of the watercourse present on the territory of a watercourse State, should not be considered as a direct basis for the apportionment of international watercourses. That is, “equitable utilization is not a rule to ameliorate a division already effected by nature. In this context, the length of the frontage of the riparians on the river may only be used to adjust an allocation effected on the basis of other factors.” In other words, while

64. Id. at 232
65. Id.
66. Id.
68. Id. at 401 (emphasis added).
the contribution and frontage of an international watercourse should be considered among other factors in computing equitable and reasonable utilization, it should not be a guiding factor; rather, all the factors in totality should be considered.

The fact that the Nile rises in the Abyssinian Highlands should not entitle Ethiopia to a share of the Nile waters per se. Instead, showing dependence on the watercourse in the manner outlined above and in accordance with the relevant factors alone should entitle Ethiopia or any other watercourse State to a share of the watercourse. Utilizing a State's contribution to an international watercourse as a decisive factor in the apportionment of the waters of the watercourse would amount to an endorsement of the Harmon Doctrine, which has been discredited by scholars and States alike. 69 This conclusion is reaffirmed by the Narmada Water Disputes Tribunal which, in adjudicating the dispute between Madhya Pradesh and Gujarat, "did not resort to the criterion of the contribution of water for the calculation of the prima facie equitable allocation of the waters of the Narmada River. This factor was only used to adjust the allocation arrived at by the application of other criteria."70

A final issue relates to the dynamic character of the factors enumerated for consideration when deciding what constitutes equitable and reasonable utilization. Any reading of the relevant factors reveals

69. According to this doctrine it is purported that the State through which the international watercourse traverses has an absolute right to utilize the waters of the watercourse without any regard to the interests or needs of the other basin States. The Doctrine was named after a legal opinion presented by United States Attorney General Judson Harmon in 1895 on the dispute between the U.S. and Mexico over the utilization of the Rio Grande River. Today, this doctrine finds scant support, and can be assumed to be dead letter law, as confirmed in the following statement:

[T]he contention that... the United States can properly refuse to arbitrate a demand by Mexico for additional waters of the Colorado is, to say the least, extremely doubtful, particularly when the Harmon opinion is viewed in the light of the following:

a. The practice of states as evidenced by treaties between various countries, including the United States, providing for the equitable apportionment of waters of international rivers.

b. The decisions of domestic courts giving effect to the doctrine of equitable apportionment, and rejecting, as between the States, the Harmon doctrine.

c. The writing of authorities on international law in opposition to the Harmon doctrine.


70. Fuentes, supra note 44, at 407.
that they are not static factors, but, rather, are susceptible to continuous change and alteration, either due to natural developments or scientific progress. Therefore, a determination of equitable and reasonable utilization must be continuously reviewed and reassessed, since changing circumstances will naturally require adjustments in the apportionment of the water of international watercourses. The Krishna Tribunal recognized this fact in noting:

[P]opulation, engineering, economic, irrigation and other conditions constantly change and with changing conditions new demands for water continuously arise. A water allocation may become inequitable when the circumstances, conditions and water needs upon which it was based are substantially altered. For all these reasons, a review and modification of the allocations may become necessary to keep pace with changing conditions.\textsuperscript{71}

B. The Obligation not to Cause Significant Harm

Besides the principle of equitable and reasonable utilization of international watercourses, the obligation not to cause significant harm to other watercourse States is the second fundamental pillar of the law of non-navigational uses of international watercourses. The no-harm rule has been enumerated in numerous international governmental and non-governmental pronouncements. It has also been referred to in innumerable judicial decisions as well as opinions of acclaimed jurists.

The 1997 Convention included the obligation not to cause significant harm in Article 7 which reads:

1. Watercourse States shall, in utilizing an international watercourse in their territories, take all appropriate measures to prevent the causing of significant harm to other watercourse States.

2. Where significant harm nevertheless is caused to another watercourse State, the States whose use causes such harm shall, in the absence of agreement to such use, take all appropriate measures, having due regard for the provisions of articles 5 and 6, in consultation with the affected State, to eliminate or mitigate such harm and, where appropriate, to discuss the question of compensation.\textsuperscript{72}

\textsuperscript{71} KRISHNA WATER DISPUTES TRIBUNAL, supra note 52, at 158, quoted in Fuentes, supra note 44, at 371.

\textsuperscript{72} UN Watercourses Convention, supra note 6, art. 7. The Helsinki Rules, on the other hand, did not include a clear provision outlawing the causing of significant harm to
In its commentary, the ILC reasoned that this was also a reflection of the equality of right and sovereignty of all watercourse States, because “[i]n the context of the non-navigational uses of international watercourses, this is another way of saying that watercourse States have equal and correlative rights to the uses and benefits of the watercourse.” 73 Thus, States’ freedom of action and utilization of international rivers is limited by the reciprocal rights of other States in utilizing the shared watercourse. This principle represents a further reflection of the limited territorial sovereignty theory. 74

Scholars have concurred that this principle is firmly grounded in customary international law and is a general principle of international law. 75 This obligation is considered a manifestation of the maxim of sic utere tuo ut alienum non laedas, 76 which is widely held to represent a general principle of international law:

other watercourse states in terms of quantities of water; instead it only proscribed the causing of substantial pollution injury to co-riparian states. Injury caused to existing uses in terms of quantity was included among the factors relevant to the determination of equitable and reasonable utilization. Helsinki Rules, supra note 23, art. V.

73. ILC 1994 Report, supra note 11, at 230.

74. This theory is “based on the assertion that every co-riparian is free to use the waters of shared rivers within its territory on condition that the rights and interests of all the other co-riparian states are taken into consideration. In this case, sovereignty over shared waters is relative and qualified. The co-riparians have reciprocal rights and duties in the use of the waters of common rivers.” DANTE A. CAPONERA, PRINCIPLES OF WATER LAW AND ADMINISTRATION: NATIONAL AND INTERNATIONAL 213 (1992). The United States Supreme Court provided a concise application of this theory in New Jersey v. New York when stating:

New York has the physical power to cut off all the water within its jurisdiction. But clearly the exercise of such a power to the destruction of the interest of lower States could not be tolerated. And on the other hand equally little could New Jersey be permitted to require New York to give up its power altogether in order that the River might come down to it undiminished. Both States have real and substantial interests in the River that must be reconciled as best they may. New Jersey v. New York, 283 U.S. 336, 342–43 (1931).

