RESTORING THE ENVIRONMENTAL PROTECTION OF INTERNATIONAL RIVERS: A CASE FOR A TEXTUAL APPROACH TO INTERPRETING GLOBAL WATER TREATIES

By Agnes Chong*

ABSTRACT

The 1992 United Nations Economic Commission for Europe (UNECE) Convention and the 1997 Watercourses Convention ("the global water conventions") offer a framework for the international protection of shared international river basins, a key source of essential freshwater resources. However, in practice, two-thirds of the world's transboundary rivers do not have cooperation arrangements to ensure the rivers' protection. One factor contributing to the low number of such agreements, according to UN Water (a mechanism consisting of intergovernmental and other international entities that coordinates the UN's work on water and sanitation), is limited trust between basin States. This distrust may be due to a fundamental misunderstanding of the rights and obligations governing international rivers under the global water conventions, and how the legal mechanisms contained in the conventions may contribute to bridging that trust gap. The global water conventions offer a legal solution to practically implement riparian States' rights and obligations vis-à-vis their shared river, particularly on the allocation of river uses (protected under the equitable utilization rule) and the prohibition on causing harm to other States' interests and the environment (guaranteed under the no-harm rule). However, a longstanding controversial issue over the exact nature of the relationship between equitable utilization and no-harm is a stumbling block for riparian States entering into basin agreements. Underlying the uncertainty and ambiguity over the relationship is the prevailing view that equitable utilization takes priority over no-harm, contrary to the text of the treaty. This interpretation of the treaty creates uncertainty that inhibits States from entering into agreements, resulting

* BA, MSc, LLM, PhD. Assistant Professor, The Chinese University of Hong Kong, E-mail: agneschong@cuhk.edu.hk.

in ungoverned and unregulated environmental protection of international rivers. This Article makes the case for a textual approach in interpreting water treaties on the basis that the global water conventions are clear and balanced and do not favor one rule over another, or upstream riparian States over downstream riparian States. Adhering to a textual approach corrects the unequal treatment of the treaty and restores the treaty to give effect to the environmental protection of international rivers.

CONTENTS

I. INTRODUCTION 28
II. INTERNATIONAL WATER LAW: STRUCTURAL ISSUE OF HIERARCHY 31
III. UN WATERCOURSES CONVENTION: NO HIERARCHY IN THE TEXT OF THE TREATY 33
IV. PREVAILING NON-TEXTUAL INTERPRETATION CONTRARY TO THE TEXT OF THE TREATY 36
V. THE CASE FOR A TEXTUAL INTERPRETATION OF THE TREATY 42
VI. INTERNATIONAL JURISPRUDENCE FOR TEXTUAL INTERPRETATION 47
VII. APPLYING THE PRINCIPLE OF ORDINARY MEANING 47
VIII. THE INTERPRETATION MUST NOT LEAD TO UNREASONABLENESS ... 49
A. First Admissions Advisory Opinion 51
B. Second Admissions Advisory Opinion 52
C. Territorial Dispute Libyan Arab Jamahiriya/Chad 53
D. Wintershall Aktiengesellschaft v Argentine Republic 54
E. ICS Inspection and Control Services Limited 56
IX. CONCLUSION 57

I. INTRODUCTION

There are 310 international river basins worldwide and almost half of the world's population lives in an international river basin.[1] UN Water reports "the world is not on track" to achieve Sustainable Development Goal 6 on water and sanitation,[2] as billions of people globally live without safe drinking water and sanitation; many water sources are becoming more polluted or

[1] Melissa McCracken & Chloe Meyer, *Monitoring of Transboundary Water Cooperation: Review of Sustainable Development Goal Indicator 6.5.2 Methodology*, 563 J. HYDROLOGY 1, 1 (2018).

