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Development of International River Basin: Regulation of Riparian Competition: Part II

Nitza Shapiro-Libia

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In part one of this study, the author discussed and analyzed the principles of territorial supremacy, territorial integrity, and the unity of a river basin in relation to riparian rights in international river development. Since progressive regulation of international rivers should be directed at stimulating development of an entire river basin, the doctrine of equitable apportionment seems to be the best suited to the task. However, the usefulness of this doctrine is limited since it is dependent upon agreements or authoritative decisions for the concrete interpretation of its terms.

Issues raised in disputes surrounding the development of international river basins suggest the problem of an appropriate system for resolution. Subordination of unilateral projects to comply with certain prior conditions, establishment of permanent or ad hoc commissions, recourse to mediation or conciliation services, or submission to arbitral or judicial settlement have all been suggested for this purpose. These alternatives must be considered in the light of their ability to cope with the issues involved as well as their applicability to a wide variety of international relations.

DISPUTES RESOLUTION CONCERNING UNILATERAL DEVELOPMENT PROJECTS

Review of the practices resorted to during the dispute between France and Spain over Lake Lanoux is illustrative. The border between France and Spain had been settled by various treaties culminating in the Treaty of Bayonne of May 1866. On the same day the parties agreed on special provisions for the regulation of water rights in international rivers. Although various French schemes for the utilization of the
waters of Lake Lanoux were advanced as early as 1917, they never came to fruition because of objections raised by Spain. The International Commission for the Pyrenees, created by the French and Spanish governments in 1875, met in February 1949 and agreed to set up a Mixed Commission of Engineers whose mandate was to study and report on the question of Lake Lanoux. This Commission met twice: during August 1949 and in August 1955 and reported its inability to accomplish anything. The International Commission of the Pyrenees met again in November 1955 and set up a Special Mixed Commission with a new composition to which were submitted both a new French scheme differing from previous French schemes by safeguarding Spanish interests and the Spanish counter-proposal. However, since no agreement was reached within the three month time limit set by the French government for the negotiations, France informed Spain in March 1956 "of its determination henceforth to exercise its freedom within the area of its rights."

The last step to which the disputants resorted was submission of the controversy to an arbitral tribunal pursuant to the Arbitration Treaty of 1929 which was in force between the parties. The compromise signed on November 19, 1956 referred the following question to the arbitral tribunal:

Is the French Government justified in its contention that in carrying out, without a preliminary agreement between the two governments, works for the use of the waters of Lake Lanoux on the terms laid down in the project and in the French proposals mentioned in the preamble to this compromise, it would not commit a violation of the provisions of the Treaty of Bayonne of 26 May of 1866 and of the Additional Act of the same date?


130. See The Sentence at 87-92; Judicial Decisions at 157.
133. The Sentence at 80; Report of the Secretary General at 497.
The argument which the Spanish government presented to the tribunal was based mainly upon two contentions. The first was that the French project alters the natural conditions of the hydrographic basin of Lake Lanoux by diverting its waters to the Ariege and thereby making the return of the waters to the Carol physically dependent on the will of man, which will lead to the de facto predominance of one party instead of the equality of the two parties contemplated by the Treaty of Bayonne and the Additional Act. [Furthermore,] from the moment that the will of man intervenes to carry out any hydraulic development whatever, an extra-physical element acts on the current and alters what Nature established.

The second Spanish contention was that the execution of the French project required "the preliminary agreement of the two governments, and that in the absence of such agreement the country which proposed the project could not have freedom of action to undertake the works."

The tribunal rejected the first contention stating, in part, that:

The unity of a basin is supported at the legal level only to the extent that it conforms to the realities of life. Water, which is by nature a fungible thing, may be restored without alteration of its qualities from the viewpoint of human needs. A withdrawal with return, as contemplated in the French project, does not alter a state of affairs established in response to the demands of life in society.

The tribunal also concluded that the requirement of preliminary agreement was not necessitated either by the treaties mentioned or by existing positive international law since the French project was not calculated to alter the waters of the Carol nor to inflict injuries to Spain. The tribunal indicated the negative impact which might follow from the acknowledgement of a contention like that of the Spanish government:

In fact, to evaluate in its essence the need for a preliminary agreement, it is necessary to adopt the hypothesis that the states concerned cannot arrive at an agreement. In that case, it would have to be admitted that a state which ordinarily is competent has lost the right to act alone as a consequence of the unconditional and discretionary opposition of another state. This is

134. The Sentence at 102-03; Report of the Secretary General at 501.
135. The Sentence at 105; Report of the Secretary General at 503.
136. The Sentence at 103; Report of the Secretary General at 501.
to admit a "right of consent," a "right of veto," which at the discretion of one state paralyses another state's exercises of its territorial competence. 137 [Emphasis added.]

Two observations should be made with regard to the Franco-Spanish experience. First, the existence of the various devices designated to cope with water-rights problems—the Treaty of Bayonne and the Additional Act of 1866, the International Commission for the Pyrenees of 1875, the Arbitration Treaty of 1929, the Mixed Commission of Engineers of 1949, and the Special Mixed Commission of 1955—did not preclude a long-lasting controversy over relatively limited issue. In light of this experience, the capability of the devices pursued to serve as efficient methods for settling water controversies appears to be questionable. The second observation involves the sensitive question of a state's territorial competency. The tribunal, cognizant of the possible paralyzing effect which might follow the subjection of unilateral projects to prior agreement, ruled that a state is not required to obtain the prior agreement of other riparians in order to carry out a project not calculated to injure such other riparians. Yet the implementation of a project might still be paralyzed, at least temporarily, by contesting the lack of injurious effect, even though prior agreement is unnecessary. When a contemplated project is challenged on the ground of its injurious effect, the alternatives presented to the challenged state, apart from agreement, are recourse to arbitration or its equivalent or completion of the project with the risk of future exposure to unpredictable liabilities determined by an eventually agreed-upon authority. A challenged state might be deterred from choosing the second alternative, either by fear of an adverse decision requiring specific restitution or heavy pecuniary damages or by a desire to prevent the consequences of worsened relations with its neighboring states. In this case, a state must await judgment on its rights, meanwhile allowing its development project to stagnate. The period of stagnation is dependent either upon the procedure available to the parties for dispute resolution or upon the parties' flexibility in establishing new and adequate procedures. In light of the tribunal's hypothesis "that the states concerned cannot arrive at an agreement" upon the procedure to be pursued, then it must be admitted that the challenging riparians are vested in fact with a "right of consent," or a "right of veto."

The resolutions adopted by three international law institutes mentioned in the first part of this article 138 also pertain to the problem of

137. The Sentence at 106; Report of the Secretary General at 504.
138. See text accompanying notes 67 to 80 supra.
institutionalizing the settlement of controversies provoked by unilateral projects.

The resolution of the Tenth Conference of the Inter-American Bar Association provided that states are

under a duty to refrain from making changes in the existing regime [of a system of international waters] that might affect adversely the advantageous use by one or more other states having a part of the system under their jurisdiction, except in accordance with: (i) an agreement with the State or States affected or (ii) a decision of an international court or arbitral commission.189

The scope of issues involved under this formation is broader than that considered in the Lake Lanoux case. In addition to the question of whether a certain change might affect adversely the advantageous use by other riparians, the question of whether to admit such changes is raised, a question which involves the broader issue of apportionment of benefits. The methods advanced for settling these issues may all be conditioned upon agreement between the disputants. Recourse to either the International Court or an arbitral commission would require a prior agreement to vest these institutions with jurisdiction.140 If no such agreement can be reached, the controversy is apt to remain unresolved and the injunction "to refrain from making changes" amounts to admitting that a riparian alleging the changes to be injurious has a right of consent or a right of veto.

The Salzburg session of The Institute of International Law recommended similar methods, but it supplemented this recommendation with a provision designed to circumvent the right to veto. The parties should first submit the dispute to judicial settlement or arbitration.

If the State objecting to the works or utilizations projected refuses to submit to judicial settlement or arbitration, the other State is free, subject to its responsibility, to go ahead while remaining bound by its obligations arising from the provisions of articles 2 to 4.141

139. Report of the Secretary General at 544.
140. The adequacy of these institutions to deal with disputes over international rivers is discussed infra.
141. Article 2 provides that the right of a riparian to utilize an international river is limited by the utilization rights of the other riparians; Article 3 provides that the scope of these rights has to be determined on the basis of equity; and Article 4 enjoins utilization or works which seriously affect the possibility of utilization of the same waters by other states except on condition of assuring them the enjoyment of the advantage to which
This method attempts to safeguard the rights of riparians against the adverse effect of utilization works carried on by other riparians and at the same time to free riparians who contemplate such works from the right of veto of the other riparians. But the provisions formulated to that effect may cause damage to either category of riparians.

On the one hand, the ability of a riparian to utilize the waters is not to be seriously affected by projects of other riparians, unless the riparian is assured of an equitable share of benefits and adequate compensation for damages. Yet, the refusal of such riparians to submit to judicial settlement or arbitration, for whatever reasons, entitles other riparians to carry out utilization projects and leaves to their judgment the effect of their projects upon the refusing riparian. Although a riparian which undertakes a utilization project is held responsible for its obligations under the above provisions, there is no assurance of having its compliance determined by an agreed-upon authority. Even if non-compliance will eventually be established by an authoritative judgment, it would not erase injuries suffered in the meantime.

On the other hand, riparians are entitled to carry out utilization projects without the prior agreement of possibly affected riparians if the latter refuse to submit to judicial settlement or arbitration. In the absence of an authoritative decision, riparians must rely on their own discretion in complying with the obligation attached to the execution of their projects. However, their discretion may be at variance with a subsequent authoritative decision, thereby resulting in liability for non-compliance.

The International Law Association's New York resolution of 1958 recommended a different method for overcoming an eventual impasse:

Co-riparian States should refrain from unilateral acts or omissions that affect adversely the legal rights of a co-riparian State in the drainage basin so long as such co-riparian State is willing to resolve differences as to their legal rights within a reasonable time by consultation. In the eventuality of a failure of these consultations to produce agreement within a reasonable time, the parties should seek a solution in accordance with the principles and procedures (other than consultation) set out in the Charter of the United Nations and the procedures envisaged in Article 33 thereof.142

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The prohibition of unilateral actions affecting the legal rights of other riparians pertains only to situations in which the riparians to be affected are willing to resolve their differences by consultations; there is no duty to refrain from unilateral actions in the absence of willingness on the part of the affected riparian to conduct consultations. Although it might be argued that the authorization of unilateral actions is justified in light of the refusal to consult, the issue must be considered in the context of the overall relations between the riparians. Hostile relations which are brought about by various sharp conflicts may prevent temporarily all contacts between the riparians. The Arabs’ twenty-year-old refusal to recognize and to negotiate with Israel illustrates this situation. Under such circumstances it is doubtful whether refusal to consult on water uses should be considered as justifying unilateral actions. In comparison, the harsh results which might ensue from unilateral actions could be spared by vesting an adequate tribunal with compulsory jurisdiction over such controversies.

To resolve situations where consultations have failed to bring about an agreement, the Hamburg Conference of 1960 promulgated the Hamburg Recommendations on Procedure concerning non-navigational uses. These recommendations provide for the formation of an "ad hoc Commission which shall endeavor to find a solution likely to be accepted by the States involved, of differences as to their rights." If no commission is formed within a reasonable time, or no solution is reached, or the solution is unacceptable to the states, the states should agree to submit the dispute to an arbitral tribunal (whose formation will be determined by the states or the commission) or to a permanent court of arbitration or, if they fail to do so, to the International Court of Justice.

The combination of recommendations made by the New York and the Hamburg conferences is advantageous since riparians are called upon to refrain from unilateral action which affects adversely other riparians and the right of veto is eliminated by the provision of alternative tribunals which are to operate in an advisory or decision-making capacity, as the case may be. The procedures recommended above resemble those employed during the controversy between France and Spain and are valuable for those riparians unequipped with the proper agreed-upon procedures.

A few observations should be made with regard to the combined effect of the Hamburg Procedure and the Franco-Spanish experience.

143. The commission and its president are to be appointed by the states involved; in the event of disagreement on the appointments, each states is to appoint two members, and they are to choose the president. In the absence of agreement between the appointees, the member president is to be appointed (at the request of any of the states involved) by the President of the International Court of Justice or by the Secretary-General of the United Nations. INTERNATIONAL LAW ASSOCIATION, REPORT OF THE FORTY-NINTH CONFERENCE HELD AT HAMBURG 59 (1961).
First, the procedure is applicable only to riparians which are willing to consult with each other with regard to unilateral projects undertaken by them. Second, the procedure’s efficiency is conditioned upon the readiness of both disputants to carry out the specified terms of the procedure. Third, recourse to all the alternative tribunals provided by the recommendations might prove to be a lengthy procedure. Fourth, the final alternative tribunal, the International Court of Justice, is possibly suited to adjudicate controversies concerning the question whether a given unilateral project is likely to affect the riparians adversely.\textsuperscript{144}

The observation concerning the protracted nature of the procedure rests on the premise that riparians tend to be strongly reserved in dealing with water-uses; that such a premise is not unencountered was proved by the Franco-Spanish experience. Despite the fact that the two riparian states were able to conclude agreements on the relevant questions and to set up commissions to deal with such questions, their differences were settled only by an arbitral tribunal. The failure of the commissions can be accounted for partly by the limited mandate conferred upon them; generally the resourcefulness of a commission depends largely upon the scope of its mandate. The mixed commission, for example, was mandated “to study the question of Lake Lanoux and to submit the results of its labors to the Governments.”\textsuperscript{145} Likewise, the authority conferred upon the ad hoc commission, established in accordance with the Hamburg Procedure, was to recommend a solution, the acceptance of which was discretionary with the governments concerned. Both the Hamburg Procedure and the Franco-Spanish experience are indicative of the tendency to exclude final decision-making authority from commissions.\textsuperscript{146} It is not suggested, however, that the method of commissions is generally ineffectual,\textsuperscript{147} but

\textsuperscript{144} The adequacy of this tribunal to adjudicate other and more comprehensive controversies over international river development is discussed \textit{infra}.

\textsuperscript{145} \textit{The Sentence} at 114; \textit{Judicial Decisions} at 168.


\textsuperscript{147} The practices of the International Joint Commission of the United States and Canada and the International Boundary and Water Commissions set up by the United
rather that the efficacy of the commission method is conditioned upon a complex of factors, such as the mandate assigned to the commission, the commission's stature, relations between the concerned riparians, and their readiness to move away from set positions. The exclusion of decision-making authority from the commission's mandate limits its potential to influence the settlement of the disputes. In the event that the other contributing factors are missing or are not sufficiently influential, such exclusion is likely to work against a settlement.