75. See McCaffrey, THE LAW OF INTERNATIONAL WATERCOURSES, supra note 31, at 346. It must not be over-looked, however, that some scholars, while accepting the rule as a general principle of law, have argued that it is of no relevance or use to the realm of the apportionment of international watercourses. As one scholar states, “[m]ost international waterways are at present fully exploited or even over-used. Accordingly, the issue is no longer one of not causing harm—in situations of full or over-use, every new or increased activity is harmful for existing utilizations—but one of apportioning resources among competing uses and users. This is why the negative no-harm rule had to be superseded by a positive rule which would make it possible to effect such an apportionment.” Lucius Caflisch, Regulation of the Uses of International Watercourses, in INTERNATIONAL WATERCOURSES, supra note 6, at 3, 12.

76. This principle is translated to mean: “[S]o use your own as not to injure
Experts have concluded that *sic utere tuo* ‘now occupies a firm place among the doctrinal bases for the obligation of States to avoid appreciable harm to other States, perhaps even more particularly with respect to harm transmitted via international watercourses’; and that it ‘has been generally recognized in the literature as a principle of international river law.’

In tracing the genealogy of this principle, scholars have attributed its emergence to private law and abuse of rights, whereby neighbors are not allowed to use or allow their territory to be used to the detriment of neighbors.

Among the most frequently cited authorities for this principle is the Trail Smelter arbitration award of 1949 which dealt with transboundary pollution from a smelter operating from Trail, British Colombia. In determining the applicable rule of international law, the tribunal decided:

[U]nder the principles of international law, as well as of the law of the United States, no State has the right to use or to permit the use of its territory in such a manner as to cause injury by fumes in or to the territory of another or the properties or persons therein, when the case is of serious consequence and the injury established by clear and convincing evidence.

In addition, in the Corfu Channel Case, the ICJ stated:

Such obligations are based, not on the Hague convention of 1907, which is applicable in time of war, but on *certain general and well-recognized principles*, namely: . . . every State’s obligation not to allow knowingly its territory to be used for acts contrary to the rights of other States.

*other’s property. ” Black’s Law Dictionary* 1757 (8th ed. 1999).

77. McCaffrey, *The Law of International Watercourses*, supra note 31, at 350. Herch Lauterpacht also considers the *sic utere* principle a reflection of customary international law: “The responsibility of a State may become involved as the result of an abuse of a right enjoyed by virtue of International Law. This occurs when a State avails itself of its right in an arbitrary manner in such a way as to inflict on upon another State an injury which cannot be justified by a legitimate consideration of its own advantage . . . . The duty of the State not to interfere with the flow of a river to the detriment of other riparian States has its source in the same principle. The maxim, *sic utere tuo ut alienum non laedas* [so use your own as not to injure another’s property] is applicable to relations of States no less than to those of individuals; it underlies a substantial part of the law of torts in English law and the corresponding branches of other systems of law; it is one of those general principles of law recognised by civilised States.” Oppenheim, supra note 3, at 345–46.


Furthermore, the UN Secretary General stated in 1949 that “[t]here has been general recognition of the rule that a State must not permit the use of its territory for purposes injurious to the interests of other States in a manner contrary to international law.”81 Moreover, the Italian Supreme Court in adjudicating a water allocation dispute stated:

If this [State], in the exercise of its sovereign rights is in a position to establish any regime that it deems most appropriate over the watercourse, it cannot escape the international duty . . . to avoid that, as a consequence of such a regime, other (co-riparian) States are deprived of the possibility of utilizing the watercourse for their own national needs.82

In addition, numerous bilateral treaties have incorporated this principle in regulating the utilization of international watercourses by watercourse States. Among these is the 1993 Framework for General Cooperation Between Egypt and Ethiopia, wherein Article 5 states: “Each party shall refrain from engaging in any activity related to the Nile waters that may cause appreciable harm to the interests of the other party.”83 Furthermore, in the 1905 Treaty on Common Lakes and Watercourses, Sweden and Norway agreed that:

In accordance with the general principles of international law, it is understood that the works mentioned in Article 1 [diversions, raising or lowering of water levels] cannot be carried out in one of the two states without the consent of the other, in each case where such works, in influencing the waters situated in the other state, would have the effect either of noticeably impairing the use of a watercourse or floating of timber, or otherwise bringing about serious changes in the waters of a region of a considerable area.84

1. Applying the Obligation not to Cause Significant Harm

What, however, is the implication of this formulation of the no-harm rule? What are State’s obligations pursuant to this provision of the 1997 Convention? Are States proscribed from causing significant harm,

84. HERBERT A. SMITH, THE ECONOMIC USES OF INTERNATIONAL RIVERS 167 (1931), quoted in Griffin, supra note 29, at 55.
or has the threshold of obligation been lowered? In answering these questions, guidance is sought through an examination of the evolution of this provision in the debates of the ILC and the GA 6th Committee.

Initially, in the report of Special Rapporteur Schwebel, the emphasis was placed on the equitable utilization principle as opposed to the significant harm principle. The reasoning behind this prioritization was that the no-harm rule should be activated only in cases where planned uses of international watercourses would deprive States of their equitable and reasonable share. Special Rapporteur’s Evensen and McCaffrey, on the other hand, realigned the priority, and incorporated the no-harm rule as a fundamental principle of the 1997 Convention and removed harm from the catalogue of factors to be considered in determining equitable utilization.

This prioritization was highly criticized by many States, which led to a re-examination of the relation between the two principles by R. Rosenstock, the final Special Rapporteur on the law of international watercourses. The resulting text enjoined States to “exercise due diligence” in their utilization of an international watercourse so as not to cause significant harm to other watercourse States.

Upon its referral to the GA 6th Committee, numerous States voiced concern over the text. Primarily, some States argued that the articles lacked clarity, while “a second criticism was that responsibility and liability under the no-harm rule were maintained except, that where they were not attributable to a lack of due diligence, their consequences were reduced to a duty to consult over the equitableness of the harmful use and measures of abatement or indemnization.” Numerous suggestions were, therefore, presented to ameliorate the widening gap between proponents of a dominant Article 7 (overwhelmingly downstream States) and proponents of the dominance of Articles 5 and 6 (overwhelmingly upstream States). The final compromise (the adopted text of the Convention) was suggested by C. Yamada, Chairman of the 6th
Committee Working Group on The Law of Non-Navigational Uses of International Watercourses, in the form of a ‘package deal’ of Articles 5, 6, and 7. Yamada’s proposition was adopted with thirty-eight votes in favor to four (China, France, Tanzania and Turkey) against and twenty-two abstentions, “a rate of approval which raises doubts over the viability of the new Convention.”