[2] Sustainable Development Goal 6 on Water and Sanitation aims to guarantee drinking water and sanitation for all–ensuring "sustainable management of water resources, wastewater and ecosystems" and building an enabling environment for the provision of safe water for all. U.N. WATER, SUMMARY PROGRESS UPDATE 2021: SDG 6 – WATER AND SANITATION FOR ALL 8 (2021).

drying up; and more regions worldwide are experiencing water stress.[3] It is critical that cooperation between States is scaled up, according to UN Water.[4] However, two-thirds of the world's transboundary rivers do not have cooperation arrangements in place to ensure the rivers' protection.[5] The United Nations Development Programme (UNDP) Water Governance Facility states four reasons why this is the case: (i) limited trust between basin States that impedes the political will to enter into agreements; (ii) limited understanding of the benefits of cooperation and the risks that arise where there is no cooperation; (iii) limited capacity among water authorities and stakeholders; and (iv) limited coordination between the donor community, developing countries and water development projects.[6]

Both in water law and policy, there is a focus on water allocation rights between riparian States and not on cooperation to protect transboundary rivers.[7] Given the importance of freshwater protection, there is an apparent deficiency in the law. Obligations to protect the environment of international rivers and prevent water pollution and contamination are not contained within the provisions governing river cooperation arrangements. UN Sustainable Development Goal (SDG) indicator 6.5.2 requires transboundary river basins to put in place "operational arrangements."[8] However, there is currently a low threshold for arrangements to be regarded as "operational." The criteria are: (i) the presence of a joint body or mechanism for transboundary cooperation; (ii) the conduct of annual meetings between riparian countries;

---

[3] *Id*.

[4] *Id*.

[5] Anders Jägerskog, *Why it is Important and Why it Needs to be Developed in Free Flow: Reaching Water Security Through Cooperation*, TRANSBOUNDARY WATER MGMT. 49, 49 (Stockholm Int'l Water Inst. 2013); Jennifer J. Sara, Edoardo Borgomeo & Anders Jägerskog, *Measuring Success in Transboundary Water Cooperation: Lessons From World Bank Engagements*, WORLD BANK BLOGS (Oct. 7, 2021). Note that U.N. Water, Transboundary Waters reports "most countries do not have all of their transboundary basin areas covered by operational arrangements." *Transboundary Waters*, U.N. WATER, https://www.unwater.org/water-facts/transboundary-waters (last visited Oct. 17, 2023).

[6] In recognizing these four challenges, the UNDP Water Governance Facility "support[s] the effective and equitable allocation and development of water resources, and harmonization of water governance systems by supporting the application of integrated water resources and cooperative river basin management principles to shared water resources." *Water Cooperation*, UNDP-SIWI WATER GOVERNANCE FACILITY, https://siwi.org/undp-siwi-water-governance-facility/work-areas/water-cooperation?accordion-goal (last visited Oct. 17, 2023).

[7] AGNES CHONG, INTERNATIONAL LAW FOR FRESHWATER PROTECTION, 354-55 (Laurence Boisson de Chazournes et al. eds., 9th ed. 2022).

[8] *Indicator 6.5.2 "Proportion of Transboundary Basin Area with an Operational Arrangement for Water Cooperation"*, U.N. WATER, https://www.unwater.org/our-work/integrated-monitoring-initiative-sdg-6/indicator-652-proportion-transboundary-basin-area (last visited Oct. 17, 2023).

(iii) the presence of a joint water management plan or joint objectives; and (iv) the conduct of annual data exchanges.[9]

The lack of legal infrastructure to implement freshwater protection means that existing water governance institutions and legal regimes are not equipped to address the contemporary challenges of managing and preserving water resources in an age of water stress and shortages, climate change, water disasters such as flood and drought, and the resulting health impacts on populations.[10] This Article explores the prioritization of river allocation rights for basin States, often at the expense of the environmental protection of international rivers. One of the key factors supporting this perceived importance of allocation rights over the environmental protection of transboundary rivers is the belief in a hierarchical relationship between the equitable utilization and the no-harm rules of the 1997 Watercourses Convention.[11] The equitable utilization rule provides riparian States sharing a transboundary river the right to use the shared river in an equitable manner.[12] Meanwhile, the no-harm rule prohibits riparian States from causing significant harm to other States and the environment.[13] This Article will discuss the impact of this perceived hierarchical relationship on States' interpretation of their obligations in the 1997 Watercourses Convention; which arguably impact their interpretation of the principles in other water treaties, such as the 1992 UNECE Water Convention,[14] and future treaties, including one based on the International Law Commission's (ILC) 2008 Draft Articles on Transboundary Aquifers.[15] This Article argues that a textual interpretation of the 1997 Watercourses Convention is appropriate, as the treaty explicitly outlines the need to balance allocation rights with the obligation not to cause significant harm to other States and the environment. Further, the international cases of the *First Admissions Advisory Opinion,* the *Second Admissions Advisory Opinion,* and the *Chagos Advisory Opinion* support a textual interpretation of water treaties. Lastly, a textual interpretation of the relevant treaty provisions appropriately reflects the

---

[9] *Id*.