In the last analysis, the efficacy of the practices discussed above is dependent upon the relations between the disputant states. The application of any of these practices to a given controversy is subject to the disputants' prior agreement to resort to such practice. Controversies between riparians who are unable to agree may, under these practices, either adversely affect development projects or result in their stagnation.

**DISPUTE RESOLUTION CONCERNING INTEGRATED DEVELOPMENT OF INTERNATIONAL RIVERS**

The practice recommended by the United Nations Panel of Experts to achieve integrated development of international rivers is presented in broad terms with variations to suit the different possible situations.\(^ {148}\)

The attitude of riparians toward integrated development will range from a desire for cooperation to vigorous opposition to any collaborative action. But common to all riparians is the remote possibility that they would have the ability to embark on a program of integrated development without extraneous help in one form or another.\(^ {149}\) In light of these circumstances the Panel of Experts suggests entrusting the United Nations with the task of initiating development plans. Charged with this task, the United Nations would first report on the economy, communication, topography, geology, climate and hydrology of selected underdeveloped international river basins. Second, the physical and economic possibilities of the basin would be appraised with particular attention given to hydroelectric and irrigation potential as well as water surpluses and deficiencies in the various parts of the basin. Third, a preliminary plan of integration would be prepared giving full weight to human factors and to existing developments within the basin, and aiming at the optimum use of

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States and Mexico contributed to the settlement of water disputes. For the role played by these Commissions, *see generally* the papers submitted by the Chairmen and Commissioners of the two Commissions to the International Conference on Water for Peace held at Washington: M. Welsh & A. Heeney, *International Joint Commission: United States and Canada* 217 (1967); D. Jordan & J. Friedkin, *The International Boundary and Water Commission: United States and Mexico* 611 (1967).

149. *Id.* at 34.
sites and water resources. Fourth, a committee comprised of representatives of the riparians concerned would be established, with United Nations' chairman and observers, for the purpose of discussing the plan but without implying any commitment. The function of the committee's discussion would be to determine the areas of agreement and disagreement, to locate the sources of disagreement (economic, political, or sociological), and to narrow down conflicts between projected national plans. Disagreement over the appraisal of the basic facts might be settled by joint technical teams appointed for this purpose.

The parties involved are given the task of elaborating on the preliminary plan. Since the parties would be confronted with many controversial issues, the initial aim should be to develop machinery for cooperation rather than to achieve spectacular results. Such cooperation would be facilitated by starting with the least controversial issues; e.g., preparation of a scheme for exchange of information and the gathering of basic data followed by a discussion of technical considerations and their functions in the general scheme. The discussion should avoid major disputes and approach them later from a different perspective; controversial issues which require a prompt solution should be handled by another, temporary, body established for this specific purpose. It would be preferable to delay the settlement of water allocation to a stage where an atmosphere of cooperation has been established.

The Panel of Experts believes that the only way to achieve continuity, necessary for integrated planning in any major development, is by establishing a permanent joint commission. The primary aim of the joint commission is the creation of a sound and effective instrument of cooperation that eventually will function efficiently without outside intervention. Broadly stated, the functions of the permanent commission would be to continue the work of the preliminary committee with a view to arriving at a comprehensive plan of integration in principle, to implementing the components of the plan as circumstances permit, and to making such revisions in the plan as may be thought proper from time to time in view of changed circumstances or technological advances. Although the composition of the commission cannot be generalized owing to the varied circumstances involved, it should reflect the purely technical as well as the general policy aspects involved. The effectiveness of joint

150. This discussion would include at least some of the following: flood control, river training, reservoirs, river gains and losses, silt charge, reclamation, surface and subsoil conditions, drainage, farm cropping patterns, irrigation layouts, hydroelectric installations, domestic water supply, fish life, sanitation, soil erosion and pollution. Id. at 36.

151. Id. at 36.

152. Id. at 37.
commissions is considered by the Panel of Experts to be dependent upon the political maturity of the countries concerned. Therefore, younger states should avail themselves of the assistance of outside agencies which would function as coordinators, advisors or mediators and which would direct the discussion along objective lines.\textsuperscript{158}

The Panel of Experts assumes that the solution of technical problems and implementation of the plan will follow in the course of time once cooperation is properly established. If the plan and its phasing are sound in conception and timing, the Panel assumes that capital will somehow be available.\textsuperscript{154}

Support for the Panel's approach and assumptions can be drawn from the activities carried on in the basin of the lower Mekong River. The riparians which participate in these activities are: Cambodia, Laos, South Vietnam and Thailand.\textsuperscript{155} Apart from the current activities concerning the development of water resources, there is, in fact, little cooperation of any kind among these countries. Substantial differences exist in their cultural and political backgrounds.\textsuperscript{156} Three of the countries are newly independent, and nationalism is increasing in all of them. Political differences and rivalry have led occasionally to severance of their diplomatic relations.\textsuperscript{157} Their foreign alignment divides them even further, and little foreign trade is conducted among them.\textsuperscript{158} Despite these apparent difficulties the four riparians are cooperating in an integrated development of the Mekong basin.

The problem of providing an adequate food supply for the people inhabiting the lower Mekong basin and of raising their low standard of living, coupled with the tremendous, virtually unutilized potentialities of the Mekong, attracted the attention of many countries and several international institutions. The real stimulus for action came from the United Nations Economic Commission for Asia and the Far East (ECAFE).

\begin{itemize}
\item \textsuperscript{153} \textit{Id.} at 35.
\item \textsuperscript{154} \textit{Id.} at 38.
\item \textsuperscript{155} The upper riparians, Burma and the People's Republic of China, do not participate in these activities. Burma declined the invitation to participate, and the People's Republic of China was excluded because it is not a member of the United Nations, which supervises the activities. The exclusion of the headwaters region has not been considered especially serious. Sewell and White, \textit{The Lower Mekong}, 558 \textit{International Conciliation} 54-56 (1965-66).
\item \textsuperscript{157} Thailand and Cambodia, for example, broke off relations in 1958 and again in 1962. Sewell and White, \textit{supra} note 155, at 7.
\item \textsuperscript{158} "The foreign trade of Thailand and South Vietnam with other Mekong countries represents less than 1 per cent of their total foreign trade. Although the percentage is somewhat greater for Cambodia and Laos, even in these cases, it is very small." \textit{Id.} at 60.
\end{itemize}
In 1952 ECAFE reported that initial studies of the Mekong basin indicated both attractive opportunities and the necessity of further studies. Subsequently, ECAFE, in cooperation with the riparians, undertook further investigations\textsuperscript{159} and reported, in October 1957,\textsuperscript{160} that immense benefits could be obtained from developing the river for a variety of purposes. Five sites on the main stream were marked as especially attractive for development projects, as they would make possible the irrigation of large areas of lands, the production of hydroelectric power at very low cost, and flood control in the lower delta region.\textsuperscript{161} Each of the projects, even though located entirely within one country, would benefit at least two or more of the other countries. Yet, the report pointed out that much more information would be required before the technical feasibility of the contemplated scheme could be demonstrated. It also made clear that optimizing the river's benefits would demand a broad river approach, and, as a corollary, a close cooperation between the riparians in basic data collection, planning and development. Consequently, it recommended the establishment of "an international channel or clearing house for the exchange of information and plans and the coordination of projects."\textsuperscript{162}

All four riparians reacted in favor of the projects suggested by the report. A Preparatory Committee composed of representatives of the four countries was set up to consider the establishment of the committee recommended by the report. In September 1957, the Preparatory Committee unanimously adopted the Statute of the Committee for Coordination of Investigation of the Lower Mekong Basin. After making a number of modifications the participant riparians unanimously adopted this

\textsuperscript{159} Interest in the possibilities for development of the Mekong basin was expressed by many countries, especially France, Japan and the United States. The United States concluded with the riparians in 1955 a Special Project Agreement, after which her experts were sent to the area to carry out field studies. Their report of 1956 was considered by the riparians and became a basic document for further developments. \textit{Id.} at 17, 18; see also H. Schaar & R. Fifield, \textit{supra} note 156, at 84-86.

\textsuperscript{160} On the Report, see Sewell and White, \textit{supra} note 155, at 18-20; H. Schaar & R. Fifield, \textit{supra} note 156, at 86-88.

\textsuperscript{161} The report indicates that less than 3 per cent of the cultivated land in the basin is irrigated; that 86 per cent of the cultivated land is \{planted\} in rice; that irrigation could increase single yields, permit double cropping, and make possible crop diversification, thus providing an escape from the curse of the one-crop system, and that the suggested projects could produce sufficient water to meet all such essential irrigation needs. More than two million acres could be saved from floods. Some 32,000 million kilowatt hours of electric power might be produced annually at the low cost of some U.S. $0.23 per kilowatt hour. The foregoing might in combination result in exportable products worth some U.S. $300 million annually.

H. Schaar and R. Fifield, \textit{supra} note 156, at 87.

\textsuperscript{162} \textit{Id.} at 88.
The Statute of the Committee resolved the intricate problems of making the Committee an effective body with powers of decision and action while enabling its members to opt out of decisions not in the interest of their particular government and of establishing a method by which the Committee, although belonging to and controlled by the riparians, could derive continuing support from the United Nations.

The first problem was resolved by providing four members of the Committee with "pleni-potentiary authority," and by vesting the Committee with the sweeping functions "to promote, coordinate, supervise and control the planning and investigation of water resources development projects in the lower Mekong Basin..." The governments retained full control by providing that each should appoint its own member, stipulating that "meetings of the Committee shall be attended by all participating countries," and "decisions of Committee shall be unanimous."

The second problem was resolved by providing that the Committee should be established by the governments of the four riparians "in response to the decisions" taken by ECAFE at its thirteenth session. It was further provided that the secretariat of ECAFE "shall cooperate with the Committee in the performance of the latter's function," that the Executive Secretary of ECAFE or his representative "may at any meeting make either oral or written statements concerning any question under consideration," and that "the Committee shall submit reports to participating governments and annually to the [ECAFE] Commission."

In August 1965, the Committee proposed that the four governments amend the Statute so as to confer upon it the additional function of promoting and operating development projects related to the development

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164. Id. ch. II, art. 1(2).
165. Id. ch. IV, art. 4.
166. Id. ch. II, art. 1(2).
167. Id. ch. V, art. 5(2).
168. Id. ch. V, art. 5(3).
169. Id. ch. I.
170. Id. ch. III, art. 3.
171. Id. ch. V, art. 5(4).
172. Id. ch. VI, art. 6.
of water resources. The proposed amendment reflects the broadened view taken by the Committee with regard to the function of water resources development. Development of the water resources was envisioned, at the outset, to promote hydroelectric power, irrigation, drainage, navigation and flood control accomplished by the construction of dams and other control works. Today the water resources development is viewed also as a means of accomplishing economic and social changes through a variety of ancillary projects. The Committee, apart from accumulating volumes of information and analysis of data on the physical aspects of the Mekong, has also undertaken many related studies concerning the promotion of economic growth and social change.

While the basin-wide plan was being prepared and studies of the mainstream potentialities continued, attention was focused on the opportunities offered by the major tributaries. The tributary projects that have been or are being constructed or studies are relatively small and inexpensive and would not have much effect on mainstream flows. Apart from the direct benefits to be derived, these projects are advantageous in satisfying the desire for tangible results during a long planning process, in establishing cooperation, and in gaining experience for the planning of larger projects. Six tributary projects have been completed or are now being constructed; five other projects have reached the state where construction can begin fairly soon.

The Nam Pong tributary project, inaugurated in March 1966, is of particular interest for illustrating the process occurring in the Mekong basin. Located in northeastern Thailand, the poorest part of the country, the project provides for electricity, irrigation, flood control, fishery development and recreational facilities. An agreement signed in August 1965 provided for transmission of power generated at the Nam Pong project to service growing demands in Vientiane until the Nam Ngum

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173. As of May 1967, the amendment was ratified by two countries, see K. Sain, Planning for Multipurpose Development of Major River Systems with Special Reference to the Lower Mekong River 590 (1967) (a paper submitted to the International Conference on Water for Peace held at Washington).

174. Awareness of the need for studies to determine what effects the development of the river might have on the economic and social structure of the population and what ancillary programs should be undertaken to ensure that the benefits of river development would be fully realized led the Ford Foundation, in 1961, to sponsor a mission headed by Gilbert F. White to make a survey of the needed economic and social studies. The committee has undertaken many of the studies and programs recommended by the Ford mission and is about to initiate others. Studies of potential have been completed; a detailed survey of manpower requirements is to be carried out by ILO; a detailed investigation of agriculture in the basin is to be conducted by Israel in the near future; studies of administrative and jurisdictional aspects of the developments of the mainstream projects have been initiated by an Italian team, and numerous training programs have been started. Sewell and White, supra note 155, at 23-27, 52, 53.
project in Laos is ready. Subsequently, power will be transmitted from the latter project to various points in Thailand. In addition to Laos and Thailand, the agreement was signed by Cambodia, South Vietnam and the United Nations as “parties directly interested in the comprehensive development of the Lower Mekong Basin.” Preliminary investigations for this project were carried out by France and Japan. The United Nations Special Fund prepared a feasibility report that led to the Federal Republic of Germany offering a sixteen million dollar low interest loan to initiate the project. Other loans or contributions in kind were made by Pakistan and the Republic of China.

The Mekong Committee has been provided with technical and financial aid granted by international agencies and private organizations. ECAFE has continued to play an important role, supplying the Committee with financial assistance and technical aid. Various countries offered their assistance in the form of implementing specific phases of the Committee’s work. Contributions and pledges from all these sources totaled 105 million dollars by the end of 1965, out of which thirty-four million was provided by the riparians themselves. A provisional ten-year requirement list estimated to cost 3.3 billion dollars was drawn up by the Committee in 1965; the specific priority projects within the list are expected to cost 191 million dollars for the immediate future. The participating riparians are capable of meeting only a small fraction of the future expenses, but there is optimism that foreign aid will be forthcoming in view of the substantial assistance that has already been given.