The principal differences between the adopted text and earlier articulations of the obligation not to cause significant harm reside in the insertion of the notion of due diligence (which was amended by the 6th Committee to read “take all appropriate measures”\textsuperscript{92}) and the requirement of entering into consultations with affected watercourse States in case significant harm occurs—to judge the extent to which the use is equitable and reasonable. Another important amendment appeared in the insertion of the phrase “significant harm” to replace “appreciable harm” as the threshold of State obligations.\textsuperscript{93} McCaffrey described the final result of negotiations as a “basket of Halloween candy: there is something in it for everyone. No matter whether you are from the equitable utilization or the no-harm school, you can claim at least partial victory.”

The replacement of “appreciable harm” with “significant harm” has been subject to continuous controversy in diplomatic and scholarly circles. Commenting on the notion of “appreciable harm,” McCaffrey observes that it implies “a real impairment of use, i.e. a detrimental impact of some consequence upon, for example, public health, industry, property, agriculture or the environment in the affected State.’ This explanation captures the meaning of ‘harm’—or, as the UN Convention puts it, ‘significant harm’—in most cases, as well.”\textsuperscript{95} These, however, are not the only forms of harm that watercourse States might cause each other:

‘Harm’ could also result from, e.g., pollution, obstruction of fish migration, works on one bank of a contiguous watercourse that caused erosion of the opposite bank, increased siltation due to upstream deforestation or unsound grazing practices, interference with the flow regime, channelling of a river resulting in erosion of the riverbed downstream, conduct having negative impacts on the riverine ecosystem, the bursting of a dam, and other actions in one

\begin{footnotes}
91. Id. at 16.
92. UN Watercourses Convention, supra note 6, art. 7.
93. Id.
94. McCaffrey, Prospects and Pitfalls, supra note 25, at 22.
\end{footnotes}
riparian state that have adverse effects in another, where the effects are transmitted by or sustained in relation to the watercourse.\textsuperscript{96}

It is clear, however, that the 1997 Convention does not absolutely prohibit causing significant harm.\textsuperscript{97} Instead, the threshold of State obligations is the exercising of "all appropriate measures" to prevent causing such harm.\textsuperscript{98} There may be questions "raised concerning the effect of such expressions as 'all appropriate measures', 'best practicable means at their disposal' or 'all practical steps'. But they are generally regarded as reflecting due diligence obligations ...."\textsuperscript{99} This interpretation of the obligation of taking "all appropriate measures" seems to be corroborated by the ILC commentary on the Draft Articles.\textsuperscript{100} The ILC therefore, elucidates on the scope and content of the obligation to exercise due diligence/take all appropriate measures by noting:

What the obligation entails is that a watercourse State whose use causes significant harm can be deemed to have breached its obligation to exercise due diligence so as not to cause significant harm only when it has intentionally or negligently caused the event which had to be prevented or has intentionally or negligently not prevented others in its territory from causing that event or has abstained from abating it. Therefore, "[t]he State may be responsible ... for not enacting necessary legislation, for not

\textsuperscript{96} Id.

\textsuperscript{97} The ILC commentary confirms this: "The obligation of due diligence contained in article 7 sets the threshold for lawful State activity. It is not intended to guarantee that in utilizing an international watercourse significant harm would not occur." ILC 1994 Report, supra note 11, at 237.

\textsuperscript{98} This obligation should be juxtaposed against the obligations relating to environmental protection that were discussed above. Article 21 of the 1997 Convention enjoins States to "prevent, reduce and control the pollution of an international watercourse that may cause significant harm ...." UN Watercourses Convention, supra note 6, art. 21 (emphasis added).

\textsuperscript{99} MCCAFFREY, THE LAW OF INTERNATIONAL WATERCOURSES, supra note 31, at 372.

\textsuperscript{100} ILC 1994 Report, supra note 11, at 238. The ILC noted in its commentary that the obligations to exercise due diligence could be deduced from numerous obligations in international treaties which included the obligation to "take all appropriate measures" (1985 Vienna Convention for the Protection of the Ozone Layer - Article 2), to "exert appropriate measures" (1988 Wellington Convention on the Regulation of the Antarctic mineral Resource Activities - Article 7), to "take all measures that are necessary" (1982 UN Convention on the Law of the Sea - Article 194). Id. This referral to obligations to take all appropriate measures as being similar to exercising due diligence shows that the amendment effectuated in the G.A. 6\textsuperscript{th} Committee might not be of much significance.
enforcing its laws . . . , or for not preventing or terminating an illegal activity, or for not punishing the person responsible for it.\

In conclusion, it is clear that the obligation not to cause significant harm, like the right to equitable and reasonable utilization of an international watercourse, is firmly grounded in customary international law and represents a general principle of law. However, the role and status of this principle in the law of non-navigational uses of international watercourses remains rather nebulous. Opinions have oscillated between those States adopting an absolutist view of the principle to others who, while not discrediting it, clearly subjugate it to the equitable and reasonable utilization principle. It is the relation between these principles and the dynamic relation between their application and the status and protection afforded to existing utilizations of international watercourses that will be the focus of the next section.

C. The Relation between the Equitable Utilization and Significant Harm Principles

During the negotiations on Articles 5, 6, and 7 of the 1997 Convention, a clear dichotomy emerged between upstream States on one hand, and downstream States on the other:

Upstream states generally favoured the equitable-utilization rule of Article 5 on the theory that it allows more flexibility in making new uses of their watercourses, particularly where the watercourses are being used intensely in downstream states. Conversely, downstream states on the whole preferred the 'no-harm' rule of Article 7 on the ground that it affords them, and especially their established uses, greater protection.\

The ILC negotiations did not escape this controversy either, some of its members favored eliminating any provision that reflected that the prohibition on causing harm, while "[o]thers believed that it was essential for the Commission to address the matter either as done in the 1991 text or the present text. The latter view prevailed. . . . Some members expressed their reservations with regard to the article, indicating preference for the text adopted on first reading."\

The ILC commentary on the Draft Articles, however, seems to provide a clear indication of the commission’s inclination towards the

101. Id. at 237.
103. ILC 1994 Report, supra note 11, at 244.
prioritization of the equitable and reasonable utilization rule over the significant harm rule. In elaborating the role of the significant harm rule in the 1997 Convention, the ILC observed:

The approach of the Commission was based on three conclusions: first, that article 5 alone did not provide sufficient guidance for States in cases where harm was a factor; second that States must exercise due diligence to utilize a watercourse in such a way as not to cause significant harm; third, that the fact that an activity involves significant harm, would not of itself necessarily constitute a basis for barring it. In certain circumstances ‘equitable and reasonable utilization’ of an international watercourse may still involve significant harm to another watercourse State. Generally, in such instances, the principle of equitable and reasonable utilization remains the guiding criterion in balancing the interests at stake.104

