NAVIGATING THE MISSISSIPPI INTERNATIONAL WATERCOURSE: THE RIGHT OF INNOCENT PASSAGE? A RIPARIAN OPPORTUNITY FOR CANADA & MEXICO

C. MARK MACNEILL*

ABSTRACT

The Mississippi River is one of the "great rivers" of the world and has served as an artery of internal North American transit since time immemorial. The Mississippi River is fed by and connected to a plethora of streams and water sources, including the Missouri and Illinois rivers, which in turn are connected to other rivers and lakes reaching across thousands of miles of internal waterways within the U.S. and Canada. Ultimately this transit network is an international watercourse that is connected to a vast network of sea, air and highway transport modes. The international water route considered in this paper stretches from the Gulf of St. Lawrence, to the St. Lawrence River and the Great Lakes and through the internal territory of the U.S. to the Gulf of Mexico, making it an international intermodal transportation nexus that has the potential to reach all the corners of North America. If strategically further developed beyond its current status to accommodate large modern cargo container ships, the bi-national inland Great Lakes Mississippi Seaway will be of major economic importance to both the U.S. and Canada.

* C. Mark Macneill is the Executive Director of the Kivalliq Business Development Centre, Rankin Inlet, Nunavut Territory, Canada. He is also a part-time law student with the University of Ottawa, Faculty of Civil Law, National Program (LL.L. degree). His prior degrees include: an LL.M., University of Denver (Envir. & Nat. Res. Law & Policy); LL.M., University of Miami (Foreign Lawyers Program – US & Comparative Legal Systems); LL.B., University of Edinburgh, Scotland, UK.; M.P.A., Carleton University, Ottawa, CA; M.B.A., St. Mary's University. He is one of five winners selected in 2007 for the annual national law student writing competition hosted by the American Bar Association's Section on Energy, Environment & Resources for his paper entitled "Gaining Command & Control of the Northwest Passage: Strait Talk on Sovereignty" Macneill is a dual US and Canadian citizen and resides at Cape Breton Island, Nova Scotia, Canada. He wishes to thank William L. Twining, the Emeritus Quain Professor of Jurisprudence at University College London, for encouragement to continue further legal writings.

INTRODUCTION

The Mississippi River is one of the "great rivers" of the world and has served as an artery of internal North American transit since time immemorial.[1] The Mississippi River is ultimately fed by a plethora of streams and water-sources, including the Missouri and Illinois rivers, which in turn are connected to other rivers and lakes reaching across the U.S. and Canada. Ultimately, this transit network is an international watercourse that is connected to a vast network of sea, air, and highway transport modes, making it an intermodal transportation nexus that has the potential to reach all the corners of North America.

The purpose of this paper is to examine the legal framework advocating the development of the Mississippi as a shared watercourse between the U.S. and Canada. This article explores the substantive merit of a Canadian claim of right of passage over the Mississippi River in transit from the Great Lakes to the Gulf of Mexico. Canada's substantive claim rests in part on traditional indigenous customary usage of the North American watercourses, along with the Jay Treaty rights of access provisions and precedence established by the U.S. and Canada in their historic joint construction of the strategic bi-national Great Lakes St.

[1] "Mississippi derives from the old Ojibwe word *misi-ziibi*, meaning 'Great River' or gichi-ziibi, meaning 'big river.' The Mississippi is the 3rd largest river basin in the world. Only the Amazon and the Congo River watersheds are larger." DANIEL SELIGMAN, WORLD'S MAJOR RIVERS: AN INTRODUCTION TO INTERNATIONAL WATER LAW WITH CASE STUDIES 99 (Colorado River Commission of Nevada, 2008).

Lawrence Seaway. Similarly, a bi-national Great Lakes Mississippi Seaway is potentially of comparable economic magnitude for north/south transport, as the east/west transport on the Great Lakes St. Lawrence Seaway is. Its development is prospectively of major economic importance to both Canada and the U.S. and potentially represents a vital part of the internal North American transit network. Furthermore, Mexico and all other nations would benefit from access to this north/south global shipping route into the heartland markets of North America. It is a possible alternate north/south route for market destinations beyond, particularly if connecting with emergent arctic global shipping routes via Canada's Northwest Passage, Russia's Northern Sea Route or the Arctic Polar Route straight over the North Pole.[2]

I. EARLY REVIEW OF THE MISSISSIPPI RIVER WATERCOURSE[3]

The U.S. is a complex intermodal network of ground, air, rail, and water routes that includes a system of interconnected watercourses[4] throughout the country that empty into vast seas at the nation's borders.[5] The Mississippi represents a major artery in this internal U.S. watercourse and was essential in the lives of Native Americans for thousands of years prior to the arrival of Europeans. The loss of control of this vital mode of travel, trade, and nourishment inextricably linked to their traditional wellbeing has arguably displaced them from their sovereign rights.[6]

The first recorded European to reach the Mississippi River was Spanish explorer Hernado de Soto, on May 8, 1541. He was followed in the seventeenth century by French explorers Louis Joliet and Jacques Marquette in 1673. Following them in 1682, explorers Rene-Robert Cavalier, Sieur de La Salle, and Henri de Tonty claimed the whole of the

---

2 *See* Christopher Mark Macneill, *Gaining Command & Control of The Northwest Passage: Strait Talk on Sovereignty*, 34 TRANSP. L.J. 355, 361–62 (2007).

3 "A 'watercourse' . . . is a river, lake or other surface body of water on which navigation is possible from one riparian State to another or from a riparian State to the high seas." INT'L L. ASS'N., BERLIN CONFERENCE (2004): WATER RESOURCES LAW, art. 42, § 3 [hereinafter BERLIN CONFERENCE (2004)].

4 *See* Tolga Bektas & Teodor Gabriel Crainic, *A Brief Overview of Intermodal Transportation*, in LOGISTICS ENGINEERING HANDBOOK, at 28-1 (G. Don Taylor ed., 2007).

5 *See* SELIGMAN, *supra* note 1, at 100–01.

6 U.N. DEP'T OF INT'L ECON. & SOC. AFFAIRS, STATE OF THE WORLD'S INDIGENOUS PEOPLES: INDIGENOUS PEOPLES' ACCESS TO HEALTH SERVICES, at 112–13 (2016).