[10] CHONG, *supra* note 7, at 356.

[11] *See* Convention on the Law of the Non-Navigational Uses of International Watercourses art. 5, May 21, 1997, 2999 U.N.T.S. 120 [hereinafter 1997 Watercourses Convention].

[12] *Id.* at arts. 4-5.

[13] *Id.*

[14] *See* Convention on the Protection and Use of Transboundary Watercourses and International Lakes, Mar. 17, 1992, 1936 U.N.T.S. 269 [hereinafter UNECE Convention].

[15] Report of the International Law Commission to the General Assembly, 63 U.N. GAOR Supp. No. 10 U.N. Doc. A/63/10 (2008), reprinted in [2008] 1 Y.B. Int'l Law Comm'n 76, U.N. Doc. A/CN.4/SER.A/2008 (Draft Articles on the Law of Transboundary Aquifers, adopted by G.A. Res. 63/124 (Jan. 15, 2009)) [hereinafter Draft Articles].

object and purpose of the treaty over any interpretation of a hierarchical relationship. A textual interpretation would directly address the environmental protection of international rivers.

II. INTERNATIONAL WATER LAW: STRUCTURAL ISSUE OF HIERARCHY

The Convention on the Law of the Non-Navigational Uses of International Watercourses ("1997 UN Watercourses Convention") was adopted by the UN General Assembly by way of Resolution 51/229 on May 21, 1997, and came into force on August 17, 2014.[16] Currently, the convention has 38 parties and sixteen signatories.[17] The 1997 Convention and subsequent legal developments crystallized the principles to share, utilize, manage and develop the international watercourses between riparian States within the field of international law,[18] which have been subsequently formalized in international watercourse agreements.[19] Furthermore, the convention's rules were reflected in the ILC's Draft Articles on the Law of Transboundary Aquifers ("*2008 ILC's Draft Articles*").[20] The 1997 Watercourses Convention was lauded as the "future Magna Carta on international watercourses" by State representatives applauding the work of the ILC on the convention in the hope the convention would become universally accepted.[21] Nevertheless, the treaty has yet to achieve universal status.[22] The UN

---

[16] 1997 Watercourses Convention, *supra* note 11.

[17] *Id*.

[18] *See Gabcikovo-Nagymaros Project* (Hung. v. Slov.), Judgment, 1997 I.C.J. Rep. 56, ¶ 85 (Sep. 25).

[19] *See*, *e.g.*, Revised Protocol on Shared Watercourses in the Southern African Development Community, Aug. 7, 2000, 40 I.L.M. 321 (2001); Agreement on the Cooperation for the Sustainable Development of the Mekong River Basin, Cambodia-Laos-Thai.-Viet., Apr. 5, 1995, 34 I.L.M. 864 (1995). It was envisaged that individual watercourse systems could then use the articles contained in the ILC's framework instrument as a basis to establish more detailed arrangements and obligations, considering the particular conditions and needs of the watercourse system. *See Report of the Commission to the General Assembly*, [1979] 2(2) Y.B. Int'l. L. Comm'n 160, A/CN.4/SER.A/1979/Add.l (Part 2) (The Law of the Non-Navigational Uses of International Watercourses).

[20] *See* Draft Articles*, supra* note 15.

[21] *See* Int'l Law Comm'n, Rep. on the Work of Its Forty-Sixth Session, U.N. Doc. A/CN.4/463, at 43 (1995).