From the aforementioned, it is unmistakable that the commission intended Article 5 to supersede Article 7 should they come in conflict, thus allowing States to cause significant harm to the uses of other States in pursuance of equitable and reasonable utilization. This conclusion is corroborated by examining Article 7(2) of the final text, which obliges watercourse States to enter into consultations with the affected State to possibly mitigate or eliminate the harm caused while, however, “having due regard for the provisions of articles 5 and 6.”105 In concurrence, Bourne notes that “notwithstanding the various statements made in the commentary, the article [7] does not prohibit a use that is equitable and reasonable and done with due diligence, even though the use causes significant harm to other watercourse States.”106 The opinion of the ILA does not differ much from that adopted by the ILC, as both the Helsinki Rules and the 1986 Seoul Report of the ILA acknowledge the possibility of causing harm to other States in pursuance of equitable apportionment of international watercourses. In Article 1 of this latter report, the ILA stated:

A basin State shall refrain from and prevent acts or omissions within its territory that will cause substantial injury to any co-basin State, provided that the application of the principle of equitable utilization as set forth in Article IV of the Helsinki Rules does not justify an exception in a particular case. Such an exception shall be determined in accordance with Article V of the Helsinki Rules.107

104. Id. at 236 (emphasis added).
105. UN Watercourses Convention, supra note 6, art. 7(2).
106. Bourne, 1997 Convention, supra note 8, at 224.

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Furthermore, in the latest effort to discern the relation between the no-harm and equitable utilization principles, the ILA 2004 Berlin session concluded that "[b]asin States, in managing the waters of an international drainage basin, shall refrain from and prevent acts or omissions within their territory that cause significant harm to another basin State having due regard for the right of each basin State to make equitable and reasonable use of the waters."

From these pronouncements it may be asserted that the 1997 Convention prohibits, not the causing of significant harm per se to other watercourse States, but rather the infliction of legal harm. In other words, what is proscribed is a diminution of an international watercourse to the extent that it infringes on the ability of co-riparians to enjoy their legal rights to and equitable share of the beneficial uses of an international watercourse.

The matter of what constitutes a legal right seems to have been settled by the fact that the ILC and other institutions, including the ICJ, have considered equitable and reasonable utilization to be the basic and fundamental right of all States. Thus, every State has an equal right to the enjoyment of the beneficial uses of an international watercourse in an equitable and reasonable manner; this is the basic legal right of every watercourse State.

It is, therefore, suggested that significant harm would not constitute a violation of international law if inflicted in the endeavour to achieve equitable and reasonable utilization of an international watercourse. This conclusion is primarily based on the previously discussed interpretation of Article 7 of the 1997 Convention.

D. The Voting and Ratification Test

This interpretation of the 1997 Convention and the obligations established under customary international law does not, however, escape criticism. For while McCaffrey contends that the 1997 Convention reflects customary obligations, the voting records and the ratifications

http://www.fao.org/DOCREP/005/W9549E/w9549e08.htm#bm08..4.10.11 (emphasis added).

110. McCaffrey asserts that "it seems reasonable to conclude on the basis of state practice that at least three of the general principles embodied in the convention correspond to customary norms. These are the obligations to use an international watercourse in an equitable and reasonable manner, not to cause significant harm, and to
deposited—as of this writing, only fifteen States are party to the 1997 Convention—seem to indicate a lack of State enthusiasm for the principles enunciated in the 1997 Convention. In addition, “[w]hile the number of votes against the Convention was small, the significant number of abstentions, and misgivings expressed by some of the states voting in favor of the Convention indicate that the Convention, whatever else it may accomplish, does not codify the shared normative expectations of states at this time.”

Employing voting records as evidence—or lack thereof—of customary international law has been recognized by the ICJ, which stated in the Nicaragua case:

This opinio juris may, though with all due caution, be deduced from, inter alia, the attitude of the Parties and the attitude of States towards certain General Assembly resolutions . . . . The effect of consent to the text of such resolutions cannot be understood as merely that of a “reiteration or elucidation” of the treaty . . . it may be understood as an acceptance of the validity of the rule or set of rules declared by the resolution by themselves.

Judge Simma of the ICJ also affirms this view by noting that opinio juris “may be deduced from the conclusion of treaties or voting records in international fora . . . .”

notify potentially affected riparian states of planned measures on an international watercourse.” McCaffrey, Prospects and Pitfalls, supra note 25, at 27.

111. United Nations Treaty Series, available at http://untreaty.un.org/ENGLISH/bible/englishinternetbible/partI/chapterXXVII/treaty42.asp (last visited Apr. 3, 2007). The Convention, according to Article 36, requires 35 States to be party thereto for it to come into force. UN Watercourses Convention, supra note 6, art. 36.

112. HILAL ELVER, PEACEFUL USES OF INTERNATIONAL RIVERS: THE EUPHRATES AND TIGRIS RIVERS DISPUTE 183 (2002) (emphasis added). The draft convention was adopted in the 6th Committee with 42 votes in favor, 3 against and 18 abstentions, while in the General Assembly; the Convention was adopted with 104 votes in favour, 3 against, and 27 abstentions. For a detailed synopsis of the voting record of the UN 6th Committee and the Plenary Sessions, see Wouters, supra note 13. Charles Bourne also adopts this view, he observes: “In the face of this voting record, it would seem to be impossible to argue successfully that the provisions of the Convention are accepted as customary law by the international community. For states not party to the Convention, therefore, its provisions will at best serve only as guidelines, assisting in determining in a particular case whether a use of the waters of an international watercourse is reasonable and equitable . . . .” Bourne, 1997 Convention, supra note 8, at 231.