Mississippi River Valley for France. Then, in 1718, the settlement of New Orleans was established approximately 100 miles upriver on the Mississippi from the Gulf of Mexico.[7]

The eighteenth century saw considerable activity in the region: the establishment in 1718 of New Orleans as the capital of French Louisiana, warfare between European powers, the American War of Independence, and conflicts between Native Americans against French and Spanish forces over access to the Mississippi River. Those conflicts culminated in Spain and France signing treaties with Native American tribes of the region for the purpose of peace and safe access to the river and the Gulf of Mexico.[8] Subsequently, via the 1763 Treaty of Paris, Great Britain acquired the rights to all land in the valley east of the Mississippi River and Spain retained the rights to the lands west of the river.[9] The 1783 Treaty of Paris[10] ceded the lower portion of the Mississippi back to Spain[11] and Pinckney's Treaty in 1795[12] opened it to the U.S.

Canada is a water basin[13] state and riparian to the Missouri/Mississippi River system (via, e.g., the Poplar River in Saskatchewan and the Milk River in Alberta) and the adjoining St. Lawrence River/Great Lakes/Illinois/Ohio River systems.[14] Canada has a shared history of use of the Mississippi River system—as a shortcut route

---

[7] Frank McCormak, *A City, a Port and a River: New Orleans Celebrates 300 Years as a Gateway to the World*, Waterways J. (Jan. 1, 2018), https://www.waterwaysjournal.net/2018/01/01/a-city-a-port-and-a-river-new-orleans-celebrates-300-years-as-a-gateway-to-the-world/ [https://perma.cc/9KVM-H8Z6].

[8] 1740 truce signed by France and Chickasaw ending wars, with the latter agreeing to allow French boats to travel unmolested on the Mississippi River. Norman W. Caldwell, *The Chickasaw Threat to French Control of the Mississippi in the 1740's*, 16 CHRONS. OF OKLA, 465, 470–84 (1938).

[9] The Definitive Treaty of Peace and Friendship, between His Britannick Majesty, the Most Christian King, and the King of Spain, Gr. Brit.-Fr.-Spain, art. 7, Feb. 10, 1763, printed by E. Owen and T. Harrison.

[10] Treaty of Peace, Gr. Brit.-U.S., art. 8, Sept. 3, 1783, 8 Stat. 80.

[11] W. E. HALL, A TREATISE ON INTERNATIONAL LAW 164–65 (Oxford Press, 8th ed. 1924).

[12] *Id.* at 165.

[13] "[A]n international drainage basin is a geographical area extending over two or more States determined by the watershed limits of waters, including surface and underground waters, flowing into a common stream." International Law Association, The Helsinki Rules on the Uses of the Waters of International Rivers, art. II, U.N. Doc. A/CONF. 52/ 484 (1967) [hereinafter Helsinki Rules].

[14] "Such watercourses form a unitary whole and normally flow into a common terminus." MALCOLM N. SHAW, INTERNATIONAL LAW 791 (Cambridge University Press, 5th ed. 2003). Historically though the extent of a water-course system's inclusiveness was debated, e.g. "it includes the complete river basin with all associated tributaries and groundwater systems, a broader definition is the approach adopted in recent years." *Id.* at 791–92.

to the Gulf of Mexico—and has a riparian right of navigational access founded on geography, history, and usage as expressly identified by Articles 3 and 28 of the 1794 Jay Treaty (further corroborated by the 1814 Treaty of Ghent) and by Pinckney's Treaty in 1795. This right is also supported by international law[15] and the inherent rights of North American indigenes.

The establishment of the U.S.-Canadian border, following the conclusion of the American War of Independence, bisected North American indigenous territory where previously no border was known.[16] In response to this international anomaly of divided native territory, Articles 3 and 28 of the 1794 Jay Treaty (named the "Treaty of Amity, Commerce, and Navigation")[17] between the U.S.[18] and—on Canada's behalf—Great Britain,[19] provided that it should be permanently agreed via Article 28 that under Article 3, Native Americans on either side of the border would retain a right "freely to pass" across the U.S.-Canadian border.[20] In the U.S., the Jay Treaty provisions were incorporated into Section 289 of the Immigration and Naturalization Act.[21] Whereas in Canada, the Jay Treaty was not adopted into statute and developed instead through common law applications.[22] Article 3 also protected a secured means of transportation via the Mississippi River for citizens of the United States and Great Britain.[23]

---

[15] "Subject to the limitations or qualifications in this Chapter, each riparian State is entitled to freedom of navigation on the entire watercourse to which they are riparian on a basis of equality and non-discrimination." BERLIN CONFERENCE (2004), *supra* note 3, art. 43, § 1.

[16] Bryan Nickels, *Native American Free Passage Rights Under the 1794 Jay Treaty: Survival Under United States Statutory Law and Canadian Common Law*, 24 B.C. INT'L & COMP. L. REV. 313, 313 (2001).

[17] *See* Treaty of Amity, Commerce, and Navigation, Between His Britannic Majesty and the United States of America, Nov. 19, 1794, U.K.-U.S., art. 3, T.S. NO. 105 [hereinafter Jay Treaty]; *see also* Robert W. Scheef, *"Public Citizens" and the Constitution: Bridging the Gap Between Popular Sovereignty and Original Intent*, 69 FORDHAM L. REV. 2201, 2252 (2001).

[18] The Jay Treaty is not signed by Native Americans but rather is signed by two exogenous sovereign nations with Great Britain as trustee of the Native American people effectively passing its fiduciary duty on via the Jay Treaty to the United States as the new Trustee of Indians within its borders and/or within Canada. *See* Jay Treaty, *supra* note 17.

[19] Canada did not gain independent national status until 1867 under the British North America Act. *See generally* British North America Act, 1867, 30 & 31 Vict. c. 3 (U.K.).

[20] Jay Treaty, *supra* note 17.

[21] *See* 8 C.F.R. § 289.2 (2019).

[22] Nickels, *supra* note 16, at 314–15. *See, e.g.,* Watt v. Liebelt, [1999] 2 F.C. 455 (Can.).

[23] Jay Treaty, *supra* note 17 ("The River Mississippi shall, however, according to the treaty of peace, be entirely open to both parties.").

The importance of access, transport, and trade on the Mississippi is also captured in Pinckney's Treaty of October 27, 1795,[24] which established intentions of friendship between the U.S. and Spain.[25] That treaty also set the boundaries of the U.S. and the Spanish colonies[26] and guaranteed U.S. navigation rights on the Mississippi, with each party agreeing not to incite Native American attack on the other. In the spirit of customary international law of "good neighborliness," the treaty is styled as a "Treaty of Friendship, Limits and Navigation Between Spain and the United States."[27]

II. AN OVERVIEW OF THE MISSISSIPPI & GREAT LAKES MARINE TRANSPORTATION SYSTEM

The Mississippi waterway and the Great Lakes Marine Transportation System ("GLMTS") is a commercial trade route, first established by Native Americans who used the routes before and during the fur trade to network access to vast expanses of North America.