[22] In contrast, other multilateral environmental treaties such as the Vienna Convention and Montreal Protocols on Substances that Deplete the Ozone Layer has 198 parties; the U.N. Convention on Biological Diversity has 196 parties; and the U.N. Framework Convention on Climate Change has 198 parties and the U.N. Convention to Combat Desertification has 197 parties. Montreal Protocol on Substances that Deplete the Ozone Layer, Sept. 16, 1987, S. Treaty Doc. 100-10, 1522 U.N.T.S. 3; Convention on Biological Diversity, June 5, 1992, 1760 U.N.T.S. 79; U.N. Framework Convention on Climate Change, May 9, 1992, S. Treaty Doc. No. 102-38, 1771 U.N.T.S. 107; U.N. Convention to Combat Desertification in those

Watercourses Convention came into force on August, 17 2014 after receiving its thirty-fifth ratification seventeen years after the conclusion of the treaty.[23] The UNECE Convention was initially adopted for the Economic Commission for Europe on Environmental and Water Problems and was later amended to allow global accession.[24] The UNECE Convention entered into force on February 6, 2013.[25] The global watercourses conventions are framework treaties intended to enable riparian States to adopt and tailor the provisions to their river basins and implement cooperation arrangements. Interpreting the two rules which derive from customary international law–the equitable utilization rule and the no-harm rule–to have a hierarchical structure is not supported by State practice and hinders the protection of international rivers afforded by custom.

The hierarchical issue in international law is as relevant as ever in both preventing and resolving current day water disputes. This includes the ICJ dispute between Chile and Bolivia involving the *Silala River*.[26] Both States allege the other State has breached their equitable utilization and no-harm rights. Chile alleges that: (i) Bolivia's declaration of Silala as springs and not an international river is improper; and (ii) Bolivia's grant of a concession to a private Bolivian company to provide water and sewage services to Chile infringes upon Chile's equitable use of the Silala River.[27] Bolivia, on the other hand, claims it has artificially enhanced surface waters of the Silala River, and accordingly has sovereignty over the artificial canals and drainage mechanisms in its territory as well as the artificial flows from these enhancements.[28] Thus, Bolivia claims, Chile's current use of the Silala waters infringes upon Bolivia's equitable utilization right.[29] In deciding on these issues, the ICJ should apply the equitable utilization and no-harm rules to determine the lawful State activity of both States. However, the ICJ failed to decide on the parties' water entitlements, resulting in no resolution on the underlying dispute between Chile and Bolivia.[30] Interpretation of a hierarchy

---

Countries Experiencing Serious Drought and/or Desertification, particularly in Africa, Oct. 14, 1994, S. Treaty Doc. 106-25, 1954 U.N.T.S. 3.

[23] Pursuant to Article 36(1) of the 1997 Watercourses Convention, the convention enters into force after the deposit of the 35th instrument of ratification, approval, accession or acceptance by a State. 1997 Watercourses Convention, *supra* at 11, at art. 36 ¶ 1.

[24] Convention on the Protection and Use of Transboundary Watercourses and International Lakes, Mar. 17, 1992, 1936 U.N.T.S. 269 (amended Nov. 28, 2003).

[25] *Id*.

[26] Dispute Over the Status and Use of the Waters of the Silala (Chile v. Bol.), Application Instituting Proceedings, 2016 I.C.J. 4 (June 16).

[27] *Id*. at 14 ¶¶ 24-26.

[28] *Id.* at 17 ¶ 26.

[29] Dispute Over the Status and Use of the Waters of the Silala (Chile v. Bol.), Verbatim Record, 2022 I.C.J. 4, 18 ¶ 2 (Apr. 14).

[30] Dispute Over the Status and Use of the Waters of the Silala (Chile v. Bol.), Judgment,

between these two rules of custom will affect their application regarding the environmental protection of an international river.

If interpreted according to its text, the treaty expressed in the Convention articles, balances the competing interests of equitable utilization and no harm while ensuring fair and equitable use of water resources. Simultaneously, a textual interpretation ensures environmental protection and limits harm to the interests of other States and the environment. An interpretation of a hierarchy of the two rules would distort the balance in favor of States' allocation rights at the cost of the environmental protection of the shared river. Therefore, a textual interpretation of the treaty upholds the balance provided by it, and safeguards the environmental protection of international rivers.[31] An appropriate starting point is the text of the treaty that provides definitions and conceptual frameworks of utilization and no-harm, as they emphasize the goals of sustainable utilization, pollution prevention, and conserving, managing and protecting international rivers for the benefit of present and future generations.[32] Utilization thus cannot be divorced from no-harm, nor looked at outside of its conceptual framework.