As an illustrative example, observing the positions espoused by the Nile basin States during the final negotiations on the 1997 Convention corroborates the conclusion that States, both upstream and downstream, do not consider the provisions of the 1997 Convention a statement of customary international law. Egypt, which abstained from the vote in both the 6th Committee and the General Assembly, noted primarily that the factors included in Article 6 could not in any way restrict the inclusion of other factors in the determining of equitable and reasonable utilization.\(^{115}\) In addition, Egypt found the wording of Article 5 objectionable, reaffirming the necessity of equating between Articles 5 and 7.\(^{116}\) Moreover, “the delegation of the Arab Republic of Egypt reaffirmed that the wording of article 7 should not be construed as undermining the established principle of sic utere tuo... and confirmed that this principle remains the cornerstone of any regime to be established by watercourse States.”\(^{117}\) Ethiopia, on the other hand, while voting for the draft Convention in the 6th Committee and abstaining from the vote in the General Assembly, noted that the Convention did not achieve the desired balance between upstream and downstream States, and that Part III of the Convention dealing with the procedures dealing with planned measures was too onerous for upstream States.\(^{118}\) Of the other ten Nile riparians, only Sudan and Kenya voted for the Convention, while Burundi voted against the Convention. Rwanda and Tanzania abstained from the vote, and the Democratic Republic Congo, Eritrea, and Uganda did not participate in the vote.\(^{119}\)

This lukewarm reception of the Convention has been attributed, \textit{inter alia}, to the difficulty that plagues any effort to formulate international regulations for international watercourses due to the immense diversity in circumstances surrounding different watercourse systems. Some have imputed international timidity in welcoming the 1997 Convention to the difficulty of arriving at a document that would alone suffice “to address the problems of water scarcity and to resolve water-sharing disputes in different parts of the world. The sharing of international rivers among riparians in different geographical regions is a


\(^{116}\) Id.

\(^{117}\) Id.

\(^{118}\) Id.

\(^{119}\) Id.
problem of great magnitude, and its resolution demands much more than a single piece of international legislation.”

It therefore, seems questionable that the 1997 Convention in general, and the relation between Articles 5, 6, and 7 in specific (which form the general applicable principles of the law of international watercourses), can be viewed as reflecting lex lata or customary international law. Thus, some scholars have argued that “the attempt in the ILC and the United Nations General Assembly to advance international water law beyond the flexible principle of equitable utilization has failed.”

IV. EQUITABLE UTILIZATION, NO-HARM AND EXISTING UTILIZATIONS OF INTERNATIONAL WATERCOURSE

It is contended here that while international law clearly recognizes the equitable utilization and the no-harm principles as a reflection of customary law, and even general principles of law, the relationship governing them remains nebulous. This dynamic relation, which currently seems to be in a state of lacuna, is the subject of this section.

Discerning the status of existing utilizations and the extent of protection afforded to such uses by international law could elucidate the nature of the relation between the equitable utilization and significant harm principles. This may be best shown by a hypothetical example:

Suppose, for example, that—as is often the case—upstream State A has not significantly developed its water resources because of its mountainous terrain. The topography of the downstream states on the watercourse, B and C, is flatter, and they have used the watercourse extensively for irrigation for centuries, if not millennia. State A now wishes to develop its water resources for hydroelectric and agricultural purposes. States B and C cry foul, on the ground that this would significantly harm their established uses. How should the positions of State A, on the one hand, and States B and C, on the other—neither of which seems unreasonable on its face—be reconciled? . . . If equitable utilization is the controlling legal principle, upstream State A may develop its water resources in an equitable and reasonable manner vis-à-vis downstream States B and C, even though that development would cause significant harm to their established uses. If, on the other hand, the obligation not to
cause significant harm is dominant, State A could engage in no development, no matter how equitable and reasonable, that would cause States B and C significant harm.\textsuperscript{122}

The status of existing uses of international watercourses, and the protection accorded to such uses, has been the focus of many discussions in scholarly and diplomatic arenas concerned with the law on international watercourses. States have adopted a myriad of legal arguments and justifications all designed to protect the interests of States in utilizing international watercourses. In discussing the status of existing uses, this section will examine the extent of protection afforded to such established uses and the measure of harm that may be afflicted to such uses in the pursuit of the equitable apportionment of international watercourses.

Primarily, it is contended that “slight” or inconsequential harm to existing uses is condoned by customary international law. This is evidenced by a catalogue of judicial and juristic opinions. The United States Supreme Court has established in innumerable cases that it would not enjoin states to halt diversions of watercourses that would not cause significant harm to other riparian states. In \textit{Kansas v. Colorado},\textsuperscript{123} the Court noted that the failure of Kansas to show serious detriment to its substantial interests meant that the court could not order the termination of diversions in Colorado. Further, in \textit{Connecticut v. Massachusetts},\textsuperscript{124} the Court adjudged that due to Connecticut’s inability to show serious injury to its existing uses, it could not disallow the continuance of diversions of a watercourse for Boston. The Court adopted the same stance in \textit{Missouri v. Illinois}, where it stated, “[b]efore this court ought to intervene the case should be of serious magnitude, clearly and fully proved . . . .”\textsuperscript{125}

Furthermore, many of the previously discussed cases, such as the Trail Smelter arbitral award, show that the international legal obligation upon States is not an absolute proscription of causing harm to the interests of other States. Rather, the obligation is one of avoiding “serious,”\textsuperscript{126} “substantial,”\textsuperscript{127} and/or “considerable”\textsuperscript{128} harm. This opinion

\begin{footnotesize}
\begin{enumerate}
\item[122.] McCaffrey, \textit{Prospects and Pitfalls}, supra note 25, at 20–22.
\item[123.] Kansas v. Colorado, 206 U.S. 46.
\item[124.] Connecticut v. Massachusetts, 282 U.S. 660 (1931).
\item[125.] Missouri v. Illinois, 200 U.S. 496, 521 (1906).
\item[126.] Trail Smelter Case, 3 R.I.A.A. at 1965.
\item[127.] Deutsches Staatsgerichtshof, Entscheidungen des Reichsgerichts in Zivilsachen [German Court, Decisions of the State Courts in Civil Matters], vol. 116 (Supp. 1927), at 18 (original in German, translation by the author).
\item[128.] \textit{Id}.
\end{enumerate}
\end{footnotesize}
is certainly corroborated by examining the efforts of the ILI, ILA, and ILC in codifying and progressively developing the law of international watercourses; thus Bourne concludes that "one can marshal a mass of opinion for excluding minor or slight injuries from the category of unlawful injuries."\(^\text{129}\)

Having shown that slight modifications of existing uses are not prohibited, this section will now move to the second, and more controversial, question of diversions and utilizations of international watercourses that cause significant harm to existing uses in co-riparian States.