Prior to the railroad, the GLMTS was a primary route in the westward expansion of the U.S., which included the Mississippi and its vast network of rivers. As President Thomas Jefferson stated, it was "to open the frontier all the way to the Pacific Ocean, preparing for what he called the 'manifest destiny' of the American nation."[28] A "white paper" report prepared for the Midwest Freight Corridor Study maintains that even today the movement of vast supplies of natural resources in the heartland of the U.S. and Canada relies on an efficient GLMTS and is vital to the development of both nations.[29]

---

[24] *See generally* Treaty of Friendship, Limits and Navigation, U.S.-Spain, Oct. 27, 1795, 8 Stat. 138, 150 [hereinafter Pinckney's Treaty]. This treaty is known as Pinckney's Treaty, or alternatively, the Treaty of San Lorenzo. *Pinckney's Treaty*, ENCYCLOPÆDIA BRITANNICA, https://www.britannica.com/event/Pinckneys-Treaty [https://perma.cc/J2DF-DU25].

[25] Pinckney's Treaty, *supra* note 24, art. I.

[26] *Id*. art. V.

[27] *Id*. (defining how the parties shall interact at their shared border of the Mississippi).

[28] Howard E. Hobbs, *Growing up in Southern Missouri on the Eve of World Destruction*, THE CAL. STAR BUS. J. (Feb. 11, 2004), http://californiastar.com [https://perma.cc/4FXA-FYPW].

[29] "The opening of the Erie Canal in 1824 provided an all water route to the rapidly growing port of New York and maritime trade on the Great Lakes flourished. Other canals were built that allowed maritime commerce to enter the Ohio River system through: Toledo, and Ohio, the Mississippi river system at Green Bay, Wisconsin. As the population in the regions around the lakes expanded maritime trade was the primary method of transportation. When railroads were introduced they were linked through ports to the GLMTS. The Chicago ship canal built in 1900 linked the GLMTS

In 1824, the U.S. and Britain recommenced a series of negotiations with reference to the shared development and navigational usage of the St. Lawrence River. The U.S. asserted a navigational right of access to the St. Lawrence, as a riparian state of the upper waters of the river and of the lakes that feed it. The U.S. argument for a riparian right of navigation was also used in the case of the Mississippi before acquiring control of the river and its surrounding domain.[30] Britain historically refused to concede navigation rights on the St. Lawrence River to the U.S., until a treaty in 1854 granted the U.S. (revocable) navigational rights as part of a bargain including other matters.[31] Ironically, the U.S.—which consistently argues in favor of its right of innocent passage around the world—denied navigation rights to others, soon after securing this right for itself.[32]

The GLMTS also provides access from the Great Lakes to two major river systems. Ships can travel from Lake Michigan to the Illinois and Mississippi river systems via the Chicago ship canal, or from the Great Lakes to the Hudson River system via the Erie Canal (also known as the New York State Barge Canal).[33] In terms of the Mississippi and Ohio River waterways, the majority of locks in place are less than 1000 feet in length and nearly half are presently over 50 years of age and nearing the end of their economic life.

> Not only is age and the need to replace these aging locks and dams a constraint on the ability of the inland waterways to handle cargo in the future, but the size of the locks limit the size of the tow consisting of 17 barges, while the older locks of 600 feet or less can only accommodate tows consisting of 8 barges. Since the majority of the tows must be split in half in order to transit a 600-foot lock. The splitting of the barge tow results in an increase in transit time for cargo with delays as barges wait to enter the locks. Additional constraints are

---

to the Mississippi river system creating the largest all water route to the inland river system." RICHARD D. STEWART, GREAT LAKES MARINE TRANSPORTATION SYSTEM: WHITE PAPER PREPARED FOR THE MIDWEST FREIGHT CORRIDOR STUDY 1 http://wupcenter.mtu.edu/education/great_lakes_maritime/lessons/Grt-Lks-Maritime_Transportation_System_Report_Stewart.pdf [https://perma.cc/FA9F-7B4A].

30 HALL, *supra* note 11, at 131–132.

31 Traité entre la Grande-Bretagne et les États-Unis d'Amérique, Relatif aux Pêcheries [Treaty between Great Britain and the United States, Regarding Fisheries], Gr. Brit.-U.S., art. 4, June 15, 1854, 16 Nouveau Recueil General de Traites 498, 502 (Charles Samwer, ed.).

32 *See e.g.* Traité entre la Grande-Bretagne et les Etats-Unis d'Amérique, Relatif aux Pêcheries, *supra* note 31.

33 STEWART, *supra* note 29, at 3.

> that the Illinois and Mississippi river system are subject to floods, ice conditions and drought.[34]

Many scholars argue that the current seaway locks with adjoining inland river waterways were built small due to political pressures from East Coast ports and railroads concerned that a larger seaway would take trade away from their established routes.[35] Subsequently, these locks obsolesced in capacity and the majority of today's seagoing vessels are too large for the locks. While expanding the width and length of the locks is recommended, one of the primary constraints to expansion is that the depth of water available in the waterways is on average only 30 feet.

> The extensive dredging required to bring the entire GLMTS to a significantly greater depth would be time consuming, expensive and may have adverse environmental consequences. However, the locks could be widened to 110 feet and lengthened without changing the depth and the improved locks would accommodate the majority of handy size seagoing vessels.[36]

With respect to navigating the full length of the combined Mississippi-Illinois waterway, barges and small vessels can travel from the Gulf of Mexico to Lake Michigan through Chicago, a distance of about 1,530 statute miles (1,329.5 nm). Once there, the canal has a depth limit of 9 feet (2.7 meters), width limit of 80 feet (24.38 meters), length limit of 600 feet (182.88 meters), and a vertical clearance of 17 feet (5.18 meters). Fortuitously, though, there are no tolls on this route.[37]

The white paper prepared by R. D. Stewart for the Midwest Freight Corridor Study notes: "a GLMTS that is not utilized to its full potential or [is] in decline will result in present cargo being shifted from the waterways and future freight moving to land based modes, creating additional strain on the nation's rail and highway system and further adding to the deterioration of infrastructure."[38] In globalized markets, the U.S. and Canada need to critically examine transportation economics to identify natural comparative advantages, such as their broad-reaching network of seaways, lakes, and rivers with intermodal land and air connections. Additionally, the future may see a shift in reliance from traditional East-West routes between Europe and North America to North-South shipping between North America and the southern hemisphere. This

---

[34] *Id*. at 8.
[35] *Id*.
[36] *Id*.
[37] *Id*. at 3.
[38] *Id*. at 14.

shift could be driven by southern hemisphere nations' continued growth. Furthermore, melting arctic ice could facilitate new trade routes and expose access to a vast hidden wealth of northern resources destined for southern destinations.