III. UN WATERCOURSES CONVENTION: NO HIERARCHY IN THE TEXT OF THE TREATY

The equitable utilization rule and the no-harm rule are codified in Articles 5 and 7 of the UN Watercourses Convention respectively.[33] Article 6 of the UN Watercourses Convention provides factors that may determine equitable utilization.[34] The treaty provisions (Articles 5, 6 and 7) do not appear to confer a hierarchy. Professor Campbell McLachlan notes that the general principle of treaty interpretation, the systemic integration with the international legal regime, which operates under the Article 31(1)(c) of VCLT is premised on the notion that treaties are "creatures of international law" and must be "applied and interpreted against the background of the general principles of international law."[35] When reading Articles 5, 6 and 7, the articles display evenness: the prohibition of significant harm, the

---

2022 I.C.J. 614 (Dec. 1).

[31] Chong, *supra* note 7, at 79-80.

[32] 1997 Watercourses Convention, *supra* note 11, at preamble.

[33] *Id.* at arts. 5, 7; *see also* UNECE Convention, *supra* note 14, at arts. 2(2)(c), 2(1) (The equitable utilization rule and no-harm rule are reflected in Article 2(2)(c) and Article 2(1) the respectively).

[34] 1997 Watercourses Convention, *supra* note 11, at art. 6.

[35] Campbell McLachlan, *The Principle of Systemic Integration and Article 31(1)(c) of the Vienna Convention*, INT'L COMPAR. L.Q. 279, 280 (2005). Terms including "without prejudice to" are used to connote some form of hierarchy, but this would not be the case for the term "having due regard for" in Article 7 of the 1997 Watercourses Convention. 1997 Watercourses Convention, *supra* note 11, at art. 7.

principle of equitable and reasonable utilization and the factors determining equitable utilization apply to all watercourse States establishing their positions.[36] A plain reading of the text of the treaty does not favor either the equitable utilization rule or the no-harm rule, nor does it favor upstream or downstream riparian States.[37] However, commentators assume a hierarchy between the equitable utilization rule and the no-harm rule that is inconsistent with the written treaty.[38]

Commentators argue there is a hierarchy between Articles 5 and 7, and in doing so cite several sources of authority. First, commentators point to Article 7(2) of the 1997 Watercourses Convention as evidence of a hierarchy.[39] In absence of explicit words providing for any hierarchy, it is assumed that a hierarchy is implied by the provision. Professor Owen McIntyre argues that the words "having due regard for Articles 5 and 6" in Article 7 "clearly implies that the prohibition in Article 7 is subordinate to the principle of equitable utilization." [40] Article 7(2) stipulates that States must "take all appropriate measures, having due regard for the provisions of Articles 5 and 6, in consultation with the affected State, to eliminate or mitigate such harm and, where appropriate, to discuss the question of compensation."[41] It is however unclear what is the basis a hierarchy is "clearly implied" from the language of the text. The term "due regard" is used in the 1982 Law of the Sea Convention and the 1958 High Sea Convention (however Article 2 of that treaty adopts the term "reasonable regard"). The ILC's 1956 Commentary to what became the 1958 treaties is silent on whether the words "due regard" implied any form of hierarchy. "Due regard" appears in multiple provisions of the 1982 Law of the Sea Convention, thus the implication of conflicting hierarchies undermines the treaty for all these references.[42] Professor Stephen McCaffrey states:

> It is equally clear that the relationship of the equitable utilization and no-harm principles remain rather controversial. The resolution of this question in the Convention, while not a model of clarity, strongly suggests that the overriding principle is that of equitable utilization. This is confirmed in the ICJ's judgment in the *Gabcikovo-Nagymaros* case, in which the ICJ referred on several occasions to the principle of equitable utilization. . . . On the other hand, the ICJ never mentioned

---

[36] *Id.* at arts. 5-7.

[37] *Id.* at arts. 5, 6.

[38] See *infra* Part IV.