Primarily, it seems reasonable to assume that wasteful existing uses should not be accorded priority or protection when confronted with needs from other riparian States. This assertion emanates also from the jurisprudence of the United States Supreme Court, which has affirmed in many cases that, particularly where water was scarce, water should be utilized with due diligence and reasonableness to ensure lack of waste.\(^\text{130}\) In *Washington v. Oregon*, the Court stated that "[t]here must be no waste . . . of the "treasure" of a river . . . Only diligence and good faith will keep the privilege alive."\(^\text{131}\)

The question, therefore, arises as to what solution the law of international watercourses offers in situations of competing reasonable, beneficial uses. The ILC addressed this question in its commentary by observing:

In many cases, the quality and quantity of water in an international watercourse will be sufficient to satisfy the needs of all watercourse States. But where the quantity or quality of the water is such that all the reasonable and beneficial uses of all watercourse States cannot be fully realized, a 'conflict of uses' results. *In such a case, international practice recognizes that some adjustments or accommodations are required in order to preserve each watercourse State's equality of right. These adjustments or accommodations are to be arrived at on the basis of equity, and can best be achieved on the basis of specific watercourse agreements.*\(^\text{132}\)

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\(^{130}\) This should not be construed as allowing the discontinuance of utilizations that are inefficient due to financial and technological constraints on a watercourse states. See discussion supra Part III on the factors to be considered in the determination of equitable and reasonable utilization for further discussion on this point.


\(^{132}\) ILC 1994 Report, supra note 11, at 221–22 (emphasis added).
Therefore, what will be offered here is a formula or methodology for reaching these ‘accommodations or adjustments’ between existing beneficial uses and new or planned uses between watercourse States.

V. A FIRST AMONG EQUALS

This paper argues that existing utilizations of international watercourses should be not readily interrupted or discontinued due to the presence of another equitable use in another watercourse State. Rather, such uses may only be compromised if it is shown that the new use is equitable and reasonable, and that the benefits accrued from initiating this new use will significantly outweigh the harm done to another State. The effect of this formula is that the harm incurred by existing uses will become a ‘first among equals’ in its relation to the principle of equitable utilization of international watercourses. As one jurist noted, existing uses of international watercourses should not be readily jeopardized due to the appearance of new uses in other watercourses States; rather “a new use will prevail over an existing one if the benefits of the new use to its user are of such great magnitude as to outweigh the injury to the existing use. Under certain circumstances, an existing use may be modified in order to accommodate a new use.”

This method of weighing the harm incurred by an existing use against the benefit reaped from a new utilization was also referred to in the commentary to the 1966 Helsinki Rules. It was recognized that numerous jurists have espoused absolutist positions either calling for the absolute protection of existing uses because they form vested interests,

133. Jerome Lipper, Equitable Utilization, in THE LAW OF INTERNATIONAL DRAINAGE BASINS 15, 65 (A. H. Garretson, et al. eds., 1967) (emphasis added). It was also stated in the case of Württemberg and Prussia v. Baden that:

The exercise of sovereign rights by every state in regard to international rivers traversing its territory is limited by the duty not to injure the interests of other members of the international community. Due consideration must be given to one another by states through whose territories there flows an international river. No state may substantially impair the natural use of the flow of such a river by its neighbour . . . . The interests of the states in question must be weighed in an equitable manner against one another. One must consider not only absolute injury caused to the neighbouring state, but also the relation of the advantage gained by one to the injury caused to the other. Deutsches Staatsgerichtshof, supra note 127 (emphasis added).

134. Helsinki Rules, supra note 23, art. VII.

135. McCaffrey refers to numerous authors that have adopted the ‘Absolute Territorial Integrity’ theory including Max Huber, Oppenheim, Reid, and Fleischmann. McCAFFREY, THE LAW OF INTERNATIONAL WATERCOURSES, supra note 31, at 133. In
or, on the other extreme, arguing that existing uses should not be granted any weight whatsoever. The former position was discredited due to the inequity of granting a perpetual vested right to the first user of an international watercourse, in that “[s]uch a policy would in all likelihood lead to a “use race”, resulting in haphazard planning and inefficiency. In addition, such a law would be so unjust and onerous that it would be ignored by States.” On the other hand, denying any weight to existing uses would inhibit investment in international watercourses due the uncertainty that would surround these uses if they may be readily interrupted by new uses: “A State is unlikely to invest large sums of money in the construction of a dam if it has no assurances of being afforded some legal protection for the use over an extended period of time.” The ILA therefore, offers a compromise between the two extreme positions:

It gives protection to an existing use but only so long as the factors justifying its continued existence are not outweighed by factors showing the desirability of its modification or termination. A modification or termination, to be consistent with equitable utilisation, may, in a particular case, require compensation to the user. There may also be instances where an existing use will be “phased out” over a period of time in order to give the user the opportunity to develop alternative sources of water.

The precise formula for ‘balancing’ or ‘weighing’ existing uses and new uses was further elucidated by the U.S. Supreme Court in the cases

addition, many Egyptian jurists have argued that Egypt enjoys ‘vested rights’ over a certain quantity of the Nile Waters which is absolutely protected by international law and which other watercourse States may not diminish for whatever purpose, for example Moussa states that “it is not disputed that international law and organization are founded on respect for acquired natural and historical rights of all parties, as well as respect of existing and acquired economic interests and allowing for their development” Ahmad Moussa, Markaz Misr fi Masaalat Miah El-nil [The Egyptian Position Regarding the Issue of the Nile Waters], 14 REVUE EGYPTIENNE DE DROIT INTERNATIONAL 48 (1958) (original in Arabic, translation by author). See also Gamal Moursi Badr, The Nile Waters Question, 15 REVUE EGYPTIENNE DE DROIT INTERNATIONAL 97 (1959). The U.S. Supreme Court also adopted a similar position in Wyoming v. Colorado, where it stated that “[t]he cardinal rule of the doctrine is that priority of appropriation gives superiority of right.” Wyoming v. Colorado, 259 U.S. 419, 470 (1922).

136. McCaffrey highlights that some publicists have espoused the ‘Absolute Territorial Sovereignty’ theory including Fenwick, Hyde, Simsarian, Mackay, and Klüber. McCAFFREY, THE LAW OF INTERNATIONAL WATERCOURSES, supra note 31, at 123.