Canada's industrial heartland adjacent to the Great Lakes will directly benefit from the creation of a North-South seaway to the Gulf of Mexico.[39] Would the U.S. allow such a development of the Mississippi watercourse?[40] To the U.S.'s advantage, the North-South route may offer significant savings in distance and cargo handling for goods bound to or from the U.S. Midwest, along with economic linkages. To the U.S.'s disadvantage, development of the route would raise environmental concerns, and greater access by foreign ships to internal U.S. destination points could cause national security issues.

III. UNITED NATIONS CONVENTION ON THE LAW OF THE SEA (1982)[41]

This Part of the paper examines the United Nations Convention on the Law of the Sea ("UNCLOS") Parts II (Territorial Sea and Contiguous Zone), III (Straits Used for International Navigation), and X (Right of Access of Land-Locked States to and from the Sea and Freedom of Transit). UNCLOS Part II, Section 2, Article 8 states "waters on the landward side of the baseline of the territorial sea form part of the internal waters of the State."[42] This implies that the Mississippi waterway system, which is within the territorial boundaries of the U.S., is internal and sovereign. However, a portion of the Mississippi water basin resides in Canada and its extended waters include the Great Lakes and St. Lawrence River. Also, given Mexico's adjacency to the Mississippi water basin, it arguably has a riparian interest to the Mississippi, and the global community further has an interest in shipping prospects on the Mississippi River. Section 3, "Innocent Passage in the Territorial Sea," of Article 17 states: "ships of all States, whether coastal or land-locked, enjoy the right

---

[39] *C.f.* STEWART, *supra* note 29, at 2 ("A recent economic impact study of the St. Lawrence Seaway System estimated the revenue benefit to the US economy to be $3.4 billion, personal income and consumption benefit of $4.3 billion and federal state and local tax revenue of $1.3 billion per year.").

[40] *See* STEWART, *supra* note 29, at 3 (suggesting that the allowance of such development is unlikely).

[41] United Nations Convention on the Law of the Sea, Dec. 10, 1982, 1833 U.N.T.S. 397.

[42] *Id.* art. 8.

of innocent passage through the territorial sea."[43] This excerpt supports the right of passage for ships flying any nation's flag to pass on the Mississippi.

UNCLOS, Part III, "Straits Used for International Navigation," notes that nothing in scope affects the legal regime in straits where passage is regulated in whole or in part by international conventions that apply to such straits. This is significant because there are long-standing U.S. treaties with respect to the international navigation of the Mississippi River—e.g., Jay and Pinckney's Treaties—which will remain unaffected by Part III, per Article 35. According to Article 35 of UNCLOS:

> [n]othing in this Part affects: (a) any areas of internal waters within a strait, except where the establishment of a straight baseline in accordance with the method set forth in article 7 has the effect of enclosing as internal waters areas which had not previously been considered as such; (b) the legal status of the waters beyond the territorial seas of States bordering straits as exclusive economic zones or high seas; or (c) the legal regime in straits in which passage is regulated in whole or in part by long-standing international conventions in force specifically relating to such straits.[44]

UNCLOS, Part X, concerns the "Right of Access of Land-Locked States to and from the Sea and Freedom of Transit."[45] Both Canada and Mexico have coasts on the Atlantic and Pacific Oceans, and are very difficult to describe as land-locked states. Thus, Part X does not seem to apply to transit passage rights of these two nations on the Mississippi.[46] Analogously, though the U.S. is not a land-locked state, it claims a right of passage through the St. Lawrence River and Canada's Northwest Passage. While the U.S. is not land-locked, it has argued that it has a right

---

[43] *Id*. art. 17. According to Article 18 of UNCLOS, "[p]assage means navigation through the territorial sea for the purpose of: (a) traversing that sea without entering internal waters or calling at a roadstead or port facility outside internal waters; or (b) proceeding to or from internal waters or a call at such roadstead or port facility." *Id*. art. 18. With respect to the sovereign security interests of the U.S. concerning foreign passage through its territorial seas to access its internal waters, it can be noted that UNCLOS Article 19(1) states "[p]assage is innocent so long as it is not prejudicial to the peace, good order and security of the coastal State," which in this context refers to passage through the territorial sea. *Id*. art. 19(1). And, Article 24(1) of UNCLOS states that: "the coastal State must not hamper the innocent passage of foreign ships through the territorial sea." Nor shall the coastal State impose requirements having the effect of denying or impairing the right of innocent passage, nor discriminate against the ships of any State. *Id*. art. 24(1).

[44] *Id*. art. 35.

[45] *Id*. pt. X.

[46] *Id*. art. 124.

of passage through these internal Canadian waters as a fundamental right of international law.[47]

Canada, the U.S., and Mexico are all geographically large countries with distant coastlines that require elaborate intermodal transportation systems to move people and goods around. North America has a vast wealth of resources which often require shipment over vast terrain before being loaded onto ships for distant markets. Thus, an enhanced development of the Mississippi watercourse system that includes linkage with the Gulf of Mexico, the Great Lakes, and the St. Lawrence River represents significant potential opportunity for moving goods from internal land-locked regions of the continent to distant market destinations.[48] Article 127, "Customs Duties, Taxes and Other Charges" states:

> 1. Traffic in transit shall not be subject to any customs duties, taxes or other charges except charges levied for specific services rendered in connection with such traffic.[49]
>
> 2. Means of transport in transit and other facilities provided for and used by land-locked States shall not be subject to taxes or charges higher than those levies for the use of means of transport of the transit State.[50]

Furthermore, UNCLOS, Article 129, "Cooperation in the Construction and Improvement of Means of Transport," also provides that "where there are no means of transport in transit States to give effect to the freedom of transit or where the existing means, including the port installation and equipment, are inadequate in any respect, the transit States and land-locked States concerned may cooperate in constructing or improving them."[51]

---

[47] *See* Macneill, *supra* note 2, at 357.