Thus far, the Committee has been successful in carrying out its assigned mandate. A wide variety of information was collected and analyzed, and plans were drawn, some of which were or are being carried out. Cooperation established at the data collecting and the planning

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176. Sewell and White, supra note 155, at 35.
177. These include the U.N. Technical Assistance Board, the International Labor Organization, the Food and Agriculture Organization, the United Nations Educational, Scientific and Cultural Organization, the World Health Organization, the World Meteorological Organization, the International Atomic Energy Agency, the World Food Programme, and the International Bank for Reconstruction and Development. Id. at 46.
178. The countries which have contributed or have pledged contributions to the Mekong development, as of March 1966, were: Australia, Belgium, Canada, Republic of China, Denmark, Finland, France, Germany, India, Iran, Israel, Italy, Japan, Netherlands, New Zealand, Norway, Pakistan, Philippines, Sweden, United Kingdom and United States. Id. Table T, at 45.
179. Id. at 46.
180. Id. at 47.
stages was extended into the development stage. In this respect, the direct cooperation between Thailand and Laos in development of hydroelectric power is of special significance. However, the results accomplished should not overshadow the fact that the real test lies ahead.

Several factors may account for the relative smoothness in which the Committee proceeded. First, the riparians' lack of background for evaluating the extent of the river's opportunities prevented a preconceived approach to the problems. Second, the Committee was able to choose criteria for selection of projects which guaranteed that no reduction in water supplies will occur and none of the existing uses will be harmed by withdrawals for irrigation. Third, working under the auspices of ECAFE provided a stabilizing influence. Fourth, cooperation was stimulated by the financial and technical aid provided by various countries and organizations. Such aid might have been withheld from unilateral projects, and, as given, it did not obligate the recipient to the donor.

The third and the fourth factors are expected to carry over into the really challenging stage, the development of the mainstream. However, during this later stage, the riparians will be better informed about the benefits to be shared, and decisions concerning the criteria for selecting projects and allocating benefits will be harder. It is hoped that the experience gained, the cooperation established and the benefits expected will help the riparians to overcome the difficulties ahead.

The economic advantages offered by the regional approach call for an organizational framework within which an integrated development can be promoted and administered. The practices recommended by the Panel of Experts and employed in the Mekong basin are directed to that end. But neither practice is designed to overcome situations in which the parties concerned are reluctant to conduct direct negotiations; nor does either provide for an efficient method for overcoming an eventual impasse in the negotiations.

The mechanism sketched by the Panel of Experts operates through direct contacts initiated by the United Nations and aided by the advice and mediation of outside agencies, if the riparians choose to avail themselves of such services. Several phases of the process are removed from the political level for consideration on the technical level to reduce friction, establish cooperation, and thus equip the parties with a potential for settling their differences without outside help. Despite the considered and cautious way in which this potentiality is built

181. In selecting projects, the committee agreed to the criteria that the natural low flows on the mainstream should not be reduced by the development of mainstream projects and that water for irrigation will be provided by the storage of flood flows on the river. *Id.* at 58.
up, such potential may not withstand the controversies encountered by
the riparians. In the event of extreme situations such as hostile relations
or severed diplomatic relations, the chances for obtaining a settlement,
unanimously agreed to, are minimal. Desertion by one of the parties, or a
veto by one of them, is enough to paralyze the achievements of previous
efforts.

A practice which subjects decision-making to the unanimous agree-
ment of all riparians is likely to affect their readiness to concede to a given
settlement, even when ordinary relations are involved. Riparians may be
reluctant to give up, of their own accord, positions held with respect to
the satisfaction of their interests through the opportunities offered by the
water resources. Likewise, consciousness of the power to opt out of any
decision might move riparians to withhold their approval as a means of
pressing their positions. Thus, solution might be endlessly deferred in the
hope of gaining a better bargain. In comparison, riparians might tend to
moderate their positions more easily if the absence of agreement would
subject them to a solution reached otherwise than by their unanimous
consent. This assumption can be supported by analogy to the numerous
compromises reached in civil cases, in which private parties prefer the
settlement of their differences by themselves to an unpredictable judicial
decision. The same logic might cause riparians to prefer negotiation and
compromise to unpredictable terms laid down by an authoritative decision.

The uncertainty expressed with regard to the constitution of the
Mekong Committee is illuminating in this context. Although the structure
of the Committee involves more than a regular intergovernmental agency,
and although it has operated successfully so far, doubts were raised as to
its potential to cope with future developments. To meet this situation the
creation of an international agency was suggested which would consist of
representatives of member states and United Nations appointees and
which would become a semi-autonomous body able to raise its own
finances and carry the responsibility for the coordinated construction
and operation of the mainstream projects. 182 The proponents of this
proposal considered the transfer of functions to such an international body
to be a low price to pay for the overall benefits which could
accrue from the control of the Mekong and which might be de-
layed indefinitely if left to direct negotiations on a political level
between the riparian states. 183

The practice recommended by the Panel of Experts is ultimately
dependent upon direct negotiations between the riparians. While the

182. Id. at 39.
183. Id. at 39.
desirability of reaching agreements through direct negotiations between riparians is not disputed, an alternative procedure can operate for the benefit of riparians who are not on negotiating terms. Severance of diplomatic relations between neighboring countries is not a rare phenomenon in the political arena. Regardless of whether severance occurred after the riparians began integrated development, phases in the process having already been completed, or before any indication of integrated development riparians might be willing to separate their economic interests from the political considerations. Economic reason might prevail in favor of coordinating water projects without implying a political concession. Political rivalry or hostility between riparians does not necessarily exclude readiness on their part to coordinate water development projects.

The possibility of political hostility operating to abuse any organizational framework is not to be ignored. Nor can one ignore the negative effect that subjecting riparians to a binding framework might have on their readiness to moderate their positions. However, it could be expected that economic interest would prevail over political hostility when coordination does not bring in its wake other political implications nor require direct negotiations, or when a medium exists through which negotiations can be channeled and the coordination administered.

Consequently, the absence of direct negotiation between riparians should not exclude them from being considered as proper parties in the context of the search or an adequate organizational framework within which an integrated development of international rivers could evolve.

PRACTICES OF MEDIATION, CONCILIATION, ARBITRATION AND JUDICIAL SETTLEMENT

The practices of mediation, conciliation and arbitration require the previous agreement of the parties or the voluntary interjection of an impartial body, in order to call them into being and thus do not represent an instance of institutionalized practice. The operation of these practices is conditioned upon the wish of the parties or the tender from an impartial body (a state or an institution) to provide its services to the parties.

Mediation and conciliation are valuable in: providing a forum in which respective positions can be exchanged and discussed, coordinating and analyzing information gathered separately by the riparians, proposing a development project which fairly allocated benefits to all the riparians, and coordinating the construction and the operation of the project or proposing the arrangements to be followed by the riparians through these phases. These services might pertain to any or to all of the above phases depending on the stage in which the riparians were confronted with an impasse. The main function of such services is to facilitate the
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riparians' agreement by providing them with uncommitted proposals and uninvolved coordinating bodies. The accomplishments of these devices usually depend upon the merits of the proposition (in terms of its technical skill and acceptability to the riparians), the stature of the mediator, and the inducement he offers. It is of significance that the mediation services offered in both the Indo-Pakistan the Israeli-Arab disputes were backed by financial assistance.¹⁸⁴

Finally, since by definition, mediation and conciliation services aim not at deciding the controversy for the disputants, but at inducing them to decide for themselves,¹⁸⁵ the failure of such inducement leaves the controversy unresolved.

The practices of arbitration and judicial settlement, on the other hand, are aimed at determining controversies by binding decisions. But the jurisidction of the relevant tribunals is based solely on the consent of the disputants to submit their controversies to such tribunals. The Hague Convention for the Pacific Settlement of International Disputes, held in 1907, imposed no obligation on the signatory Powers to submit any difference in the arbitration of the Permanent Court of Arbitration.¹⁸⁶ Disputants who resort to arbitration must enter into a compromise defining the constitution of the tribunal and its mandate for each specific controversy.¹⁸⁷ Nor does the Statute of the International Court of

184. The following information on the Indo-Pakistan dispute highlights this point: By August 1959 President Black [of the World Bank] had succeeded in persuading the ‘friendly Governments’—The United States, Canada, the United Kingdom, West Germany, Australia, and New Zealand—to underwrite a water settlement that would advance the cause of peace in the Indus Basin at a total cost of about one billion dollars. This rough estimate included the cost of works in both India and Pakistan, but the contributions of the consortium in the form of grants totaling over half a billion dollars, would go to Pakistan. The United States and the World Bank would in addition, make loans to both Pakistan and India totaling another $200 million.


185. J. Brierly, The Law of Nations: An Introduction to International Law of Peace 373 (6th ed. 1963). Though conciliation is a process in which a dispute is referred to a commission whose task is to elucidate the facts and (usually after hearing the parties and endeavoring to bring them to an agreement) to make proposals for a settlement, it does not have the binding character of an award of judgment. 2 I. Oppenheim, International Law: A Treatise 12 (8th ed. 1955).

186. International Law Division of the Carnegie Endowment for International Peace, The Hague Conventions and Declarations of 1899 and 1907 art. 53 at 65 (1915). But see two limited exceptions conditioned, however, upon the parties' prior agreement. Id.

187. The compromise defines the subject of the dispute, the manner of appointing arbitrators, any special powers which may be given to the tribunal, and any special conditions upon which the parties may agree. The parties may agree to have recourse to the Permanent Court of Arbitration itself, but they may also assign the arbitration to one or several arbitrators chosen by them either from the members of the court or otherwise. The Court of Arbitration consists of a large number of individuals of recognized com-
Justice impose a compulsory jurisdiction. The impact of Article 36 of the Statute (the Optional Clause) on the compulsory ipso facto jurisdiction of the Court was substantially reduced by the wide reservations attached to the declarations of acceptance of the jurisdiction.\textsuperscript{88} Arbitral tribunals set otherwise than in accordance with the Hague Convention are also preconditioned upon the consent of the parties, since they derive their authority from specific or general arbitration treaties, or from arbitration clauses incorporated into treaties primarily regulating matters other than arbitration.\textsuperscript{89}

Apart from the jurisdictional problem, the adequacy of legal tribunals to deal with water controversies is not free from doubt. The primary function of a jurist acting in the capacity of a judge or an arbitrator is to apply legal principles to a given case in order to determine the rights and the legality of actions of the disputants. Settlement of water disputes ordinarily involves a technically complicated long-term regulation of water uses. The legal issues in such controversies are relatively few and involve general aspects of the problem rather than concrete difficulties. The concrete difficulties pertain to such factors as economic, social, hydrologic, and technological matters. While these tribunals can be empowered by the disputants to decide \textit{ex aequo et bono}, permitting them to apply principles other than legal ones, the authority to so decide does not imply the necessary competency. It is also true that the judge or the arbitrator can be assisted by expert testimony on technical questions, but the final decision on these matters still rests with the judge or the arbitrator. In view of the fact that settlement of water disputes is substantially based on scientific and technical findings, legal tribunals are not the most qualified bodies to perform these functions.

Another element which should not be overlooked is the time factor. Each of the phases antecedent to operating a project is susceptible of provoking controversial issues, and such issues may also ensue from a change in conditions occurring after the project has gone into operation. If resort were made in each of the phases to a court decision, the whole development process would consume an excessive period of time. In comparison, the process might be shorter if a qualified impartial body...
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would accompany the parties' negotiations and vote for a settlement in the event of an impasse. 190

The survey of the various practices reveals their limits. As a result, none is fully qualified to discharge the function of an organizational framework of general applicability. The major weak points which account for the inadequacies are one or more of the following:

(a) absence of compulsory resort to a given practice;
(b) absence of a body possessing the relevant skills, stature, and capacity to induce agreement between the parties;
(c) absence of a method for overcoming impasses in the parties' negotiations; and
(d) absence of a qualified authority to function in a decision-making capacity.

Although none of the practices discussed offers an adequate organizational framework for the settlement of controversies over the development of international river basins, the search for an adequate organizational framework is not exhausted. It remains to be considered whether the United Nations, which has become involved recently in international river basin development, can provide that framework.

UNITED NATIONS ASSISTANCE IN THE DEVELOPMENT OF INTERNATIONAL RIVER BASINS

Only recently has the United Nations become involved in the field of international river basins as part of its activities concerning water resources development pursuant to its broader endeavor to effectuate general economic progress.191 The broad scope of the functions entrusted to

190. It was worth noting the reluctance with which the United States Supreme Court treats the invocation of its adjudicatory power in controversies over interstate streams. In the case of Nebraska v. Wyoming, the Court reiterated its opinion that such controversies:

... present complicated and delicate questions, and, due to the possibility of future change of conditions, necessitate expert administration rather than judicial imposition of a hard and fast rule. Such controversies may appropriately be composed by negotiation and agreement, pursuant to the compact clause of the Federal Constitution. We say of this case, as the court has said of interstate differences of like nature, that such mutual accommodation and agreement should, if possible, be the medium of settlement, instead of invocation of our adjudicatory power.

325 U.S. 589, 616 (1944).

191. U.N. CHARTER, The Preamble. Under its charter, the United Nations is charged with "the promotion of the economic advancement of all peoples." The inclusion of this function within the charter was based on the conviction that a durable international peace and security system could not be achieved unless effective measures were taken to solve major economic and social problems. Article 55 of the charter explicitly states that with a view to the creation of conditions of stability and well-being which are necessary for peaceful and friendly relations among nations... the United
the United Nations raised the issue of what powers the member states should concede to the Organization in order to effectuate its purposes. The Charter includes a provision (Article 2(7)) which denies to the United Nations authority "to intervene in matters which are essentially within the domestic jurisdiction of any state." The general terms of this provision gave rise to various contentions about the authority with which the Organization was vested.

The significance of the limitation imposed by Article 2(7) on United Nations authority to intervene in matters of international rivers is discussed infra. The present discussion is concerned with the technical assistance in the development of international river basins provided by the United Nations and its related organizations and centers on reviewing the framework in which this assistance operates and examining its impact upon the regulation of riparian competition for the use of international rivers.

In December 1961, the General Assembly designated the decade to come as the United Nations Development Decade. The Secretary General was requested to prepare proposals for intensified actions by the United Nations with particular reference to industrialization, diversification and development of highly productive agricultural sectors, establishment of well conceived and integrated economic development plans, promotion of general education, vocational and technical training, and intensification of research and demonstration.

The proposals formulated by the Secretary General for the United Nations Development Decade included two surveys related to water resources: a survey of water needs and water resources in potentially water-short developing countries, and a survey of the potential for development in international rivers. The water surveys, together with

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Nations shall promote—higher standards of living, full employment and conditions of economic and social progress and development.

This commitment of the Organization is strengthened by the specific pledge of all its members, contained in Article 56, "to take joint and separate action in cooperation with the organization for the achievement of the purposes set forth in Article 5."