[39] 1997 Watercourses Convention, *supra* note 11, at art. 7(2).

[40] OWEN MCINTYRE, ENVIRONMENTAL PROTECTION OF INTERNATIONAL WATERCOURSES UNDER INTERNATIONAL LAW, 105 (1st ed. 2007).

[41] 1997 Watercourses Convention, *supra* note 11, at art. 7.

[42] Chong, *supra* note 7, at 187-92.

> the no-harm principle, despite its having been relied upon heavily by Hungary.[43]

In the same vein, Professor Gabriel Eckstein states: "The principle of no significant harm, however, is considered subordinate to that of equitable and reasonable use."[44]

Second, commentators cite the *Gabcikovo* case as authority for the proposition that the ICJ emphasizes the primacy of the equitable utilization rule over the no-harm rule.[45] Commentators argue that the ICJ focused on Slovakia's breach of the rule of equitable utilization and ignored the no-harm rule, and that this constitutes evidence of the ICJ's confirmation of the primacy of the obligation of equitable and reasonable utilization over the no-harm rule.[46] The authority frequently cited for such hierarchy invokes a weak legal reasoning for its deduction: that is, it was the principle of equitable utilization (and not the principle not to cause significant harm) that was affirmed by the Court in the *Gabcikovo* case.[47] However, the case involved competing equitable utilization rights between Hungary and Slovakia regarding Hungary's suspended operations of the agreed dam construction and Slovakia's implementation of Variant C as an alternative to Hungary's suspended operations.[48] The Court did not assess the actions of Hungary and Slovakia by comparing the equitable utilization right against the no-harm obligation of the States, as the case did not engage the no-harm rule.[49] The

---

[43] Stephen C. McCaffrey, *An Overview of the U.N. Convention on the Law of the Non-Navigational Uses of International Watercourses*, 20 J. LAND RES. & ENV'T L. 57, 70 (2000).

[44] Gabriel E. Eckstein & Yoram Eckstein, *A Hydrogeological Approach to Transboundary Ground Water Resources and International Law*, 19 AM. U. INT'L L. REV. 201, 230 n.146 (2003).

[45] Charles B. Bourne, *The Primacy of the Principle of Equitable Utilization in the 1997 Watercourses Convention*, 35 CAN. Y.B. INT'L L. 215, 220 (1997) [hereinafter *Primacy*]; Joseph W. Dellapenna, *The Evolving Law of Transnational Aquifers in Management of Shared Groundwater Resources,* 18 NAT. RES. MGMT. POL'Y 209, 239; Charles B. Bourne, *The Case Concerning the Gabçikovo-Nagymaros Project: An Important Milestone in International Water Law*, 8 Y.B. INT'L ENV'T L. 6, 10 (1998) [hereinafter *Milestone*]; Salman M. A. Salman, *The Helsinki Rules, the UN Watercourses Convention and the Berlin Rules: Perspectives on International Water Law*, 23 INT'L J. Water RES. DEV. 625, 634 (2007); STEPHEN C. MCCAFFREY, THE LAW OF INTERNATIONAL WATER COURSES 408 (Oxford Univ. Press, 2d ed. 2007); McIntyre, *supra* note 40, at 105.

[46] *Id.*; *Primacy*, *supra* note 45, at 220; Dellapenna, *supra* note 45, at 239; *Milestone*, *supra* note 45, at 10; Salman, *supra* note 45, at 634; MCCAFREY, *supra* note 45, at 408; MCINTYRE, *supra* note 40, at 105.

[47] Tamar Meshel, *Swimming Against the Current: Revisiting the Principles of International Water Law in the Resolution of Fresh Water Disputes*, 61 HARV. INT'L L. J. 135, 135 (2020).

[48] Chong, *supra* note 7, at 286-97.

[49] Gabçikovo-Nagymaros Project (Hung./Slovk.), Judgment, 1997 I.C.J. 7 (Sept. 25).

Court regarded the acts as not reaching the threshold of significant harm.[50] Therefore, the Court did not consider the relationship between the equitable utilization rights of Hungary and Slovakia and their obligation to not cause significant harm. Hence, it cannot be argued that the Court considered the equitable utilization rule as having priority over the no-harm rule.