[48] UNCLOS, *supra* note 41, art. 125.

[49] *Id*. art. 127(1).

[50] *Id.* art. 127(2).

[51] *Id*. art. 129.

IV. HELSINKI RULES (1966) ON THE USES OF WATERS OF INTERNATIONAL RIVERS

International rules for equal riparian rights to international rivers[52] have developed with time through customary law, but these laws were not developed extensively until the International Law Association ("ILA") proposed the Helsinki Rules 1966.[53] The ILA noted "that each basin state was entitled to a reasonable and equitable share in the beneficial use of waters"[54] of a drainage basin. The Helsinki Rules are applicable to all drainage basins and serve to regulate how rivers and their sources of water that cross national boundaries may be used.[55]

> The Helsinki Rules were the first attempt by any international association to codify the entire law of international watercourses. The resulting rules have heavily influenced state practice as well as the efforts of other international associations in examining the law of internationally shared fresh waters. The Helsinki Rules treat international drainage basins (watersheds extending over two or more states) as indivisible hydrologic units to be managed as a single unit to assure the "maximum utilisation and development of any portion of its waters". [sic] This rule explicitly includes all tributaries (including tributary groundwater) within the concept of "drainage basin" and thus extends beyond the primary international watercourse itself. The Rules formulated the phrase "equitable utilization" to express the rule of restricted sovereignty as applied to fresh waters: "Each basin State is

---

[52] *See* Territorial Jurisdiction of the International Commission of the River Oder, Judgment, 1929 P.C.I.J. (ser. A) No. 23, at 27 (Sept. 10) ("[the] community of interest in a navigable river becomes the basis of a common legal right, the essential features of which are the perfect equality of all riparian states in the user of the whole course of the river and the exclusion of any preferential privilege of any one riparian state in relation to the others."); s*ee also* SHAW, *supra* note 14, at 792.

[53] SHAW, *supra* note 14, at 792, n. 207 ("[W]hile the interests of riparian states had to be taken into account by a riparian state proposing changes to the river system, there was no rule precluding the use of hydraulic power of international watercourses without a prior agreement between the interested states.").

[54] *Id.* at 792; *accord* International Water Resources Law, 60 Int'l L. Ass'n Rep. Conf. 531 (1982), at 535 ("equitable utilization"); International Water Resources Law, 62 Int'l L. Ass'n Rep. Conf. 231 (1986), at 277 ("reasonable and equitable share"); Jean J.A. Salmon, *La pollution des fleuves et des lacs et le droit international*, INSTITUTE DE DROIT INTERNATIONAL ANNUAIRE 193, 220 ("injury is 'substantial' if it materially interferes with or prevents *reasonable use*") (emphasis added).

[55] Helsinki Rules, *supra* note 13, art. I.

> entitled, within its territory, to a reasonable and equitable share in the beneficial uses of the waters of an international drainage basin."[56]

While Chapter 1 of the Helsinki Rules defines the scope and general terminology of International Rivers Law, it also addresses under Chapter 2 the principle of "Equitable Utilization" and states that a reasonable and equitable use of the waters of an international drainage basin should be determined by all relevant factors in each case. Relevant factors, in part, include: "geography of the basin, including [] the extent of the drainage area in the territory of each basin State," "hydrology of the basin, including [] the contribution of water by each basin State," "climate affecting the basin," past and current utilization of the basin waters, "economic and social needs of each basin State," and "the degree to which the needs of a basin State may be satisfied, without causing substantial injury to a co-basin State."[57]

V. BERLIN RULES (2004) ON WATER RESOURCES[58]

In 1970, the U.N. created a more inclusive set of rules[59] that was developed by the International Law Commission and later adopted as the Convention on the Law of Non-Navigational Uses of International Watercourses.[60] Similarly, the ILA expanded the Helsinki Rules (1966) by adopting the Rules on International Groundwaters, Seoul Rules (1986), and the Berlin Rules (2004) on Water Resources which have superseded the 1966 Helsinki Rules.[61]

Chapter III, "Internationally Shared Waters of the Berlin Rules 2004," Article 10 (1) "Participation by Basin States" asserts the right of Basin States is "to participate in the management of waters of an

---

[56] Joseph W. Dellapenna, *The Customary International Law of Transboundary Fresh Waters,* 1 INT'L J. GLOBAL ENVTL. ISSUES, 264, 273 (2001).

[57] *Id.* art. 5.

[58] BERLIN CONFERENCE (2004), *supra* note 3, art. 11.

[59] The new rules were meant to clarify issues, specifically those arising with regard to international aquifers that are connected to river systems and other expansionary water resource topics, which were not contemplated previously. *See* Stephen McCaffrey, *International Groundwater Law: Evolution and Context*, *in* WORLD BANK, TECHNICAL PAPER NO. 459, GROUNDWATER: LEGAL AND POLICY PERSPECTIVES: PROCEEDINGS OF A WORLD BANK SEMINAR 136, 152 (Salman M. A. Salman ed., 1999).

[60] Joseph W. Dellapenna, *The Berlin Rules on Water Resources: The New Paradigm for International Water Law*, WORLD ENVTL. & WATER RES. CONG. 2006 1, 2 (2006), available at https://ascelibrary.org/doi/10.1061/40856%28200%29250

[61] *Id.* at 8.

international drainage basin in an equitable, reasonable, and sustainable manner."[62] The Berlin Rules 2004, Article 11, "Cooperation" also stresses that the obligation of cooperation[63] among basin states in the management of the shared water resource is a basic principal of international water law ("IWL"). Article 13 revised the Helsinki Rules 1966 guidelines for "Determining an Equitable and Reasonable Use,"[64] and in Chapter IX, "Navigation," Article 43, Section 5, "Freedom of Navigation" is defined as including:

> a. Freedom of movement on the entire navigable course of the watercourse;
>
> b. Freedom to enter ports and to make use of plants and docks; and
>
> c. Freedom to transport goods and passengers, directly or through transshipment, between the territory of one riparian State and the territory of another riparian State and between the territory of a riparian State and the open sea.[65]

The Berlin Rules (2004) also include Articles (44–47) respectively on the "Limitations on Freedom of Navigation," "Regulating Navigation," "Maintaining Navigation," and on "Granting the Right to Navigate to Non-Riparian States," where essentially "freedom of navigation is limited to vessels of riparian states."[66]

---

[62] BERLIN CONFERENCE (2004), *supra* note 3, arts. 13, 15.

[63] *See id*.