137. Helsinki Rules, supra note 23, art. 7, cmt.
138. Id. art. 8, cmt. (a).
139. Id.
of *Colorado v. New Mexico*,140 in 1982 and 1984. The dispute revolved around the Vermejo River, at which time was in almost complete utilization in New Mexico for many years while Colorado had only commenced planning for diversions of the waters of the river for industrial development in 1975. In adjudicating the dispute, the Court noted that its previous jurisprudence had established that the application of the equitable and reasonable utilization rule requires the consideration of all the relevant factors, and balancing the harm caused to the existing uses with the benefits garnered by new utilizations:

[W]ater rights in Wyoming and Nebraska, which under state law were senior, had to yield to the “countervailing equities” of an established economy in Colorado even though it was based on junior appropriations. We noted that the rule of priority should not be strictly applied where it “would work more hardship” on the junior user “than it would bestow benefits” on the senior user. The same principle is applicable in balancing the benefits of a diversion for *proposed* uses against the possible harms to existing uses.141

In determining the “countervailing equities” the Court underlined that:

[T]he equities supporting the protection of existing economies will usually be compelling. The harm that may result from disrupting established uses is typically certain and immediate, whereas the potential benefits from a proposed diversion may be speculative and remote. Under some circumstances, however, the countervailing equities supporting a diversion for future use in one State may justify the detriment to existing users in another State.... While the equities supporting the protection of established, senior uses are substantial, it is also appropriate to consider additional factors relevant to a just apportionment.142

This passage clearly shows that while all relevant factors should be considered, the protection of existing uses remains “compelling” and “substantial.” It is therefore asserted that existing uses are accorded higher priority and special consideration in apportionment disputes. This conclusion is corroborated by the section of the judgment elucidating the burden of proof necessary to show that an existing use should be modified to accommodate a new use.

Initially, the burden of proof is on the State enjoying the existing utilization to show that commencing a new utilization would cause it

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141. *Id.* at 186–87 (emphasis in original) (internal citation omitted).
142. *Id.* at 187–88 (emphasis added).
“real or substantial injury.” In the case at hand, noting that the river is under complete utilization, New Mexico would have been substantially injured by the proposed utilizations in Colorado. Having carried its burden to show substantial injury would be inflicted by the proposed use, the burden of proof shifted to Colorado:

The burden has therefore shifted to Colorado to establish that a diversion should nevertheless be permitted under the principle of equitable apportionment. Thus, with respect to whether reasonable conservation measures by New Mexico will offset the loss of water due to Colorado’s diversion, or whether the benefit to Colorado from the diversion will substantially outweigh the possible harm to New Mexico, Colorado will bear the burden of proof.... Moreover, Colorado must establish not only that its claim is of a “serious magnitude,” but also that its position is supported by “clear and convincing evidence.”

In addition, the Court noted that the State initiating a new use was under an obligation to show that it planned to minimize the extent of the diversion, and thus minimize the extent of the harm inflicted on the existing uses.

Thus, the court placed the burden of proof on the State contemplating the initiation of a new use of an international watercourse to show:

1. That the existing uses could be maintained with the adoption of conservation measures.

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143. Id. at 188. This is the same standard that was referred to above in the discussion of slight injury to existing uses. The U.S. Supreme Court affirmed this in Connecticut v. Massachusetts, 282 U.S. 660.

144. Colorado v. New Mexico, 459 U.S. at 188. The Special Master appointed by the Supreme Court confirmed that most of the waters of the river were utilized by New Mexico “and that very little, if any, reaches the confluence with the Canadian River. He thus recognized that strict application of the rule of priority would not permit Colorado any diversion since the entire available supply is needed to satisfy the demands of appropriators in New Mexico.” Id. at 180.

145. Id. at 188 (emphasis added).

146. Id.

147. This burden of proof is of course only ‘triggered’ if the state enjoying the existing use could prove that it would be substantially harmed by the new use being contemplated by the other watercourse state. Id.

148. The Court also noted that any conservation measures to be taken in the existing utilization that were suggested by the initiating state should be “financially and physically feasible” and “within practicable limits.” Id. at 192. The court thus reflected its own jurisprudence in cases such as Wyoming v. Colorado, and other international jurisprudence – see discussion supra Part III on the factors to be examined in determining
2. OR, that the benefit gained by the new use would *substantially outweigh* the harm inflicted on the existing use.

3. AND, that it plans to minimize its planned diversion by adopting conservation measures.

4. The State must show that its claim was of *serious magnitude* and to substantiate this claim with *clear and convincing evidence*.

The court was however unable to issue a final judgement on the case; instead it remanded because of a lack of specific factual information regarding the possibilities of conservation in both States and the harm and benefits expected if the diversions were allowed in Colorado. Following the receipt of further details from the Special Master, the Court re-examined the case, and applied the aforementioned standard of proof to Colorado’s proposed diversions.

In the second hearing of the case, it was observed by the Special Master that the primary source of inefficiencies among the existing utilizations resided in a Conservancy District in New Mexico. The Court, however, still ruled in New Mexico’s favor, noting that this aforementioned fact, which was relied on by Colorado to prove that conservation efforts in the existing uses would allow for the institution of new uses, did not meet the threshold placed by the Court in its earlier hearing. The Court reasoned that Colorado’s failure to point to *specific measures* that could be taken in New Mexico to alleviate the harm inflicted by the new use meant that it had failed to meet the threshold.

The Court stated:

> Colorado has not identified any “financially and physically feasible” means by which the District can further eliminate or reduce inefficiency and ... we [the Court] believe that the burden is on Colorado to do so. A State can carry its burden of proof in an equitable apportionment action only with specific evidence about how existing uses may be improved, or with clear evidence that a project is far less efficient that most other projects. Mere assertions about the relative efficiencies of competing projects will not do.

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149. *Id.*


151. *Id.* at 318.

152. *Id.*

153. *Id.* at 320.

154. *Id.*
Furthermore, the Court observed that Colorado’s planning efforts did not reflect the undertaking of reasonable measures to minimize the diversions required, or that the needs of the proposed project could be satisfied through other sources. The Court noted that

[s]ociety’s interest in minimizing erroneous decisions in equitable apportionment cases requires that hard facts, not suppositions or opinions, be the basis for interstate diversions . . . [W]e [the court] do not believe Colorado has produced sufficient facts to show, clear and convincing evidence, that reasonable conservation efforts will mitigate sufficiently the injury that New Mexico successfully established last Term that it would suffer were a diversion allowed.

In examining whether Colorado had produced clear and convincing evidence that its diversions would create benefits substantially outweighing the harm inflicted on existing uses, the Court also found in favor of New Mexico. It was observed that Colorado planned to utilize the diverted waters primarily in agriculture and later in coal mining, power generation, timbering, and other industrial operations. The Special Master concluded these diversions would lead to considerable benefits in Colorado. The Court, however, again found against Colorado, noting that it had failed to meet the required threshold of clear and convincing evidence of substantial benefit as compared to the inflicted harm. The Court stated:

Colorado objects that speculation about benefits of future uses is inevitable and that water will not be put to its best use if the expenditures necessary to development and operation must be made without assurance of future supplies. We agree, of course, that asking for absolute precision in forecasts about the benefits and harms of a diversion would be unrealistic. But we have not asked for such precision. We have only required that a State proposing a diversion conceive and implement some type of long-range planning and analysis of the diversion it proposes.