IV. PREVAILING NON-TEXTUAL INTERPRETATION CONTRARY TO THE TEXT OF THE TREATY

The prevailing non-textual interpretation of the UN Watercourses Convention stems from the debates and negotiations from the ILC work in the drafting of the UN Watercourses Convention.[51] The hierarchy issue of the equitable utilization rule over the no-harm rule were the result of concerns that the two rules were not sufficient in protecting the divergent interests of upper riparians and lower riparians.[52]

Regarding the interpretation of Article 7, Professor McCaffrey, Special Rapporteur (1985-1992), suggests there is no common intention between the parties in the text of the treaty. Professor McCaffrey states:

> To some delegations at the U.N. negotiations, the ILC's final text–which represents an effort to strike a balance between the two principles–favored equitable utilization too heavily. They argued for a text that more clearly gave precedence to the "no-harm" principle. Other delegations took the opposite view. For them the basic rule was equitable utilization; at most, any harm to another riparian State should merely be one factor to be taken into account in determining whether the harming State's use was equitable. You see before you the compromise formula arrived at in the U.N. negotiations. Perhaps not surprisingly, the final text is somewhat like a basket of Halloween candy: there is something in it for everyone. No matter whether you are from the equitable utilization or the no-harm school, you can claim at least partial victory.[53]

Here, Professor McCaffrey seems to imply from the negotiations that the text was deliberately drafted to satisfy both sides. Such phenomenon is common where ambiguity is the choice for compromise and parts of the

---

[50] Shigeta Yasuhiro, *Some Reflections on the Relationship between the Principle of Equitable Utilization of International Watercourses and the Obligation Not to Cause Transfrontier Pollution Harm*, 9 ASIAN Y.B. ON INT'L L. 147, 153-56 (2004).

[51] Chong, *supra* note 7, at 110-11.

[52] *Id*. at 117.

[53] Stephen McCaffrey, *The UN Convention on the Law of Non-Navigational Uses of International Watercourses: Prospects and Pitfalls, in* 414 WORLD BANK TECH. PAPER 17, 22 (Salman M.A. Salman & Laurence Boisson de Chazournes eds., 1998).

treaty constitute an agreement to disagree.[54] From such compromise:

> It is possible that the different meanings attached to the same expression by the parties in dispute is due not to an accident but to the deliberate design of one or more of the parties bent upon benefiting from an ambiguity surrounding the expression or provision which it succeeded in having inserted–or which it allowed to be inserted–in the treaty without the other party being aware of the pitfall thus prepared for it or waiting for it.[55]

The assumption is that the drafting of Article 7 was deliberately ambiguous. However, the actual final text is not ambiguous. On the contrary, Article 7 is clear and precise in stating that "having due regard for" is understood according to the text's ordinary meaning.[56] The argument that the parties did not show a common intention at the conference does not warrant dismissing the text of the treaty as ambiguous. On the contrary the text itself covers and bridges divergent intentions.

This was the case in the final draft of Article 7, which was agreed upon by the Working Group of the Whole. According to Professor Lucius Caflisch, the final text of Article 7 was contentious between upper riparian States and lower riparian States.[57] The resolution came when the phrase "in conformity with the provisions of Articles 5 and 6" was substituted with "having due regard for Articles 5 and 6."[58] Thus, Professor Caflisch observed:

This new formula was considered by a number of lower riparians to be sufficiently neutral not to suggest a subordination of the no-harm rule to the principle of equitable and reasonable utilization. A number of upper riparians thought just the contrary, namely, that that formula was strong enough to support the idea of such a subordination.[59]

Both sides perceived the term "having due regard for" to work in their favor.[60] The final text, however, is binding on the parties regardless of what

---

[54] *See* Isabelle Van Damme, *Treaty Interpretation by the WTO Appellate Body*, 21 EUR. J. INT'L L. 627, 629 (2010) (describing how attempts to synthesize treaty provisions are eschewed by reliance on ambiguity).

[55] H. Lauterpacht, *Restrictive Interpretation and the Principle of Effectiveness in the Interpretation of Treaties*, 26 BRIT. Y.B. INT'L L. 48, 77 (1949) (Lauterpacht explains that in such circumstances, the use of the contra proferentem rule is applied to overcome these controversial outcomes from technical drafting).