[64] *Id.* art. 13.

[65] *Id.* art. 43(5).

[66] *Id.* arts. 44–47. *See also id*. art. 44 cmt. ("This reflects the now predominant approach to freedom of navigation in bilateral or multilateral treaties. Some nineteenth century treaties extend freedom of navigation to all States, but twentieth century treaties more often restricted freedom of navigation to riparian states. Today, in addition to specific treaties opening certain watercourses to all ships of all States, some trade agreements (for example, the GATT and WTO agreements) open watercourses to the shipping of non-riparian States party to the agreement if a particular riparian State has made a declaration opening transportation services generally to such other States. This aspect is addressed explicitly in Article 47. Paragraphs 2 and 3 parallel the limitations on the meaning of 'innocent passage' in [UNCLOS], arts. 18, 19. Paragraph 4 reiterates the right of a riparian State to prohibit cabotage by vessels of other States without violating freedom of navigation. Paragraph 5 reflects the fact that States sometimes charge fees to recover the cost of services provided to vessels exercising freedom of navigation. The practice is too widespread to argue that it violates customary international law, but to allow a State to charge a fee higher than necessary to recover the costs of its services would nullify freedom of navigation.").

VI. CASE LAW ON INTERNATIONAL WATERCOURSES

In the Gabcikovo-Nagymoros Project case,[67] the International Court of Justice ("ICJ")[68] expressed the view that riparian states to a common watercourse have an obligation to cooperate. The ICJ declared that Article 12 of the Vienna Convention "confirmed that treaties concerning water rights or navigation on rivers constituted territorial treaties."[69] Importantly, the case recognized the dual obligation of riparian states to maintain the sustainability of the watercourse and an obligation to protect its environment.[70] Essentially, the Danube water law development established the duty of cooperation as a basic principle underlying IWL.[71]

In the North Sea Continental Shelf cases (1969),[72] Fisheries Jurisdiction (1974),[73] and the Gabcikovo-Nagymaros case (1997),[74] the ICJ recognized the view that states are under a duty to consult and negotiate "in the event of any conflict whatsoever in undertaking any project on an IWC [international water course]."[75] The Factory of Charzow case (1928)[76] and Permanent Court of International Justice ("PCIJ") Reports[77] also recognized the principle "that if work done by an upstream state yields any benefits for the downstream state, it must be shared on the basis of a cost benefit-analysis; otherwise, it could be a case of unjust enrichment."[78] This suggests if Canada was successful in gaining

---

[67] Gabcikovo-Nagymaros Project (Hung./Slovk.), Judgment, 1997 I.C.J. 7, at 78 (Sept. 25) [hereinafter Gabcikovo-Nagymaros Project].

[68] THE UNIVERSITY OF BRITISH COLUMBIA, *Law-Legal Citation Guide,* http://guides.library.ubc.ca/legalcitation/intlaw [https://perma.cc/ZP3N-MTRJ].

[69] SHAW, *supra* note 14, at 874.

[70] "The Danube has played a vital part in the commercial and economic development of its riparian States, and has underlined and reinforced their interdependence, making international cooperation essential. [. . .] Only by international cooperation could action be taken to alleviate [. . .] problems [of navigation, flood control, and environmental protection.]" See BERLIN CONFERENCE (2004), *supra* note 3, art. 11 cmt.

[71] TRILOCHAN UPRETI, INTERNATIONAL WATERCOURSES LAW AND ITS APPLICATION IN SOUTH ASIA 115, n. 33 (2006).

[72] *See generally* North Sea Continental Shelf (Ger./Den., Ger./Neth.), Judgment, 1969 I.C.J. 3 (Feb. 20).

[73] *See generally* Fisheries Jurisdiction **(**U.K. v. Ice.), Judgment, 1974 I.C.J. Rep. 3 (July 25).

[74] *See generally* Gabcikovo-Nagymaros Project, *supra* note 67.

[75] UPRETI, *supra* note 71, at 119.

[76] Factory at Chozrow (Ger. v. Pol.), Judgment, 1928 P.C.I.J. (ser. A) No. 17 (Sept. 13).

[77] *Id.* ¶ 47.

[78] UPRETI, *supra* note 71, at 112.

cooperation with the U.S. to improve navigability of the Mississippi watercourse for transit between the Great Lakes to the Gulf of Mexico, then costs should be shared.

The doctrine of estoppel in IWL also forms part of the principle of equitable utilization, where it is recognized by the PCIJ in the Diversion of Water from the Meuse case,[79] "that there is a duty on a state to refrain from acting inconsistently with the interests of others."[80] In the 1984 Gulf of Maine case—a dispute over the maritime boundary between the United States and Canada and the sharing of the benefits from the respective exclusive economic zones and areas beyond in the high seas—the ICJ ruling set out guidelines for avoiding unilateral action and conflict.[81] This implies should Canada pursue lobbying for upgrading the commercial navigability of the Mississippi watercourse to accommodate larger and more economic sea-going traffic, and if the U.S. submits to negotiations (as would be expected under international law), then they would be subject to arbitration if an agreement could not be reached. As U.S. President Theodore Roosevelt noted: "each river system, from its headwaters in the forests to its mouth on the coast, is a single unit and should be treated as such."[82] Thus, it can be argued that the Mississippi River watercourse system with its water basin extending into the streams, lakes, woods, and mountains of Canada, and with its mouth emptying into the Gulf of Mexico, represents a unitary drainage basin that extends from Canada, through the U.S., to the coast of Mexico.[83]

The River Oder judgment, PCIJ series (1937) held that the community of interest in a river is the basis of common legal rights of co-basin states[84] and this serves as the foundation of IWL. But a riparian right of navigation on international watercourses is one of passage[85] and does not extend a right of ownership in the riverbed to which it applies.[86]

---

[79] *See generally* Diversion of Water from Meuse (Neth v. Belg.), Judgment, 1937 P.C.I.J. (ser. A/B) No. 70, at 321 (June 28) (discussing Belgium's construction of a lock to extract water from the River Meuse).

[80] UPRETI, *supra* note 71, at 136.

[81] *See* Delimitation of the Maritime Boundary in the Gulf of Maine Area (Can./U.S.), Judgment, 1984 I.C.J. Rep. 246, 255–83 (Oct. 12).

[82] C. B. Bourne, *The Development of International Water Resources: The Drainage Basin Approach*, 47 Can. B. Rev. 62, 63 (1969).

[83] UPRETI, *supra* note 71, at 160.