192. The dilemma, as posed by John Foster Dulles, was: Is it [the United Nations] going to be an organization which deals essentially with the governments of member-states, and through international relations? Or is it going to be an organization which is going to penetrate directly into the domestic life and the social economy of each one of the member-states? M. RAJAN, U.N. AND DOMESTIC JURISDICTION 43 (1961). Dulles asserted that it had been agreed in the discussion of the constitution of the Economic and Social Council that it should be of the former type. Id.

193. See text accompanying notes 234 to 297 infra.


195. Id. Art. 4.

surveys of mineral and energy resources, were presented as a proposal for a five-year survey program for natural resources development.\textsuperscript{197} The proposal's conception of water resources development as a tool of economic progress reflects an established practice of the United Nations. For many developing countries, water resources development, if planned efficiently, may mean a much higher level of agricultural production, generation of hydroelectric power to assist industrialization, community water supplies to contribute to the health and self-respect of the population, effective arteries of cheap transport to otherwise inaccessible areas, counter-action of the ill effects of floods, and systems of sewers to combat the pollution of potential sources of water supply.\textsuperscript{198}

Despite the widespread recognition of the need for water resources development, the majority of the international river basins in the developing countries, which cover about three-quarters of the land surface of these countries, are underdeveloped.\textsuperscript{199} Lack of capital, experts, trained personnel, equipment, and basic hydrological records, together with the political divisions of the international basins, have stood in the way of their development.

In response to these difficulties the United Nations gradually has expanded its financial and technical assistance programs. Several autonomous agencies have been created to help the developing countries cope with the lack of capital for public and private investment and the shortage of foreign exchange.\textsuperscript{200} In the technical field, a gradual expansion of the technical assistance programs was followed by the Expanded Program of Technical Assistance and the Special Fund. The last two programs merged in 1966 into the United Nations Development Program (UNDP).

A complementary relation between financial and technical assistance exists. Whereas the financial agencies are concerned with assisting investment in development plans, the technical programs are concerned with pre-investment services which help make investment feasible and more effective. The scarcity of specific investment projects was one of the main obstacles to large scale and accelerated economic progress and almost all

\textsuperscript{197} No action has yet been taken on the proposed water surveys, and it is doubtful whether any such action will be taken in the foreseeable future.

\textsuperscript{198} A. Michel, \textit{supra} note 184, at 11.


\textsuperscript{200} They include the International Bank for Reconstruction and Development (1945), the International Monetary Fund (1945), the International Finance Corporation (1956), and the International Development Association (1956). For general discussion on these agencies, see U. Kirdar, \textit{The Structure of U.N. Economic-Aid to Underdeveloped Countries}, 104-96, 259-81 (1966). For discussion on the conflict over the establishment of the U.N. Capital Development Fund, which has not yet been resolved, see \textit{id.} at 225-28.
of the developing countries are affected to some degree by such scarcity.\textsuperscript{201} The technical assistance programs are designed to combat the problems created by the developing countries’ lack of adequate pre-investment projects coupled with the meagerness of the expertise available for such projects. Some of the services supplied are even better described by the term “pre-pre-investment,” for they serve to prepare the way for more intensive pre-investment work.\textsuperscript{202} This assistance is furnished in the form of service of experts who work individually or in organized teams, provision of training and educational facilities such as scholarships, fellowships, organization of training centers, seminars, tours, and demonstrations, and the provision of equipment.

The development of the international rivers traversing the developing countries, being regarded as a component of economic progress generally, falls within the purview of the technical assistance programs. Since most of the pre-investment projects on international rivers have not yet been completed, the technical assistance programs at present constitute the essential framework within which the United Nations acts upon questions of international rivers.

The distinctions among the various technical assistance programs established by the United Nations originate from the separate funds which finance them and the amount of money available for each of the programs. Common to all these programs is their function of assisting the developing countries improve their economies, primarily through services concerning the stages preceding investment. The various programs are supervised by the General Assembly and the Economic and Social Council, in which general policy guidelines for the programs originate. The actual work of the various programs is carried on by the United Nations in cooperation with some of the specialized agencies related to it. The submission of these programs to the General Assembly and the Economic and Social Council suggests that these programs are administered by the subsidiary organs of the United Nations. However, the legal status of some of the programs

\textsuperscript{201} The statement made by Harold Shipman of the International Bank is very instructive:

Despite the fact that a rather large number of agencies (bilateral and multilateral) are working in the international field and are prepared to consider the financing of water systems, one of the major reasons why more loans are not being made today is the failure of water supply officials to have projects prepared which could be considered for financing, with preliminary engineering and feasibility studies completed, priorities established and financing plans reasonably developed.


\textsuperscript{202} The United Nations, The U.N. Special Fund 19 (1960) (U.N. publication, Sales No. 60.I.8).
and their administering organs is obscured by, inter alia, the fact that the specialized agencies, which are not part of the United Nations, participate in an administration of these programs, and the fact that the financing of the programs originates outside the budget of the United Nations.  

Assistance to projects on international rivers follows the general policy guidelines and procedures prescribed for the technical assistance programs as a whole. The primary objective of technical assistance is to help the developing countries strengthen their national economies with a view to promoting their economic and political independence. Further emphasis is given to the element of national independence by prescribing that technical assistance should not be a means of foreign economic and political interference in the internal affairs of the countries and should not be accompanied by any conditions of a political nature. These two principles require that a difficult balance be struck. At what point does the provision of economic assistance cease to be in consonance with national independence and begin to be a means of foreign interference in the internal affairs of the recipient countries? One step toward striking this balance is the requirement that technical assistance be rendered only to or through the government concerned and on the basis of requests received from it. In a like manner, the kind of services rendered should be designed to meet the needs of the country concerned and should be provided as far as possible in the form which its government desires.

A country desiring assistance in a project should, in advance, attempt to define the nature and the scope of the problems for which assistance is sought. After the approval of a project, the provision of assistance operates on the premise that the project is the recipient government's project rather than a project of the assisting organ. Thus, the assistance of the organ concerned should be marginal but decisive, while the recipient government's contributions should be substantial. Accordingly, the recipient government is expected to finance at least that part of the project payable in local currencies. The contributions made by the government are important not merely in financial terms, but more significantly in terms of active participation in the project. The provision of local person-

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203. For discussion of this question, see U. KIRKAR, supra note 200, at 30-39, 214-18.
nel, services and buildings by the government is essential for the continuity of the project and its follow-up after the term of the assistance is over. In order to ensure such continuity, the government is expected to assume a firm and relatively long-term obligation for the follow-up of the project.

Requests for UNDP assistance are submitted by governments to the Administrator of the UNDP for review and evaluation, and final approval of all projects rests with the UNDP's Governing Council. The selection of projects by the Administrator and the Governing Council is based primarily on the projects' potential for contributing substantially to the economic growth of the requesting countries; the choice of projects operates largely on an individual project basis and not on an a priori allocation of funds to any country or for any specific field of assistance. Due consideration is given, however, to the urgency of the needs of the requesting countries and to the attainment of a wide geographic distribution in allocations over a period of years. The individual project request, in order to conform to the criteria for approval, must demonstrate that it is integrated into an overall national development effort and is coordinated with other assistance programs. International river projects must show sufficient promise, on the basis of preliminary investigations, to warrant an intensive survey designed to confirm the prospects for productive investment. Upon clarification of the prospects for investment, whether resulting in positive or negative answers, the UNDP assistance ceases.

While the assistance provided to the developing countries under the technical assistance program concerns virtually every conceivable field of economic development, a major segment of the assistance rendered has been devoted to the development of water resources. Of 727 pre-investment projects approved by the Governing Council of the UNDP as of May, 1967, 144 major projects pertained to the development of water resources. Since projects on international rivers concern two or more

205. A single inter-governmental committee of 37 members, the Governing Council of the UNDP, was established in January 1966 to perform functions previously exercised by the Governing Council of the Special Fund and the Technical Assistance Committee, including the consideration and approval of projects and programs and the allocation of funds. The new Governing Council was also mandated with the provision of general policy guidance and direction for the UNDP as a whole, as well as for the United Nations regular programs. An Interagency Consultative Board of the UNDP was established as an advisory committee, replacing the Technical Assistance Board of EPTA and the Consultative Board of the Special Fund. The Board's function is, inter alia, to advise the management of the programs and projects submitted by governments prior to their submission for the approval of the Governing Council.

206. These projects included multipurpose projects involving development of entire river basins or lakes (36 projects); water for agriculture (75 projects); water supply and sewerage (17 projects); and, hydrometeorology (16 projects). Quite a few of the
countries, resulting in additional complications, the extent of the assistance given to such projects is encouraging.

Assistance to international river development extends to Africa, the Far East, Europe and Latin America. A major part of the international river projects relates to Africa, where projects are carried out on the basins of the Senegal River, Lakes Victoria, Koga, Albert, and the Nile River, Lake Chad, the Logone River, and the Mono River. In the Far East, projects discussed supra with regard to the Mekong River are carried out with the assistance of ECAFE and the UNDP. In Europe, a project on the Vardar River (Yugoslavia and Greece) is supported by the United Nations (Resources and Transport Division). No international river project has yet been approved for Latin America. However, initial steps were taken on certain projects on the Rio de la Plata and the Amazon Rivers.

The general objective sought to be effectuated by the projects is to raise the low standard of living of large segments of populations which depend on the water resources for their livelihood. The more immediate objectives are to investigate economical means for developing the water resources for purposes of irrigation (benefiting agricultural production, livestock raising, fishing, and forestry), electrical production, navigation improvement, and flood control. The investigations also encompass fields related to water resources development, such as appropriate agricultural patterns, efficient navigation techniques, and the economic and social implications of introducing such developments. Likewise, the investigations include experimental and demonstration work as well as surveys.

Project requests often are based on knowledge acquired by former colonial authorities, or with the aid of bilateral arrangements or preparatory assistance of the technical assistance programs. Various organs of the United Nations family of organizations participate in the preparatory assistance as well as the execution of the projects themselves. None of the projects has yet reached the stage of investment, and most are still in the process of pre-investment investigations. The only terminated project, the Mono River project, was concluded because the prospects of the contemplated investment scheme were negative.

The expertise in water management and related fields is brought to the recipient countries through the provision of consultants and experts.
in a wide range of relevant competencies. Local personnel are trained for assuming various functions in the course of project implementation and follow-up. The extent of the recipient countrys' contributions is not so substantial as to render the contributions of the technical assistance programs marginal. In fact, the share of the expenditures carried by the technical assistance programs is much higher than that of the recipient countries.

Finally, the approval of project requests came after the riparian countries indicated their willingness to cooperate in the investigation of their common water resources. Moreover, in the cases where more than two countries were involved, coordination of the riparian governments' actions with regard to the projects was entrusted to commissions established by the co-riparians. Since riparian cooperation is an essential element for the assumption of international river projects, a closer examination of the role played by the assistance programs in bringing the riparians together, as well as the expressions of such cooperation, will follow.

Since a basin-wide approach is highly desirable for the planning of optimal development of water resources, riparian cooperation forms an important element for the attainment of optimal results. The provision of technical assistance, however, must not interfere in the internal affairs of the recipient countries nor be subject to political conditions. Therefore, the exertion of any pressure on riparians to cooperate in economic activities which concern water resources development is impermissible.

The role of initiating cooperation between the governments of co-riparians is filled by the representatives of the UNDP, the regional commissions, and the relevant specialized agencies concerned with the specific prospective projects. The Water Section of the Resources and Transport Division, which functions also as the Water Resources Development Centre, is especially concerned with this role, since one of its functions is the "bringing together of the parties concerned" with international river development.

Governments are approached separately, often through their relevant technical departments or agencies. The technical aspects are the first to be discussed, while the legal and political ones are intentionally deferred. Initial contacts deal with subjects such as the benefits to be derived from investigation and development of the river resources, the advantages to

210. See text accompanying note 204 supra.
211. The servicing of United Nations projects is carried out by the Resources and Transport Division (of the Department of Economic and Social Affairs), whose staff includes economists and technicians. In the performance of this function, the Division collaborates with the Department's two administrative units for such projects, the Bureau of Technical Assistance Operations and the Office of the Director for Special Fund Operations.
be gained from co-riparians' coordinated action in this field, and the technical assistance which a coordinated action is likely to bring about.

On several occasions the persuasive force of such presentations increased the readiness of co-riparians' governments to cooperate. However, occasionally governments are not amenable to such persuasion, because of their advantageous location with regard to the use of the river's resources, other economic priorities, or political conflicts with other co-riparians. In these cases, further persuasive efforts are deferred until a more propitious time. One such current case is that of East Pakistan and India, in which cooperation was withheld for political reasons.212

The submission of a joint application by co-riparians is generally a prerequisite to UNDP's consideration of a project on an international river. The applications often appear in the context of international agreements between the co-riparians providing for cooperation in developing the relevant river and for establishment of intergovernmental organs charged with the preparation and implementation of projects.

Experience in providing technical assistance for the development of international river basins traversing developing countries numbers only a few years. Most of the pre-investment projects embarked upon are in the process of implementation. Very few projects have entered the construc-

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212. Almost all the major rivers of East Pakistan have their source outside its boundary and receive perennial supplies from the melting snow in the Himalayan ranges. Two large international rivers, the Brahmaputra and the Ganges, meet in East Pakistan along with a third river, the Meghna. The Ganges River runs through the northeastern part of India before entering East Pakistan, whereas the Brahmaputra River rises in southern Tibet, flows through east India, and then enters Pakistan. During the monsoon season overflowing rivers cause flood problems. During most of the remaining part of the year, the river flows are low and inadequate to meet the needs of irrigation. The main crops are grown during the monsoon season depending on the rainfall, but the crops are periodically damaged by high floods. Only a part of the cultivated area is sown during the dry months. M. Abbas, Planning Water Development for Irrigation, Flood Control and Navigation in Pakistan 2 (a paper submitted to the International Conference on Water for Peace). The planning of water resources development requires an evaluation of the effect of irrigation and other diversions on the stream flow and a determination of the availability of water to meet the requirements of all present and future projects. Such an assessment should cover the entire basin for optimal results. Similarly, basin-wide planning is highly desirable for flood control. Since the upper reaches of the major rivers of Pakistan lie in other countries, planning for an optimum development of her water resources requires the cooperation of the other riparian countries. East Pakistan is well aware of the fact that without an understanding with its co-riparians she will not be able to achieve the optimal development of her water resources. Id. at 8. However, her strained relations with India have precluded any such beneficial cooperation. Consequently, she has resorted to the less adequate alternative of developing her water resources unilaterally. The UNDP, which is currently assisting East Pakistan in water projects, has attempted to approach the two riparians with a view to initiating cooperation between them. See U.N. Doc. E/3587 at 24, 25 (1962); U.N. Doc. E/3881 at 59, 60 (1964); and U.N. Doc. E/4138 at 64, 65 (1966). But the attempt was aborted by political considerations. Under these circumstances, the UNDP has given up further activities for the multilateral development of the basins involved, awaiting a more propitious political climate.
tion stage, and operational phases of such projects, except for some of the Mekong's projects, are almost nonexistent. Under these circumstances, it would be premature to assess with any degree of assurance the impact of the technical assistance programs on the development and the regulation of international river basins. Nevertheless, some inherent and potential strong points and limitations of these programs may be identified.