A final issue that was examined by the Court was whether the fact that Colorado contributed about three-fifths of the Vermejo River entitled it to a share of the river. The Special Master recommended that

155. Id.
156. Id. at 320–21.
157. Id. at 322.
158. Id. at 321.
159. Id.
160. Id. at 323.
161. Id.
"the equities are with Colorado, which requests only a portion of the water which it produces." The Court, however, again adjudged in favour of New Mexico:

[TR]he equitable apportionment of appropriated rights should turn on the benefits, harms, and efficiencies of competing uses, and that the source of the Vermejo River's waters should be essentially irrelevant to the adjudication of these sovereigns' competing claims.

Thus, it is clear that a State demanding a share of an international watercourse for the initiation of a new use that might significantly harm other watercourse States must comply with a high standard of proof to allow for the infliction of harm on existing uses. It also seems clear, from this groundbreaking case, that certain factors enumerated in Article 6 of the 1997 Convention do not enjoy as much weight as other factors. So, for example, the fact that the Vermejo rises in Colorado did not entitle it to a share of the beneficial uses of the watercourse. Rather, a State should demonstrate through clear and convincing evidence that it is in need of the water, and that this water will produce beneficial results, and these beneficial results substantially outweigh the harm caused to existing uses.

This methodology for applying the 'accommodations and adjustments' envisioned by the abovementioned ILC commentary clearly places more weight and priority on existing uses. In other words, such utilizations of international watercourses should not be considered on equal footing with other factors; harm caused to these uses should not become simply another factor to be considered. According to this method, existing uses could be considered 'a first among equals' in relation to other categories of uses. Therefore, the prohibition on

162. Id.
163. Id.
164. It is important here to recall that McCaffrey was quoted above in saying that Articles 5, 6, and 7 of the 1997 Convention show that harm should be treated as a factor in the determination of equitable utilization, and that significant harm should be tolerated in the achieving of an equitable and reasonable apportionment of the beneficial uses of an international watercourse. McCaffrey, The Law of International Watercourses, supra note 31, at 348.
165. The idea of granting existing uses preferential treatment has been adopted in numerous pronouncements by various authorities, albeit with differing degrees of protection for these uses, thus for example, a 1958 UN Report on the law of international watercourses observed: 'Historic uses and priority of appropriation have, in many cases, come to have an almost sacred significance, irrespective of the actual benefits derived, or whether the water is being put to the best use.' Quoted in McCaffrey, The Law of International Watercourses, supra note 31, at 337. Furthermore, the Indus waters commission in apportioning the waters of the Sutlej river between the provinces of
significant harm acts as a mitigating factor on the absolute application of equitable utilization by ensuring, primarily, that the proposed new use is equitable and reasonable. Second, the prohibition ensures that all possible avenues—such as conservation measures and the availability of other sources—have been exhausted before existing uses are disturbed or terminated. Third, it ensures that the benefits accrued though such utilizations significantly outweigh the harm caused by altering existing uses. Finally, the State proposing the initiation of a new use would have to employ conservation measures to reduce the extent of the harm inflicted.

It is submitted that this methodology reflects more accurately the status of *sic utere tuo* as a general principle of law. It also reflects the desired balance between the significant harm and equitable utilization rules. Further, it also denies arguments bestowing on existing uses absolute protection reflected in assertions of vested, historical, or natural rights. Such a contention would, observes McCaffrey, be "unsound as a matter of both policy and law. It encourages a 'race to the river' and rewards the 'winner' with absolute protection, regardless of the merits of either its use or the potential uses of other states . . . ."166

Instead, this formula creates a clear mechanism to which States could revert in water apportionment disputes to reach reasonable and equitable division among competing uses. Other formulations—such as the one adopted in the 1997 Convention—which seem to subjugate the no-harm rule to the equitable utilization rule, would be detrimental to existing beneficial uses because they do not ensure that all other

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Punjab and Bahawalpur, observed that “the general principle is recognized that these waters should be distributed in the best interests of the public at large, irrespective of provincial or state boundaries, subject always to the proviso that established rights are fully respected.” J.G. Laylin, *Principles of Law Governing the Uses of International Rivers: Contributions From the Indus Basin*, 51 AM. SOC. INT’L L. PROC. 20, 22 (1957), *quoted in Bourne, The Right to Utilize*, supra note 129, at 236. Moreover, in examining the status of existing uses of international watercourses, the Committee on International Watercourses of the American Branch of the ILA observed: "As a rule, the protection of uses, lawful when they came into existence, so long as they remain beneficial, has been treated as an absolute first charge upon the waters. If for example, a nation has, without objection by other co-riparians, built a multi-purpose dam and is operating a hydroelectric plant upon and international river, it will hardly be suggested that a study of potential uses of the river should be approached as though the dam were still in the planning stage and the economic and populations development dependant on it had not yet taken place.” *Quoted in Aziza Mourad Fahmi, International River Law for Non-Navigable Rivers with Special Reference to the Nile*, 23 REVUE EGYPTIENNE DE DROIT INTERNATIONAL 29 (1967) (emphasis added).

remedies and avenues had been exhausted and examined before threatening existing uses. Therefore,

[r]easonable existing uses should be given conditional priority because communities rely on the status quo. Communities that expect a certain supply of water should not be deprived of their water unless their use is unreasonable. Moreover, this proposition promotes stability and efficiency because it allows States the opportunity to invest in reasonable, long-term planning. As long as the initial use continues to be reasonable, the State can continue to use its resources in the same manner.167

This formula also retains the necessary degree of flexibility which allows it to be applied to different watercourses. In other words, "existing beneficial uses are generally—in international law—accorded a special, preferred status in the apportionment of an international river. The precise quality of that status necessarily depends upon the economic, political, and hydrological facts pertinent to the particular apportionment."168

VI. CONCLUSIONS

It is therefore possible to assert that while the status of the 1997 Convention as a statement and codification of customary international law remains questionable, the method enunciated in the case of Colorado v. New Mexico presents States, tribunals, courts, and international organizations with a practical and effective solution to the problematic relation between the equitable utilization and significant harm rules. It offers a mechanism for considering and respecting the rights, needs, and developmental goals of all watercourse States without according any State or use inherent absolute priority. Finally, it also offers a realistic approach towards considering the status of existing uses of international watercourses, which may in some cases represent the raison d'etre of certain riparian States, without disregarding the legitimate requirements of other States.