[84] Territorial Jurisdiction of the Int'l Comm'n of the River Oder (U.K. v. Pol.), Judgment, 1929 P.C.I.J. (ser. A) No. 23, at 27 (Sept. 10).

[85] RODERICK PAISLEY, LAND LAW 295–96 (2000).

[86] *Id.* at 295 (citing Orr v. Colquhoun's Trs. 4 R 116, 126 (Scot.)).

VII. U.S. WATERCOURSE CASES & STATUTORY WATERCOURSE LAW

If a watercourse can be shown to be navigable, then in U.S. domestic law it will likely become subject to a federal navigational servitude to the U.S.[87] In the case of the *United States v. Appalachian Electric Power Co.* (1940), a waterbody was found to be navigable when it is used or has the potential to be used in its ordinary condition to transport commerce.[88] Furthermore, in a prior case, *Economy Light & Power Co. v. United States* (1921) it was held that "to be navigable, a stream need not be open to navigation at all seasons of the year, nor at all stages of the water." [89] Also, the U.S. Constitution (Article I, Section 8; "The Commerce Clause") was interpreted in *Gibbons v. Ogden* (1824) to mean that navigable waters of the U.S. are public property and subject to the control of the U.S. government.[90]

The U.S. Clean Water Act defines "navigable waters" as "the waters of the United States, including the territorial seas."[91] Also, the decision by the U.S. Supreme Court in the *United States v. Zanger* (1991)[92] determined that the U.S. Environmental Protection Act applied to waters of the U.S. "to encompass intrastate lakes, rivers, streams (including intermittent streams), mudflats, impoundments of waters, tributaries of navigable waters, and wetlands."[93] This expansive definition of domestic waters of the U.S. is similar to the international community's, when defining an international watercourse. Thus, the concept of the Mississippi as an international watercourse appears inconsistent with U.S. laws, and applying the U.S. definition of "the waters of the U.S." is inconsistent with customary international law because under the U.S. definition Canadian tributaries and wetlands, which are part of the Mississippi water basin,

---

87 ENVTL. PROTECTION AGENCY & ARMY CORPS OF ENG'RS, APPENDIX D: LEGAL DEFINITION OF "TRADITIONAL NAVIGABLE WATERS" (2007), https://www.epa.gov/sites/production/files/2017-05/documents/app_d_traditional_navigable_waters.pdf [https://perma.cc/9DXP-CA3Z].

88 "Nor is lack of commercial traffic a bar to a conclusion of navigability where personal or private use by boats demonstrates the availability of the stream for the simpler types of commercial navigation." *Id.* (quoting U.S. v. Appalachian Elec. Power Co., 311 U.S. 377, 416 (1940)).

89 *Id.* ("a waterway need not be continuously navigable; it is navigable even if it has 'occasional natural obstructions or portages' and even if it is not navigable 'at all seasons . . . or at all stages of the water.'") (quoting Econ. Light & Power Co. v. U.S., 256 U.S. 113, 122 (1921)).

90 *Id.* at 25–26.

91 33 U.S.C. § 1362 (7) (2012).

92 United States *v*. Zanger, 767 F. Supp. 1030, 1034 (N.D. Cal. 1991).

93 40 C.F.R. 230.3(s) (1988).

could arguably be claimed to be U.S. waters. Inverting this logic suggests that Canada would then have an equivalent retort that the Mississippi watercourse is Canadian—and not a shared water resource. The logical flaw of the U.S. definition of "the waters of the U.S." is the geo-political limitation that the waters be within the boundaries of the U.S. This definition is problematic because the argument does not extend to navigation which is a servitude of passage and a public right. This right of passage also becomes an international right when the watercourse originates in one nation and transits through another. Needless to say, even if Canada and Mexico were granted expanded commercial navigation and freedom of passage on the Mississippi watercourse, as adjudged by the ICJ in the Corfu Channel case, [94] respect for territorial sovereignty remains a cornerstone of international relations. Given the Mississippi River watercourse is a U.S. network of rivers and lakes, U.S. sovereignty of the watercourse remains paramount in any discussion of expanding its navigability.

VIII. INTERNATIONAL CUSTOMARY LAW: INTERNATIONAL RIVERS AND WATERCOURSES

Under the international legal principle of good neighborliness, if Canada, Mexico, and the First Nations of North America (who are also considered sovereign)[95] having an established nexus in U.S. waterways connecting the Gulf of St. Lawrence with the Gulf of Mexico, and will benefit from shorter shipping routes to internal U.S. markets or to other markets beyond, then they possess a right to develop and use the watercourse for that purpose. *Jus cogens* as an international legal principle[96] suggests "good neighborliness" is paramount for harmonious international relations and is the very root of the U.S. position on its right of innocent passage through any waterway that represents an international strait (e.g., the Northwest Passage, the Panama Canal, and the straits of Gibraltar, Magellan, Hormuz, and others).

> Even when a norm of customary international law has been determined with some certainty, customary forms of enforcement – claim and

---

[94] *See* Corfu Channel (U.K./Alb.) 1949 I.C.J. Rep. 4 (Apr. 9).

[95] "*Imperium in imperio*" (roughly, "sovereign within a sovereign). United States *ex rel*. Diablo v. McCandless, 18 F.2d 282, 283 (1927).

[96] *See* M. Cherif Bassiouni, *International Crimes: Jus Cogens and Obligatio Erga Omnes*, 59 LAW & CONTEMP. PROBS. 63, 67 (1996) (defining "*jus cogens*").

> counterclaim among states – leave us without a neutral enforcement mechanism. Without a neutral enforcement mechanism, there is always the suspicion that national interest overrides any real commitment to law. And without a neutral enforcement mechanism, international law ultimately has nothing better to offer for punishing violations than the law of the vendetta.[97]

The problem with relying on establishing legal rights from customary international law is that—other than the non-binding ICJ under which a sovereign nation has to agree to appear before for international disputes—there is no enforcement mechanism to assert the authority of the ICJ and the international community.