Expert personnel have been recruited under the programs from both the developed and the developing countries to assist co-riparians in devising well-conceived plans for development of water resources and related fields. Likewise, local manpower has been trained to enable assumption of development functions in due course. More generally, the programs have helped to create in the developing countries an awareness of the vast potentialities of pre-investment work, and increasing amounts of their limited resources are now being devoted to such work.\textsuperscript{213}

Pre-investment projects, which are supported by the UNDP, indicate the prospects for follow-up capital investment. Thus far, the International Bank together with the International Development Association (IDA) and the International Finance Corporation (IFC) have been the major sources of investment in national and regional UNDP projects. The International Bank is the largest single source of follow-up capital investments in such projects, providing 554.1 million dollars as of September, 1967, principally in the form of long-term loans for infra-structure programs, particularly dams and transport.\textsuperscript{214} One might hope that the above financial institutions, by virtue of their international orientation, in the future will make considerable investments in regional projects of international river development.

An important feature of the assistance programs is their acceptability to the developing countries. Recipient countries often prefer United Nations assistance to bilateral arrangements because of its nature and effects. Countries from all over the world and in all stages of development are partners in the United Nations, pay a share of program costs and have a voice in determining broad policy. United Nations assistance is expected to be impartial, acceptable to all political parties in the recipient countries, and above any suspicion of seeking a political or commercial advantage for another country or a particular group of countries. It is believed that truly multi-national assistance, free from extraneous considerations inherent in bilateral aid, induces recipient governments to adhere to business-like criteria and conditions, more wholehearted and

\begin{itemize}
\item \textsuperscript{213} U.N. Special Fund, \textit{supra} note 202, at 20.
\item \textsuperscript{214} \textit{PRE-INVESTMENT NEWS}, September 1967, at 7 (UNDP publication).
\end{itemize}
effective local participation, and greater returns for money expended.\textsuperscript{215}

Finally, the potential impact of the above advantages on the regulation of riparian competition is no less significant. The initiative taken by the UNDP's representatives in obtaining cooperation among co-riparians in studying their common basins, the encouragement given to the establishment by the co-riparians of joint commissions, and the operation of the commissions in association with the impartial and helpful representatives of the programs, all indicate the potential for accelerating co-riparians' political readiness to cooperate in developing their common rivers. The developing countries' intense yearning for economic progress, together with the absence in these countries of well defined ideas as to the allocation of the rivers' benefits, enhances the potential for cooperation. Furthermore, the participation of impartial experts in the riparians' development efforts increases their acceptability by the co-riparians as mediators or even arbitrators and consequently creates the potential for reducing friction in the development of the riparians' common basins.

The positive effects of the technical assistance programs must be considered, however, in the light of the grave limitations upon these programs' ability to provide a comprehensive solution to the problem of international river development and regulation.

The first limitation is the meagerness of the resources available for such programs as compared with the urgent, vast, and diverse needs of increasing numbers of developing countries. The Technical Assistance Board of the Expanded Program of Technical Assistance (EPTA)\textsuperscript{216} comments on this problem as follows:

\textsuperscript{215} U.N. Special Fund, supra note 202, at 20.

\textsuperscript{216} The Expanded Program of Technical Assistance (EPTA) was established in December 1949, pursuant to Resolution 22 (IX) of the Economic and Social Council, approved by the Assembly in Resolution 304 (IV). EPTA was a development and expansion of the rather limited existing technical assistance programs of the United Nations and some of the specialized agencies. The assistance provided by the various organizations under the TPTA programs was coordinated and administered by the Technical Assistance Board, which consisted of the executive heads of the participating organizations. The United Nations is one of the eleven participating organizations in EPTA. The other ten are: The International Labor Organization (ILO), the Food and Agriculture Organization (FAO), the United Nations Educational, Scientific and Cultural Organization (UNESCO), the International Civil Aviation Organization (ICAO), the World Health Organization (WHO), the International Telecommunication Union (ITU), the World Meteorological Organization (WMO), the International Atomic Energy Agency (IAEA), the Universal Postal Union (UPU), and the Intergovernmental Maritime Consultative Organization (IMCO). U.N. Doc. E/TAC/153/Rev.7, at 2 (1965). Those agencies which are active in water resources development are FAO, UNESCO, WMO, and WHO. EPTA is financed by voluntary contributions from governments, members of the United Nations, or the organizations participating in EPTA. The funds contributed by the governments are shared by the participating organizations. U. Kirdar, supra note 200, at 37.
The area of need is so immense that the resources of the Expanded Program have had to be extremely, and indeed painfully, thinly spread. In most countries have they formed only a small part of the total external aid, and a far smaller part still of the total development effort.\textsuperscript{217}

The Board’s point that the resources channelled through the United Nations form “only a small part of the total external aid” can be illustrated by the following comparison. In 1961, the operations carried out under EPTA were equivalent to 41.5 million dollars,\textsuperscript{218} and the contributions pledged to the Special Fund\textsuperscript{219} totaled 47.6 million dollars.\textsuperscript{220} In comparison, bilateral assistance of all kinds amounted to 4.1 billion dollars by the United States, 1.2 billion dollars by France, 745 million dollars by the United Kingdom, and 933 million dollars by the Communist countries.\textsuperscript{221} Contributions pledged to United Nations assistance programs during subsequent years, though gradually increasing to a record of almost 190 million dollars for the year 1968,\textsuperscript{222} remained miniscule compared to the bilateral assistance of all kinds. The Board’s second point, that United Nations technical assistance forms only a very small part of the total development effort, can be illustrated partly by the following example. Whereas all the economic assistance provided by the United States through the Agency for International Development totaled, in 1961, 2,012 million dollars,\textsuperscript{223} the share of the assistance in pre-investment projects was only about 42.6 million dollars, out of which 36.6 million dollars was a contribution to United Nations development programs.\textsuperscript{224} Viewing the Board’s comment together with the above figures, in light of the immense need for pre-investment projects, it seems that the donating countries are restrained in providing assistance in pre-

\textsuperscript{218} U. \textit{Kirdar}, supra note 200, at 90.
\textsuperscript{219} The Special Fund was established in October 1958, pursuant to the Assembly Resolution 1240 (XIII). The Special Fund is a separate fund designed to finance operations directed “towards enlarging the scope of the United Nations programs of technical assistance so as to include special projects in certain basic fields.” G.A. Res. 1240 (XIII), 13 U.N. GAOR Supp. 18, at 11, art. I(1)(c), U.N. Doc. A/4090 (1958). It concentrates on relatively large projects which are expected to lead to early results and to have a broad impact on the development of the countries concerned, in particular by facilitating new capital investment. \textit{Id.} art. I(2)(a)(c).
\textsuperscript{221} U. \textit{Kirdar}, supra note 200, at 90.
\textsuperscript{224} Letter from Frank M. Charette, Chief Statistics and Reports Division, Office of Programs Policy Coordination, Agency for International Development, Department of State, June 14, 1968.
investment projects and in channelling their assistance through the United Nations.

The utilization of the meager resources available to the programs is itself fraught with difficulties attributed to the practice of pledging contributions on a yearly basis and, sometimes, in currencies with limited convertibility. The fact that the amounts of the contributions pledged differ from year to year, and in most cases are not paid on time and occasionally are not even settled, makes it extremely difficult to draw up long-term programs and is responsible for alterations and cancellations of programs. Likewise, the practice of the Soviet Union and other Communist states of pledging unconvertible currencies restricts the use of these contributions to the resources of their respective donors, complicates the planning of programs, and infects their multilateral character with bilateralism. Clearly, the financial handicaps of the assistance programs limited the occasions in which these programs can lend support to the development and the regulation of international rivers.

The second limitation follows from the conditioning of the Special Fund programs upon eligibility for assistance and request for assistance. The eligibility for assistance requirement excludes non-member states from the benefits of the Fund's programs. The People's Republic of China, in which the Mekong River originates, was excluded from participating in the multilateral development projects being carried out on this river under the auspices of ECAFE. Likewise, the Rhodesian declaration of independence caused an UNDP project on Lake Karibia, executed in cooperation with Zambia and Rhodesia, to be interrupted and later to be carried on only in Zambia. Considering the domestic instability affecting numerous African countries, where separatist movements are not infrequent, it is likely that questions of membership might interfere with the execution of UNDP projects.

The request for assistance requirement is common to all the technical assistance programs. In the case of international river projects, this requirement necessitates the prior accord of co-riparians to submit joint applications for assistance in planning a coordinated development project.

225. For instance, although 50.4 million dollars has been pledged for the year 1963, only 37.5 million dollars was paid as of October 31, 1963. U. KIRKAR, supra note 200, at 91.
226. Id. at 89-93.
228. For more details, see U. KIRBAD, supra note 200, at 41-44.
229. See note 158 supra.
The absence of such agreement precludes the assistance programs from undertaking full scale projects on international rivers. Efforts under the assistance programs to bring about such agreements do not apply to all situations and do not succeed in all cases. The current pragmatic practice of the UNDP avoids involvement in international rivers affected by political conflicts.

In addition, the programs do not apply where prior attempts to initiate cooperation between co-riparians were not concluded successfully. Co-riparians' refusal to cooperate might be motivated by political hostility, differing schedules of economic priorities, or advantageous location on the common river. Political hostility includes varying degrees of tension which were created otherwise than by a conflict over the common river itself. Within this category is the tense relationship between East Pakistan and India which precluded cooperation on essential development projects. Advantageous location with regard to the use of the common river has motivated the unwillingness of a few Latin American countries to cooperate in river development. Lack of willingness to join in multilateral projects bars the undertaking by the assistance programs of full scale development projects. Thus, the non-application of the assistance programs to certain situations limits the occasions in which they can serve the cause of international river development and regulation.

Finally, the existing practice of making technical assistance available to international river development, helpful as it is, does not provide a stable framework for regulating riparian competition over the exploitation of international rivers. The support derived by the riparians from working in association with the representatives of the programs extends only for the term of the pre-investment project. Upon termination of the project riparians must face the problems of following up the project and allocating the derived benefits. The institution fashioned to continue the work in those later stages is the common commission of the co-riparian, generally composed of equal representatives from each co-riparian, reflecting the basic concept governing the determination of issues concerning the common rivers. Under this concept the approval of all riparians is required for binding decisions. Excluding the Mekong Committee, none of the commissions established in connection with the technical assistance programs has yet faced the stages following the pre-investment projects. The Mekong Committee itself, which has at all times functioned under the auspices of ECAFE, has yet to confront major issues. The experience of these commissions still is too meager to

231. See note 212 supra.
232. See text accompanying note 181 supra.
refute the assumption that a system operating on the principle of a veto-power operates precariously. The argument and doubts raised earlier with regard to the Mekong Committee²³³ apply even more forcefully to the practice discussed here. It should be observed especially that most of the riparians are newly independent, strongly nationalistic, and, in many cases, afflicted with domestic instability. Moreover, it is doubtful whether co-riparians generally will be able to attract as much international assistance as have the co-riparians of the Mekong River. Against this background it seems too risky to allow the regulation of riparian competition over the exploitation of international rivers to depend upon the discretion of each of the riparians.

The encouragement given by the programs to the riparians' initial cooperative steps should be bolstered by a more stable practice, one which is qualified to combat the arbitrary exercise of riparians' discretion. One way of providing for such a practice is by vesting the impartial experts serving on the projects with the authority to arbitrate controversies among the riparians. It was suggested earlier that the participation of impartial experts in the riparians' development effort increases the potential of their acceptance by the co-riparians as mediators or arbitrators. However, potential willingness to submit to arbitration cannot be equated with compulsory arbitration. Therefore, the framework of the technical assistance programs cannot be regarded as providing a stable practice for the regulation of riparian competition over the exploitation of international river basins.

In sum, the activities of the technical assistance programs constitute a strong impetus for developing international rivers and reaching agreements regulating the exploitation of these rivers for the benefit of all the co-riparians. However, the ability of the programs to influence the regulation of riparian competition is limited by the programs' financial handicaps, their non-applicability to certain international rivers, and the existing practice of subjugating the adjustment of conflicts to the discretion of each co-riparian. In view of the last limitation, it remains to consider whether the United Nations is competent to decide controversies over the development of international rivers, either directly or indirectly through the adoption of conclusions reached by its appointees.

United Nations competency to decide questions of riparian competition in light of the Charter's domestic jurisdiction reservation

The delicate issue of United Nations authority vis-à-vis its member

²³³. See text accompanying notes 181 to 183 supra.
The problem of the domestic jurisdiction reservation has never been clearly resolved. The Charter reflects the basic dichotomy faced by its framers between the desire to entrust the United Nations with broad functions and the fear of impairing the member states' domestic jurisdiction. While the Charter charges the United Nations with the responsibility for international security and the promotion of economic and social progress and development as well as the solution of international economic and social problems, it also prescribes that the United Nations shall act in accordance with the principle of the sovereign equality of all its members (Article 2(1)). The relation between the authority of the United Nations and the sovereignty of its members is delineated ambiguously in Article 2(7):

Nothing contained in the present Charter shall authorize the United Nations to intervene in matters essentially within the domestic jurisdiction of any state or shall require the Members to submit such matters to settlement under the present Charter; but this principle shall not prejudice the application of enforcement measures under Chapter VII.

Clearly this provision limits the authority of the United Nations to act against its members, but the kinds of matters and actions falling within this limitation are described only in the most general terms.

With a view to ascertaining whether the domestic jurisdiction reservation affects United Nations competency to decide questions of riparian competition over international river exploitation, the present chapter examines the problems presented by Article 2(7) and the way in which United Nations practice has responded to them. Since the question of riparian competition over international river utilization, divorced from the question of economic progress generally, has been considered by the United Nations on only two occasions, the discussion of United Nations practice dwells substantially on analogous questions concerning the general welfare provisions of the Charter.