Four principles of IWL that have emerged from customary norms resolving international watercourse disputes are: (1) "Absolute Territorial Sovereignty," (2) "Territorial Integrity," (3) "Prior Appropriation," and "Equitable Utilization."[98] Absolute Territorial Sovereignty is premised on the belief "that a state is fully free to use the waters flowing through its territory . . . and it need not pay heed to any restriction or prohibition on such use."[99] Territorial Integrity is premised on the belief in "the right of a downstream state on the ground that upstream states cannot diminish, or change the flow of an [international watercourse]."[100] Prior Appropriation provides "that the state which first utilises the water of an international river acquires the legal right to continue to receive that quality and quantity of water in future and cannot be deprived of it without its consent."[101]

> In practice, however, the more developed and resourceful countries have had their water appropriation before and often are therefore in a more beneficial position than the weak or poor countries. Therefore, it could be argued that this theory favours more developed states at the expense of weaker states and is not based on a fair and equitable foundation. . . . In practice, this rule is most often inimical to the

---

[97] Dellapenna, *supra* note 60, at 268.

[98] UPRETI, *supra* note 71, at 103–09.

[99] *Id.* Upstream states traditionally adopt this view in their own interest to the detriment of other basin states. "It is a notorious principle that is heavily objected to by the international community. . . . However, it has never been a principle recognised by most nations but rather heavily deplored for its basic foundation." *Id.* at 103–04.

[100] *Id.* at 104. "In substance, this rule could be called a veto power of the downstream state because it prohibits any significant use of water by upstream states without the consent of the downstream states. The no harm rule supports this doctrine. . . . IWL does not support this principle." *Id.* at 105–06.

[101] *Id.* at 106

> interest of upstream states because ancient civilisations and utilisation of water took place along the banks of rivers in downstream states.[102]

Equitable Utilization is the most widely recognized principle of IWL and has been previously addressed in discussion of the Helsinki Rules (1966).[103] It can be added there is no single definition of "equitable."[104]

As IWL develops, conflicts emerging between riparian water basin states will require seeking "equity" in remedy.[105] With world population growth, demand for water use for navigable and non-navigable purposes is ever-increasing. [106] Scarcity and pollution issues are reaching critical stages, and access for consumption and sustainability has morphed into a national security issue.[107] The general principle that each state possesses absolute sovereignty over the whole area within its national boundaries leads to each state dealing as it chooses with its navigable rivers. The inherent corollary of that position is that the state can prevent or restrict other states from navigating them—whether the navigable portion of the river is either wholly or partially included within its boundaries.[108] Conversely, this premise holds that foreign states, including co-riparian states, "could not have any rights over waters contained within a specific territory, except through prescription or express agreement . . . between the whole body of states with reference to all rivers."[109]

Since 1890, there has been a trend toward stopping the prohibition and navigational restrictions on foreigners and co-riparian states for the general good of world trade and relations. In recent years, the IWL has moved toward the concept of a "watercourse system" and shifted its focus from state sovereignty to a riparian community with emphasis on the shared natural resource.[110] Jurists who argue in favor of the navigation right of co-riparian states employ the principle of "the general good" of the world at large, and assert the propriety rights of individual states should

---

[102] *Id.* at 106, 108.

[103] *See* Helsinki Rules, *supra* note 13, arts. IV–VIII.

[104] UPRETI, *supra* note 71, at 110.

[105] *Id.* at 131.

[106] POPULATION INSTITUTE, POPULATION AND WATER (2010), available at https://www.populationinstitute.org/external/files/Fact_Sheets/Water_and_population.pdf [https://perma.cc/5ZBM-BCAX].

[107] UPRETI, *supra* note 71, at 131.

[108] HALL, *supra* note 11, at 130.

[109] *Id.*

[110] ROSALYN HIGGINS, PROBLEMS AND PROCESS: INTERNATIONAL LAW AND HOW WE USE IT 136 (1994).

be subordinate to "the general good." The subordination of proprietary rights of individual watercourse states also implies the opening of international watercourses to trade and transit is a paramount goal of mankind. This suggests the premise that if a section of a watercourse belonging to one nation is advantageous for use by a co-riparian nation, it confers a right of use to the latter. Influential nineteenth century legal scholar W.E. Hall argues that this view is erroneous, based on the view that the wants and needs of an individual, in law, do not give rise to legal rights that can supplant the existing rights of others.[111] In the case of developing the Mississippi watercourse into a shared navigational resource, the sovereign rights of the U.S. under customary international law must not be supplanted by ascribing rights to a broader global view or need without the agreement and cooperation of the U.S. To otherwise open any watercourse, on the grounds that a riparian state has a right of use, represents a trespass upon the host state and a violation of law.[112]

IX. CONCLUSION

An international watercourse is not only a transitory natural resource flowing from the water basins and tributaries of one nation through the lands and domain of another, but it is also a vital resource for all. Thus, how the resources of an international river are divided and governed (or not) are important issues of international water law.

The Helsinki Rules 1966 and the Berlin Rules 2004 provide an excellent source of customary international law with respect to the use and management of international watercourses and support the argument that the Mississippi should be open for joint development and management on a cooperative basis between Canada and the U.S., and arguably Mexico, as a tripartite project. However, the U.S. has not ratified these conventions and is not obliged to comply when they are deemed inconsistent with U.S. laws.

---

[111] HALL, *supra* note 11, at 133.

[112] *Id.* at 133–34 ("A right, it is alleged, exists; but it is an imperfect one, and therefore its enjoyment may always be subjected to such conditions as are required in the judgment of the state whose property is affected, and for sufficient cause it may be denied altogether. Whatever may be thought of the consistency of one part of this doctrine with another, there is in effect little to choose between it and the opinion of those who consider that the rights of property in navigable rivers have not as a matter of fact been modified with a view to the general good, and that they are independent of the wants of individuals other than the owners, but who recognise that it has become usual as a matter of comity to permit navigation by co-riparian states, and that it would be a vexatious act to refuse the privilege without serious cause.").

UNCLOS is particular to the sea (not rivers) and while its application suggests a quest for the pursuit of common good for mankind, it does nevertheless respect the sovereignty of states and support a legal position that the U.S. is obliged to develop the Mississippi watercourse for the benefit of its riparian neighbors. Jurists and customary IWL suggest the legal principles of "fairness" and "good neighborliness" require states to cooperate with respect to "shared resources."

Where a resource such as the Mississippi watercourse is formed in one state (Canada), flows through another (U.S.), and dispenses itself at the doorstep of another state (Mexico), it can—in the words of President Theodore Roosevelt—be seen as one singular unitary watercourse, which, as a shared community resource, will require the cooperation of the riparian states for its mutual protection and use.

It may not be apparent to the U.S., Canada, and Mexico that the commercial development of the navigability of the Mississippi watercourse is a necessary and shared objective. Nevertheless, industry and transport officials recognize a need to upgrade the capacity of the internal waterway as essential infrastructure for how goods and people are moved within the vast North American continent.