The contradictory meanings attached to the term "intervene" by writers as well as members of the United Nations are responsible for much of the controversy surrounding the domestic jurisdiction reservation. According to the liberal school of thought the term

235. Uncertainty as to the scope of the limitation is increased by the difference between this provision and its prototype in the LEAGUE OF NATIONS COVENANT, art. 15(8): If the dispute between the parties is claimed by one of them, and is found by the Council, to arise out of a matter which by international law is solely within the domestic jurisdiction of that party, the Council shall so report, and shall make no recommendations to its settlement.
is not to be given a narrow technical interpretation. While discussion does not amount to intervention, the creation of a commission of inquiry, the making of a recommendation of a procedural or substantive nature, or the taking of a binding decision constitutes intervention under the terms of this paragraph.236

According to the leading exponents of the strict school of thought "intervention" must be interpreted by referring to its accepted technical meaning.237 Intervention under international law is defined by Oppenheim as "dictatorial interference by a State for the purpose of maintaining or altering the actual condition of things."238 Lauterpacht maintains that current interpretation of intervention implies a preemptory demand for positive conduct or abstention which, if not complied with, involves a threat of or recourse to compulsion in some form, though not necessarily physical compulsion.239 Under this school of thought, the domestic jurisdiction reservation excludes intervention conceived as dictatorial or mandatory interference intended to exert direct pressure upon the state concerned; but, it does not rule out action by way of discussion, study, enquiry and recommendation falling short of such intervention.240 Recommendations which do not imply a legal obligation to accept them but which are calculated to exert direct pressure likely to be followed by measures of enforcement would probably amount to intervention. Other recommendations, general in character or even addressed to individual states, are not excluded by the domestic jurisdiction reservation.241

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236. This interpretation is supported by the argument that limiting "intervention" to coercive measures would have the result of largely limiting the application of the reservation to a range of cases so narrow that it obviously could not have been intended. Id. Such a limitation, it is explained, would render the reservation superfluous in relation to the authority of the General Assembly and the Economic and Social Council which, in any case, do not have the power to take enforcement measures. L. Goodrich & E. Hambro, Charter of the U.N.: Commentary and Documents 120 (2nd ed. 1949).


238. I. Oppenheim, supra note 185, at 305. The definition is explained to mean: Intervention can take place in the external as well as in the internal affairs of a State. It concerns, in the first place, the external independence, and in the second either the territorial or the personal supremacy. But it must be emphasized that intervention proper is always dictatorial interference, not interference pure and simple. Therefore, intervention must neither be confused with good offices, nor with intercession, nor with co-operation because none of these imply, dictatorial interference.

Id.

239. H. Lauterpacht, supra note 238, at 167.

240. I. Oppenheim, supra note 185, at 415, 416.

241. Id. at 416. Cf. H. Lauterpacht, supra note 238, at 169-70: Undoubtedly when a 'recommendation' is in fact in the nature of a decision the disregard of which may in certain eventualities involve coercion, it is arguable—
Critical of both schools, Preuss offers an intermediate interpretation of the term intervention. The technical interpretation is acceptable to him upon an "essential qualification," and "insofar as it related to action of a general nature taken by the General Assembly or the Economic and Social Council under the 'general welfare' provisions of the Charter." The essential qualification concerns the point that the United Nations was intended to deal exclusively with governments and not with individuals in a state. Preuss distinguishes between recommendations addressed to member states generally which relate to matters within the scope of the Charter, and recommendations addressed to specific states which relate to matters essentially within their domestic jurisdiction. Recommendations of the first category, and the discussions leading to them, are considered by Preuss as "consistent with the pledge of member states to take joint and separate action in cooperation with the Organization for achieving the economic and social goals set forth in the Charter." Moreover, since these recommendations are applicable to all member states, "they would not be viewed as interventions, even if they should concern a matter regarded in principle as falling within the domestic jurisdiction of individual states." On the other hand, recommendations of the second category are said to constitute "a form of interference which the framers plainly wished to avoid, and which, by common understanding, they considered to be prohibited under the Charter."

Whereas the Council was designated in Article 15(8) of the Covenant as the authority competent to determine whether a concrete case falls within the domestic jurisdiction of the state concerned, Article 2(7) of the Charter omitted any reference to that question. This omission is consistent with attributing the competency to decide jurisdiction to the International Court of Justice, to United Nations organs or to the member states concerned. The selection among the three alternative authorities would have bearing on the purview of the reservation itself.

The International Court of Justice might be argued to be the competent authority by virtue of its being the judicial organ of the United Nations and the only disinterested body. Goodrich and Hambro suggest that if the question of domestic jurisdiction was not to be decided

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we cannot put it higher than that—that it may fall within the terms of Article 2, paragraph 7.


243. Id. at 607.

244. Id. at 586.

245. Id.

246. Id.
exclusively by legal standards, "there appeared no compelling reason for making the Court the sole, or even the principal, interpreter of Article 2(7)." The competency of the Court is also challenged on the ground that Article 2(7) limits the application of the Statute of the Court. The Statute, being an integral part of the Charter, is subject to the general principles of the Charter. Accordingly, the Statute's provisions regarding the Court's authority, including its power to determine whether it has jurisdiction (Article 36(6)), are overridden by the general principle laid down in Article 2(7). It seems doubtful that any ruling of the Court could properly be construed as intervention within the meaning of Article 2(7). However, each member state, unless willing to submit to the Court's jurisdiction, may deem itself justified in adhering to its own views of Article 2(7).

The view that each of the member states retains the authority to decide whether the exception of Article 2(7) applies to it, is reasoned as follows. Since the United Nations is based on the principle of the sovereignty of all its members, each member state enjoys the right inherent in sovereignty to interpret for itself the nature, extent, and meaning of the obligations assumed in the Charter insofar as this right has not been explicitly surrendered. A member state objecting to an action taken by any of the United Nations organs on the ground that it constitutes an infringement of Article 2(7) as interpreted by the organ itself, can refuse to be bound thereby. Member states are bound to accept the decisions of the Security Council provided they are "in accordance with the present Charter" (Article 25). Decisions of the General Assembly or the Economic and Social Council are advisory only and have no binding force.

Since the functions of the United Nations organs overlap somewhat and the same matter might be brought before more than one organ (subject to Article 12(1)), and since a jurisdictional decision of one organ does not bind other organs, vesting authority to decide disputed questions of charter interpretation in the organ charged with its application easily could lead to conflicting interpretations within the United Nations itself, resulting in conflicts and deadlocks. Likewise, since the binding force of a jurisdictional decision relates only to the specific case under consideration, it would not affect similar cases which might

249. Id.
250. Moreover, restriction upon the independence of states cannot be presumed. Id. at 541.
251. Id. at 542.
be brought before the same organ in the future. This might result in inconsistent decisions influenced by political considerations. Vesting the Security Council with authority to decide its jurisdiction might entail the frequent obstruction of its operations by a veto employed by any of the permanent members on jurisdictional questions.

The inability or the reluctance of the 50 delegations to fashion a more precise solution, leaving the conflicting views to be resolved somehow in the future, introduced into the Charter an element of ambiguity which may be a source of future controversies. Ambiguity, however, also implies flexibility which permits adaptation and evolution in consonance with changing circumstances. Only a study of the interpretation given to Article 2(7) by the United Nations in practice can disclose the interpretation it may be given in the future.

United Nations organs, in the pursuit of their functions, have, by and large, been noncommittal as to the scope of the domestic jurisdiction reservation. Resolutions eventually adopted, after discussions pertaining explicitly or implicitly to the jurisdictional issue, are not articulated in terms of Article 2(7). Obviously, a practice of circumventing the jurisdictional issue does little to provide answers to the issues presented by Article 2(7). Unless some authority can be found for adopting one of the interpretations of the term "intervention" which has been suggested by scholars, it would be difficult to identify matters established by the United Nations practice as not belonging essentially to the domestic jurisdiction of states. However, since the views of each of the three schools of interpretation have been contested by member states during various discussions, none of these views will be endorsed in this study as a basis for discussion. The following examination attempts to extract some generalizations from the actions taken by United Nations organs on questions involving the jurisdictional issue, and from the arguments presented with a view to determining whether the United Nations might be inhibited in adopting resolutions deciding questions of riparian competition over international river exploitation.

In practice the United Nations organs concerned, without asserting expressly their competence to decide the jurisdictional issue, have acted upon the questions submitted to them even when, as was true in many cases, the organ's competency was vigorously challenged. The proposals and the few formal motions made to submit the issue to the advisory opinion of the Court have consistently been rejected by the organs handling the relevant questions.252 The persistent actions of the United

Nations organs, by way of discussions, enquiries, reports, and recommendations, in the face of vehement denials of their competence to do so can be argued to have established a practice in which the organs are competent to determine their jurisdiction to handle the questions submitted to them.

The issues of "intervention" and "matters essentially within the domestic jurisdiction" are analyzed in the light of United Nations action upon questions involving human rights and fundamental freedoms, economic progress generally, and international river utilization particularly. The common denominator of these questions is the pledge given by the member states to cooperate with the United Nations (Article 56) in the promotion of conditions of economic and social progress, solution of international economic and social problems, and observance of human rights and fundamental freedoms (Article 55). The fact that the responsibility of the United Nations and the pledge of the member states relate to the economic and social field in pari passu might suggest that the United Nations would act similarly in all situations falling within the broad scope of Article 55. However, this has not been the case in terms of United Nations practice under Article 2(7). The following analysis, therefore, examines and compares the response of the United Nations to questions falling under the three categories mentioned above and attempts to ascertain why certain actions will be taken in one category of questions and will be avoided in others.

Questions Involving Observance of Human Rights and Fundamental Freedoms

The United Nations organs have assumed competency to act upon a number of questions involving the broad category of observance of human rights and fundamental freedoms. While each situation was considered in light of its specific circumstances, certain generalizations can be drawn from the discussion preceding the course of action settled upon by the relevant organs. The arguments which supported the competency of the organs to act in those situations have persistently categorized the situations as involving two or more of the following elements: (a) potential threat to the peace or impairment of friendly relations among states; (b) violations of obligations arising out of the Charter; (c) violations of other international agreements; and (d) defiance of general international law. On the whole, United Nations practice indicates that denials of human rights have received mainly international attention when presented in the form of racial discrimination and repression of colonial territories. The recent trend has been to tie denial of human rights to the principles of self-determination and racial equality which is
felt to constitute a "permanent source of international friction" which "threatens international peace and security." United Nations organs have acted in a variety of ways, most of which qualify as "intervention" within the meaning attached to this term by the liberal or intermediate schools. On the other hand, it is very doubtful whether any of these measures amounts to a compulsive and dictatorial interference, as the term "intervention" is defined by the strict school. Since the resolutions of United Nations' organs did not specify to which jurisdiction the matters raised by the relevant situations belonged, the actions taken by the organs can be construed as implying either that they did not constitute intervention or that they responded to questions not belonging to the reserved domain, or both.

It appears that the only certain conclusion that may be drawn from the practice concerning human rights questions is that in situations involving actual or potential threat to the peace and violations of the Charter, international agreements, and general international law, Article 2(7) does not constitute a bar against a wide variety of measures ranging from discussions, enquiries and reports to specific recommendations to pursue or withdraw from certain measures and general recommendations calling upon the member states to bring sanctions to bear on non-complying states.

The differences in the nature and the extent of the measures taken by the United Nations organs cannot serve to clarify the scope of the domestic jurisdiction reservation, since different actions were taken in response to similar or almost identical questions. Rather, the various actions taken by United Nations organs on questions of human rights and fundamental freedoms were fashioned to the degree of international concern evoked by these questions rather than to the criteria prescribed in Article 2(7). Yet, the fact that in many situations the Assembly called up-

254. See text accompanying notes 236 to 246 supra. Actions have consisted of discussions, enquiries, reports, condemnation of certain actions by named states, requests for withdrawal from certain measures taken, appeals to named states for pursuit of specific policies, and recommendations directed to all member states for taking political and economic measures against non-complying states.
255. See text accompanying notes 238 to 241 supra. It should be observed in this context that Article 2(7) explicitly excludes the application of the domestic jurisdiction reservation to enforcement measures taken by the Security Council in situations constituting a "threat to the peace, breach of the peace, or act of aggression." U.N. CHARTER art. 39. Hence, measures taken under this exception, such as the Security Council resolution calling for selective mandatory sanctions against the illegal racist regime of Southern Rhodesia (taken in accordance with Articles 39 and 40 of the Charter), [S.C. Res. 232 of 1966, cited in 4 U.N. MONTHLY CHRONICLE No. 1 at 21 (January 1967)] do not bear on the interpretation of "intervention" by the practice of the United Nations.
on specific members to pursue certain policies and desist from others, and recommended economic and political sanctions against non-complying states, suggests that the concept embodied in the domestic jurisdiction reservation did not bar recourse to such measures when taken in response to situations evoking widespread international concern.

**Questions of Economic Progress**

United Nations activities in the economic field can be said to consist of two categories of actions: actions in the nature of economic assistance to specific states, and actions in the nature of general resolutions addressed to member states at large. The first category includes surveys, reports and recommendations made by the regional economic commissions and other special economic survey missions, and aid rendered under the technical assistance programs. These actions are undertaken only with the consent of the states concerned. Consent to certain actions of the United Nations negates the application of the domestic jurisdiction reservation to such actions. Such activities thus do not bear on the United Nations' interpretation of Article 2(7).

Many of the actions falling under the second category pertain to matters traditionally considered within the domestic jurisdiction. Such actions include recommendations by the General Assembly to the member states to take measures designed: to promote and maintain full and productive employment; to combat inflation and to raise the general standard of living of their peoples; to expedite the carrying out of land reform programs; to improve the investment climate in countries seeking to attract private foreign capital (by preventing unduly burdensome taxation and discrimination against foreign investment); to promote conditions favorable to trade, taking into account any harmful repercussions that commercial policies and trade practices might have, particularly on the trade of the developing countries; and, to promote the private foreign investment in developing countries recommended by the United Nations Conference on Trade and Development. Although many of these actions impinge upon traditional concept of domestic jurisdiction, it does not necessarily follow that the traditional concept of the reserved domain has been broken so as to permit United Nations intervention in these matters. While under the liberal school's interpretation such actions would be construed as intervention, since anything more than discussion is so viewed, under the interpretation of the strict and the intermediate schools, general recommendations relating to matters within the scope of the Charter are not deemed intervention.

With regard to the second category, United Nations practice appears
to indicate that in matters concerning the economies of states it is unwilling to go further than adopting general recommendations unless consent is given by the relevant states to specific actions. From this it seems safe to conclude that Article 2(7) does not constitute a bar against general recommendations upon questions concerning the economies of the states. In view of the fact that the actions taken on questions of human rights called upon named states to pursue or withdraw from pursuing specific policies, it might be further concluded that the values of "economic progress" and "solution of international economic problems" do not enlist as intensive sponsorship as does the value of human rights, and that economic questions are not thought to present imminent threats to world peace. In sum, United Nations practice may be taken as establishing that economic questions do not evoke enough international concern to call upon specific states to pursue or desist from specific measures.

Questions of International River Utilization

The question of riparian competition over international river utilization, divorced from the question of economic progress generally, has been considered by the United Nations on only two occasions. The first discussion followed a Syrian complaint to the Security Council against Israeli projects on the Jordan River. The second was occasioned by the draft resolution submitted by Bolivia to the Assembly's Sixth Committee which proposed to codify the law on the utilization and exploitation of international rivers. The discussion on both occasions centered on draft resolutions intended to resolve the matters at issue. Although these draft resolutions were defeated, an examination of these attempts and the discussions surrounding them is illuminating.

In October 1953, a Syrian complaint was lodged with the Security Council claiming that Israel had begun a project to change the bed of the Jordan River in contravention of the Israel-Syrian General Armistice Agreement. Authority over the demilitarized zone, it was argued, was not vested in either of the parties but was the responsibility of local authorities acting under the chairman of the Mixed Armistice Commission; consequently, Israel was not entitled to undertake any projects in its sector of that zone. It was alleged that the project would deprive those living along the Jordan of water needed to irrigate their land and would give Israel a military advantage in the demilitarized zone in

256. Within the framework of economic progress, consideration has been given to the question of international river development. However, the actions taken or to be taken in this field, such as those taken under the technical assistance programs, are subject to the consent of the concerned states.

violation of the Armistice Agreement. The latter allegation was accompanied by a statement that Israel had partially mobilized its forces behind the central sector of that zone.\textsuperscript{258} A report submitted to the Security Council by the Chief of Staff of the Truce Supervision Organization contained his decision of the previous month instructing the cessation of Israeli work in the zone so long as no agreement had been arranged.\textsuperscript{259} Israel informed the Council at the October meeting that it was willing temporarily to suspend its work in the demilitarized zone in order to facilitate the Council's consideration of the question, without prejudice to its case on the merits.\textsuperscript{260} Subsequently, the Council resolved that, without prejudice to the rights or claims of the parties concerned, it was desirable to suspend the projects begun in the demilitarized zone during its urgent examination of the question.\textsuperscript{261}

The dispute presented to the Security Council consisted of three elements: an imminent threat to the peace in the region; the observance of an international agreement; and the development of an international river for the benefit of its co-riparians. The last element constituted an international economic problem and a matter of economic progress within the terms of Article 55. The Jordan dispute differed from the economic questions generally considered by the United Nations in that it involved the additional elements of an imminent threat to the peace and the observance of an international agreement. The combination of the three elements presented a setting similar to that of the human rights question, over which the United Nations assumed competency to call upon named states to follow specific measures. Given this analogy, the Council could have been considered competent to decide on measures for settling the Jordan dispute within the framework of regional projects, even if the question of international rivers alone was viewed as falling within the reserved domain. It would have been appropriate to approach the dispute as a problem of regional developments in view of the fact that it had created a threat to the peace and was alleged to be a violation of the Armistice Agreement, and in view of the potential contributions of such a project to the welfare of the region. Such an approach was in fact adopted in the draft resolution submitted jointly by France, the United Kingdom and the United States.\textsuperscript{262}

The draft resolution declared that, in order to promote the return of

\textsuperscript{258} Id.
\textsuperscript{259} Id.
\textsuperscript{260} Id. at 225.
\textsuperscript{261} Id.
\textsuperscript{262} S/3151. Lebanon also submitted a draft resolution (S/3152) as an alternative to the three-power joint draft resolution. The discussion in the Council focused, however, on the three-power joint draft resolution. U.N., Yearbook 1953 at 228.
permanent peace to Palestine, it was essential that the Armistice Agree-
ment be strictly and faithfully observed by the parties. The Chief of
Staff, who was made responsible under the Armistice Agreement for the
general supervision of the demilitarized zone, was called upon to maintain
the demilitarized character of that zone as defined in the Agreement.

Regarding the development of the Jordan River, the draft resolution
provided:

The Security Council—

11. Requests and authorizes the Chief of Staff to explore
possibilities of reconciling the interests involved in this dispute
including rights in the Demilitarized Zone and full satisfaction
of existing irrigation rights at all seasons, and to take such
steps as he may deem appropriate to effect a reconciliation,
having in view the development of the natural resources affected
in a just and orderly manner for the general welfare;

12. Calls upon the Governments of Israel and Syria to cooper-
ate with the Chief of Staff to these ends and to refrain from any
unilateral action which would prejudice them;

13. Requests the Secretary-General to place at the disposal
of the Chief of Staff a sufficient number of experts, in particular
hydraulic engineers, to supply him on the technical level with the
necessary data for a complete appreciation of the project in
question and of its effect upon the Demilitarized Zone.

These provisions constituted an important attempt on the part of the
United Nations to settle a dispute concerning international river develop-
ment. They provided for the effectuation of a settlement based upon a
reconciliation of the interests involved, the satisfaction of existing irriga-
tion needs, and the development of natural resources in a just and orderly
manner for the general welfare. A distinct device was chosen for that
purpose; the Chief of Staff was authorized to explore the possibilities for
such a settlement with the assistance of experts in the relevant com-
petencies. The governments of Israel and Syria were called upon to
cooperate with the Chief of Staff in the performance of his task and to
refrain from any unilateral action impeding his efforts. More specifically,
the Chief of Staff was authorized to determine whether the project as
contemplated or as modified conformed to the standards set for resolving
the disputes. The effect of such an authorization might have been either

263. Art. 6 of the three-power joint draft resolution.
264. Arts. 8 and 9 of the draft resolution.
to bar Israel from proceeding with its project on the Jordan River, in
the event that the project was found to affect the zone adversely, or, upon
a contrary finding to invalidate the Syrian claim of a right to veto the
project. Hence, the draft resolution sought to safeguard, through an
objective fact finding process, the interests of the co-riparians to the
Jordan River, including protection against impeding useful and harmless
development projects.

In support of the draft resolution, the United States representative
maintained that development projects consistent with the Armistice
Agreement, in furtherance of the general interest, and consistent with
established rights and obligations should be encouraged.265 No govern-
ment, he asserted, should be able to veto legitimate projects in the
demilitarized zone.266 The representative of the United Kingdom
declared that the longer the temporary armistice arrangements continued,
the more desirable it was that some way be found to allow constructive
projects in the area to be undertaken provided that it could be demonstrat-
ed that no interest would suffer thereby.267 The French representative
expressed the opinion that it would be unjust and contrary to the spirit of
the United Nations for a region's future economic development to be
decided by theoretical military exercises carried out on maps. Surely
Israel, by planning the construction close to its frontier of hydroelectric
installations essential to its economy was demonstrating its faith and
confidence in the peaceful spirit of its neighbors.268 The problem to be
resolved by the Chief of Staff, he stated, was that of utilization of one of
the rare sources of water in Palestine in the best interest of all the parties.
The discussion demonstrated that satisfying the rights of one party did
not necessarily mean the frustration of the rights of the other. Some of
the Jordan's waters might be diverted at the same time that the influx of
water into irrigation channels was assured by control.269

Israel gave its qualified consent to the draft resolution but Syria
indicated its opposition.270 The Syrian representative asserted that the
draft resolution would paralyze the Security Council in security matters
and draw it into areas properly within the exclusive responsibility of the
Economic and Social Council.271 Furthermore, under the three-Power
draft, the Chief of Staff would have to act as a judge to ascertain whether
certain private rights existed or not, a task for which he was not equipped.

266. Id.
267. Id.
268. Id.
269. Id. at 230.
270. Id.
271. Id. at 232.
He could not administer the demilitarized zone under the agreement and had no authority to pass judgments. He was empowered to supervise the zone but not, it was argued, to consider hydraulic projects except to the extent that they affected the Armistice Agreement.\textsuperscript{272} The representative of Lebanon also found the draft resolution unacceptable because, \textit{inter alia}, it did not subject the appointment of the experts to the consent of the two parties to the dispute.\textsuperscript{273} The Soviet representative explained that he could not support the three-Power draft because it did not relate directly to the problem under discussion, but rather constituted an attempt to substitute for that question the problem of how the United States, by taking advantage of the Israeli-Syrian dispute over building the canal and hydroelectric station, could obtain mastery over the economy of the Middle and the Near East.\textsuperscript{274}

The opposition to the draft resolution aligned itself behind a political approach to the dispute. It refused to acknowledge the Council's competency to approach the question from its economic side and rejected the appointment of a third party to attempt reconciliation and determination of essentially economic questions. Although the opposition constituted only a small minority in the Council, it succeeded in defeating the draft resolution, thereby aborting a promising attempt to deal with the Arab-Israeli conflict and Jordan River development. In January 1954, a somewhat modified draft resolution was put to a vote and received seven votes in favor, two against,\textsuperscript{275} and two abstentions;\textsuperscript{276} the resolution failed to pass due to the Soviet veto.

Set against the not unusual invocation of the veto power vested in the permanent members of the Council, the defeat of the resolution in the face of overwhelming support for it is not striking. It is significant, however, that the broad support given to the attempt in the Council was not carried on to other levels of the United Nations such as the Assembly and the Economic and Social Council. It is suggested that the question of the Jordan River's development did not arouse sufficient international concern to cause the Assembly, the Economic Council, or their subsidiary organs to consider it.

This conclusion is not weakened by the fact that the handling of the Jordan River question was strongly colored by political considerations. Most of the questions upon which the United Nations has acted involved political considerations; this is notably true in the category of human

\textsuperscript{272} Id.
\textsuperscript{273} Id.
\textsuperscript{274} Id. at 233.
\textsuperscript{275} The opposing votes were cast by the U.S.S.R. and Lebanon. \textit{Id.} at 233 n. 67.
\textsuperscript{276} The abstainers were China and Brazil. \textit{Id.}
RIPARIAN COMPETITION

rights questions, each of which involved important political interests of certain states, including the permanent members of the Security Council. In these situations, the political considerations at times served to moderate the actions taken rather than to avert any United Nations action at all. It follows that the international concern aroused by the human rights questions was sufficiently profound to overcome political considerations and to stimulate a United Nations response, whereas the international concern aroused by the question of the Jordan development has failed to evoke a commensurate reaction and specifically has not been deemed sufficiently important to warrant United Nations action in the form of a resolution requesting the concerned states to take specific measures.

The second consideration of the question of riparian competition over international river utilization was occasioned by the Bolivian proposal to codify the laws on the utilization of international rivers. On October 5, 1959, the Bolivian representative proposed that the Sixth (legal) Committee of the General Assembly recommend adoption by the Assembly of the following resolution:

The General Assembly

Considering the desirability of introducing uniformity and order into the rules applied in practice by States in connection with the utilization and exploitation of international or State waterways and navigation thereon;

1. Requests the International Law Commission to include the codification of current laws on the utilization and exploitation of international or inter-State waterways and navigation thereon as the next subject in its program of work;

2. Requests the U.N. Secretariat, in collaboration with the International Law Commission, to undertake the task of compiling, classifying and analysing existing information on practices having the force of law which govern the use of international or inter-State rivers.\(^{277}\)

The Bolivian representative argued in support of the draft resolution that the problem of international rivers demanded urgent solution because, with the population of the world increasing daily, half of the world's arable land remained unworked for lack of water.\(^{278}\) The implication of rules concerning the utilization and exploitation of international rivers

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\(^{278}\) 14 U.N. GAOR, Six Comm. 46 (1959).
had been emphasized by the Economic and Social Council on various occasions and by several resolutions.\textsuperscript{279} The economic but not the legal aspects of international rivers had been discussed by the Assembly's Second Committee and the Economic and Social Council. The difference between the two approaches was, however, considerable.\textsuperscript{280} From the legal standpoint, the utilization and exploitation of inland waters were not governed by any international statute. In that connection the law applied was purely customary, ill-defined, and lacking in uniformity. There was, accordingly, a pressing need for an overall study of the subject to prepare the way for a subsequent, more thorough, study.\textsuperscript{281}

Enthusiastic support of the draft resolution was expressed by the representative of Ecuador, who considered the question one of "undoubted universal interest."\textsuperscript{282} He pointed out that the unfettered use of inland waters and navigation thereon was still hampered by political and economic difficulties, states showing themselves excessively jealous of their national sovereignty. As to the legal aspect of the question, he rejected the view that international rivers, lakes and canals, and the riches they contained could ever be the exclusive property of any one people. "Such waters should serve as a bond between nations and not as a frontier which divided them."\textsuperscript{283} Ecuador, he added, considered that even waters which were physically under a single sovereignty might be regarded as an international regime.\textsuperscript{284}

The common denominator of the arguments against the draft resolution was the attempt to delay addressing the International Law Commission with the request to consider the problem. The arguments essentially focused on the insufficient importance of the question, the prematurity of any attempt to codify the relevant principles, and the inappropriateness of the International Law Commission for carrying out this task. The argument of insufficient importance, in the context in which it was raised and especially as pronounced by the U.S.S.R. representative, could be construed as meaning that the utilization of international rivers was not considered a question of sufficient international concern. The argument of prematurity, is also commensurate with asserting that the question is not of sufficient international concern, since the prematurity was not attributed to the degree to which the question itself was ripe for regulation at any level. Such a contention would have indeed run counter to reality.

\textsuperscript{279} Id. at 49.  
\textsuperscript{280} Id. at 46.  
\textsuperscript{281} Id. at 49.  
\textsuperscript{282} Id. at 49.  
\textsuperscript{283} Id. at 68.  
\textsuperscript{284} Id.
The prematurity was attributed to the extent to which the existent practices, precedents and doctrines followed by states were ripe for codification of international law. Whether the contention of prematurity for codification is right or wrong, it nonetheless evades the basic issue of the need to regulate international river utilization by international law.

The Charter mandates the Assembly to initiate studies and make recommendations for the purpose of "promoting international co-operation in the political field and encouraging the progressive development of international law and its codification." In order to discharge that function the Assembly established the International Law Commission for "the promotion of the progressive development of international law and its codification." "Progressive development of international law" was defined by the statute as meaning "the preparation of draft conventions on subjects which have not yet been regulated by international law or in regard to which the law has been sufficiently developed in the practice of States." "Codification" was defined as "the more precise formulation and systematization of rules of international law in fields where there already has been extensive State practice, precedent and doctrine." There are no substantial differences between the two concepts, but rather divergence in their emphasis. In both cases the Commission would have to comment on the existence of agreements, divergencies and disagreements in the practice of States, and it would be necessary to conclude international conventions before the result of its work was binding on states. Accordingly, a topic deemed desirable for international law regulation but premature for codification can be acted upon through the draft convention technique.

The contention of prematurity for codification was not accompanied by a proposal to resort to the draft convention technique. Instead, the technique of local arrangements was advocated as a solution to the question. Considering the alternatives offered by the Charter and the Statute, the prematurity contention amounted to a denial of the desirability of regulating the question. It follows that the question was not considered as one of sufficient international concern, but rather as one of the individual states' concern to come to terms with their co-riparians.

288. Id. art. 15.
289. Id.
290. Id. art. 20.
291. Id. art. 23.
The argument that, because of the technical aspects involved, the International Law Commission was not the appropriate body to undertake the study of the question introduced a relevant consideration. However, in view of the specific authorization of the Commission by the Statute to "consult with scientific institutions and individual experts," the consideration of technical knowledge was capable of being incorporated into the Commission's work.

In summation, the opposition to the draft resolution did not deem the question as evoking sufficient international concern to require its inclusion in the work program of the International Law Commission. Moreover, the fact that settlement of the questions by means of local arrangements was deemed to be a satisfactory solution implies the unuttered position of adherence to the concept of state sovereignty.

In the face of the objections raised by many representatives, the Bolivian delegation was persuaded to introduce a third revision of its original draft resolution. The new text represented a compromise arrived at by a working party formed at the preceding meeting. The revised draft resolution was understood to propose the preparation of a purely preliminary report on the question by the Secretariat. While the Bolivian representative expressed his belief that the preliminary report would confirm his delegation's view that codification of the topic was possible, the Afghanistani representative agreed to abstain from voting against the resolution "on the understanding that any study which might emerge would be purely informative, would not be binding on Members, and would be subject to correction by the Member States." The text of the Bolivian revised draft resolution (A/C.6/L/445/Rev.3) reads as follows:

_The General Assembly,_

_Considering_ that it is desirable to initiate preliminary studies on the legal problems relating to the utilization and use of international rivers with a view to determine whether the subject is appropriate for codification,

Requests the Secretary-General to prepare and circulate to Member States a report containing:

(a) Information provided by Member States regarding their

292. _Id._ art. 16(e); _see also id._ arts. 25 and 26.
293. _See_ discussion in the Sixth Committee, _supra_ note 280, at 67-69, especially the statement of the Bolivian representative at 67.
294. _Id._ at 68; _see also_ views expressed by the representatives of Spain, Mexico and India; _id._ at 67-69.
laws and legislation in force in the matter and, when necessary, a summary of such information;

(b) A summary of existing bilateral and multilateral treaties;

(c) A summary of decisions of international tribunals, including arbitral awards;

(d) A survey of studies made or being made by non-governmental organizations concerned with international law.

The revised draft resolution was adopted on October 19, 1959 by a vote of 66 to one, with five abstentions. Upon the recommendation of the Sixth Committee, the General Assembly, on November 21, 1959, adopted the resolution without change. Pursuant to the Assembly resolution, the Secretary-General submitted a report compiling the requested information on April 15, 1963. No further action has yet been taken on the question discussed. Hence, whereas the proponents of the original Bolivian proposal accomplished initiation of an informative preliminary report on the question, its opponents succeeded in preventing the inclusion of the question in the work program of the International Law Commission. Although the resolution considered it desirable to conduct the report with a view to determining whether the subject was appropriate for codification, it did not specify when and by what organ this decision should be taken and the report itself did not form an opinion on this question. As a practical result, the issue of requesting the International Law Commission to deal with the question of international river utilization was postponed for an indefinite time.

On the whole, the process undergone by the original Bolivian proposal, the opposition faced by it, the insistence upon the introduction of several revisions, and the formulation of its final text in a way which deferred indefinitely discussion on the main issue, evidences United Nations apprehension about regulating the utilization of international rivers, and its unwillingness to act upon such regulation. United Nations practice with respect to the question of riparian competition over the exploitation of international rivers, as distinguished from the requested operations of the technical assistance programs, indicates a restrained reaction. Compared with the decisions taken upon the economic questions, and more notably on human rights questions, the response to the question of riparian competition appears very limited. This limited response implies that the regulation of riparian competition even when presenting a
threat to international peace, as did the Jordan dispute, has not enlisted as wide sponsorship as the regulation of economic and social questions. Consequently, United Nations practice may be interpreted as establishing that the question of riparian competition over international river exploitation does not evoke sufficient international concern to move United Nations organs to adopt decisions calling upon specific riparians, and perhaps also riparians in general, to pursue specific policies.

The analysis of United Nations resolutions pertaining to questions within the purview of Article 55 indicates that the United Nations has responded with different levels of intensity to each of the categories discussed. With regard to questions of human rights, the United Nations has been willing to call upon specific states to pursue certain policies, and even to call upon the member states at large to bring economic and political sanctions to bear upon non-complying states. In the economic field its readiness was exhausted by addressing recommendations to all member states or to broad groups of them. As to the question of riparian competition over international river exploitation, it was able neither to reach a decision addressing specific member states nor to agree on a resolution capable of leading to a general recommendation. 297

The difference in the responses to the three categories of questions derives largely from the extent of the international concern evoked by each of them. United Nations competency to decide questions within the purview of its functions is limited legally by the domestic jurisdiction reservation, and is in practice tied to the criterion of international concern.

The two occasions on which the question of riparian competition was considered by the United Nations indicate that regulation in this area does not enlist sponsorship broad enough to induce either a decision on a specific dispute, or a decision capable of leading to the general regulation of the subject matter. The likelihood of the United Nations deciding disputes over international river exploitation appears remote also in view of the course of actions taken by it on economic questions generally. As has been indicated, in the economic field the United Nations has issued only general recommendations addressed either to all member states or to broad groups of them.

The reluctance of the United Nations to impose a settlement upon rival riparians does not exclude, however, the possibility of United

297. The International Law Commission—after reporting on its work on the codification of a topic recommended by the General Assembly—may recommend to the General Assembly, among others, to adopt the report by resolution, or to recommend the draft to members, with a view to the conclusion of a convention. See art. 23 of the Statute of the International Law Commission, annexed to F.A. Res. 174 (II), 2 U.N. GAOR 105, U.N. Doc. A/519 (1942).
Nations representatives acting, with the co-riparians' consent, in the capacity of mediators or arbitrators, as did the World Bank of the Pakistan-Indian disputes. The World Bank was an international body possessing financial and technical resources as well as prestige. A somewhat similar setting for the operation of the technical assistance programs increases the likelihood of future successful mediations. The promotion of a setting conducive to a tender and an acceptance of good offices constitutes a significant step toward institutionalizing the harmonization of riparians' conflicting interests. However, such a setting cannot be equated with a stable institutionalized framework for the adjustment of controversies over international river exploitation.

**CONCLUSION**

The foregoing analysis reveals that the community of nation-states as presently organized is not adequately equipped to adjust conflicts over the development of international rivers. Absent are the two elements which generally serve to adjust conflicts in a society—an accepted set of rules according to which conflicts are aptly resolved and an institutionalized procedure for the efficient application of such rules to specific situations.

There is no agreement on the international level as to which principles constitute the international law applicable to the development of international rivers. Territorial supremacy, territorial integrity, and the unity of a river basin are generally advanced as the guiding principles of law in this area, but the application of these concepts to the problem of international river development inevitably results in conflict because of the inherent contradiction of the principles.

Existing institutions, as well as recommended schemes, fall short of providing an institutional framework for the efficient adjustment of controversies over international river development. The major deficiency of the judicial settlement method lies in the fact that controversies over international river exploitation involve mainly technical questions, the solution of which requires competency in the fields relevant to water resources development rather than in the legal field. The practice of mediation and conciliation operate only on a voluntary basis, and, by definition, lack the capacity to decide controversies. The practice of negotiating settlements through commissions comprised of representatives of the riparians is susceptible to deadlocks. The procedures advanced by the learned law societies, mentioned earlier, cannot safeguard riparians against damages inflicted by development work carried on by other co-riparians or against the stagnation of needed development projects. In addition, the last two methods may be unacceptable to co-riparians inhibited in negotiating with each other.
The United Nations attacks the problem of international river development in its technical aspects and endeavors to fill the gap in the developing countries' knowledge of the nature of their water resources and of how to plan the development of those resources. The United Nations encourages cooperation among the riparians of such rivers involving coordinated investigation and planning. However, the encouragement given to cooperation in the initial stages, important as it is, does not substitute for a compulsory method by which subsequent conflicts of interest are adjusted. The attempt to involve the United Nations in a compulsory adjustment of such a controversy has failed. The United Nations' pattern of actions in the economic field generally suggests that the United Nations will not assume that function in the near future.

The shortcomings of the various approaches discussed in this study derive essentially from the fact that they lack the quality of being specifically designed for the function of adjusting conflicts over international river exploitation. Concepts are borrowed from other areas of international law without adaptation to the distinctive problems and characteristics of this subject. Application of territorial supremacy and territorial integrity concepts to the development of international rivers ignores the natural mobility and indivisibility of the water flowing within a river basin. Similarly, the application of a dispute-resolving method, generally employed to settle single controversies over factual and legal issues, ignores the fact that international river development requires a continuous adjustment of conflicting interests and involves a complex of technical problems.

Solutions suggested by the law societies are marked in part by this weakness. While acknowledgement of the interdependence of the parts of a river basin is followed by a recognition of the right of all co-riparians to share equitably in the benefits of the river, the designation of trial-type judicial hearings as the last resort for the settlement of disputes over international rivers represents a withdrawal into inadequate general methods.

The desire to determine disputes over international rivers within the framework of the United Nations can also be viewed as an attempt to apply existing tools to purposes for which they were not designed. The raison d'être for the establishment of the United Nations was "to save succeeding generations from the scourge of war."

The whole scheme of the Charter shows the prime concern of the United Nations to be the maintenance of international peace and security. Except for enforcement of the International Court's decisions, only a threat to the peace, a

298. U.N. CHARTER, preamble.
299. U.N. CHARTER art. 94, para. 2.
breach of the peace, or act of aggression empowers the United Nations to make binding decisions and employ enforcement measures. The organ invested with these powers is the Security Council, whose constitution differs from those of the other organs of the United Nations in that it gives preference to considerations relevant to peacekeeping, namely military power. Resolutions of the General Assembly and the Economic and Social Council have the force of recommendations which are not legally binding. The United Nations was fashioned to meet decisively only questions involving breach of the peace. Binding determination of other issues falling within the scope of United Nations' purposes was omitted. Furthermore, the designation of voluntary cooperation as the method for resolving these other issues emphasizes that the Charter does not purport to establish an international federation competent in the many fields of international relations, but rather a loose association of states committed to be bound only by decisions on matters of international security.

The absence of organs with sufficient authority and expertise to deal effectively in the economic and social areas parallels the Charter's endorsement of specialized agencies. Article 59 specifically directs the United Nations to initiate negotiations among the states concerned for the creation of any new specialized agencies required for the accomplishment of international economic and social cooperation. The institution of the specialized agency is thus viewed as a complementary method for the achievement of the Charter's goals. The incompetency of the United Nations in these areas is mitigated by providing for the initiation of negotiations leading to the establishment of separate intergovernmental bodies adapted to the performance of specific functions. It is precisely because a specialized agency can be created to deal with a particular type of problem, and its constitution can give it the technical expertise and authority to do so effectively, that this institution is particularly well suited to deal with specific problems.

The foundation of specialized agencies is a functional approach which, in its pure sense, might be termed a theory of technical self-determination: International functions derive from the need to perform those things which cannot be done well, or without friction, except on an international scale; regulating principles are aimed at performing each of these functions in a way which benefits the states concerned, satisfies them as much and as fairly as possible, and reduces friction among them. The functions determine the nature of the actions required, the organs suitable for their proper performance, and the power needed by the respective authorities. Since each function shapes its own institutions, it is performed

300. U.N. Charter, ch. VII.
within a separate and distinct framework. Such a framework is provided by the establishment of functional intergovernmental agencies.

The functional intergovernmental organization seeks to break away from the traditional link between authority and a definite territory by linking authority to a specific activity. The authority of the organization obviously derives from the states' surrender of certain aspects of this sovereignty to the organization. The transfer of sovereignty involved is, however, limited by the defined function of the organization. The reluctance of states to clothe the United Nations with broad powers over the comprehensive fields of economic and social progress does not necessarily imply a refusal to accept authority over specific and carefully defined matters which would implement the functional approach.

Two considerations support the assumption that states might be willing to part with certain limited powers. The first is the current trend of states to join intergovernmental organizations. New states are especially inclined to do so, as they look upon membership in intergovernmental organizations as strengthening their position in the world community. The second, and more significant one, is the beneficial nature of the functions performed by an organization. The more beneficial and vital the services provided by an organization, the more inclined states will be to accept its authority. It is not accidental that the specialized agencies which provide important services have won the most comprehensive membership. A concern with State self-interest is, in turn, incorporated to a considerable extent into the functional approach, since functional organizations are, by definition, established to make up for the inability of single states to perform certain activities well and without friction.

The above propositions indicate the need for facilitating the beneficial and frictionless development of international river basins within a framework broader than that of a single riparian state. Since many states are or will be interested in international river development, and many of these states do not possess sufficient expertise for efficient river development, and since international river development often involves conflicts of interest among states which at times are unable to reconcile them, it is submitted that the appropriate institutional framework for overseeing the development of international river basins is that of a functional international organization, operating on a basin-wide as well as on a global scale. The function of the organization should be the provision of assistance in international river development, and the adjustment of riparian conflicts. To perform these functions aptly, its operative organs

301. See generally P. Jacob & A. Atherton, The Dynamics of International Organization 18-25, 357-59 (1965).
should consist of experts in water resources development; it should be invested with authority to adjust riparians' conflicts; and it should be guided by the doctrine of equitable apportionment.