[56] G.A. Res. 51/299, art. 7(2), Convention on the Law of the Non-Navigational Uses of International Watercourses (July 8, 1997).

[57] Lucius Caflisch, *Regulation of the Uses of International Watercourses*, *in* INTERNATIONAL WATERCOURSES: ENHANCHING COOPERATION AND MANAGING CONFLICT 3, 15 (World Bank 1998).

[58] *Id.*

[59] *Id.*

[60] *Id*. at 15-16.

their subjective intentions were when they made the bargain. The "intentions approach" cannot be applied when interpreting the text due to a jurisprudential bar that does not permit taking into account different intentions of the parties in interpreting the treaty.[61] In 1964, the ILC's special rapporteur on the law of treaties gave primacy to the textual approach over the subjective intentions approach in stating:

> [T]he basic rule of treaty interpretation [is] the primacy of the text as evidence of the intentions of the parties . . . . [The draft article on treaty interpretation] accepts the view that the text must be presumed to be the authentic expression of the intentions of the parties; and that, in consequence, the starting point and purpose of interpretation is to elucidate the meaning of the text, not to investigate *ab initio* the intentions of the parties. While not excluding recourse to other indications of the intentions of the parties in appropriate cases, it makes the actual text the dominant factor in the interpretation of the treaty.[62]

The textual approach enables interpretation of the parties' intentions from an objective standard (as provided in the text), and the subjective intentions of the parties are irrelevant in interpretation where the text clearly elucidates such intentions.[63] A non-textual interpretation of a hierarchy cannot be inferred from the treaty text (as in the present case of interpreting Article 7) where the treaty is clear and requires only the textual approach of interpretation. Moreover, the interpretation of a hierarchy in Article 7 is contrary to the text, and object and purpose of the treaty.[64] A tribunal looking at Article 7 need not look beyond the text of the treaty. There is no explicit mention of a hierarchy, and there is no need to give effect to one.[65] This is further supported by the international jurisprudence of "due regard" and the principle of reasonable regard, whereby a tribunal deciding on the application of the obligation not to cause significant harm and the right of equitable utilization may therefrom seek authority.[66]

The interpretation that Article 7 is subordinate to Article 5 is at odds with the text of the treaty. The common interpretation of a hierarchical relationship

---

[61] *Documents of the Second Part of its 17th Session and of its 18th Session,* [1966] 2 Y.B. Int'l L. Comm'n 222-23, U.N. Doc. A/6309/Rev.1 [hereinafter 1966 Y.B. Vol. 2]; *Documents of the 16th Session*, [1964] 2 Y.B. Int'l L. Comm'n 56, U.N. Doc. A/CN.4/SER.A/1964/ADD.1 [hereinafter 1964 Y.B. Vol. 2].

[62] *Documents of the Third Report on the Law of Treaties, by Sir Humphrey Waldock, Special Rapporteur*, [1964] 2 Y.B. Int'l L. Comm'n 56, U.N. Doc. A/CN.4/167 [hereinafter *Sir Humphrey Waldock's Third Report*, 1964 Y.B. Vol. 2].

[63] RICHARD GARDINER, TREATY INTERPRETATION 4 (2d ed. 2015).

[64] Interpretation of Peace Treaties with Bulgaria, Hungary and Romania (Second Phase), Advisory Opinion, 1950 I.C.J. 229 (July 18).

[65] 1997 Watercourses Convention, *supra* note 11, at art. 7.

[66] *See* Chong, *supra* note 7, at 181-82.

between the equitable utilization rule and the no-harm rule does not result from a textual interpretation of Article 7. Professor Charles Bourne states:

> The wording of this [Article 7 of the 1997 Watercourses Convention] is much improved over that of the ILC's version of it. By clearly stating that due regard must be had for the articles setting out the principle of equitable utilization, it settles the issue of priority in favour of that principle. . . .The function of Article 7, as defined in the Watercourses Convention, therefore, is not to impose limits on the right of States to undertake equitable and reasonable utilizations under Articles 5 and 6, but on the implementation of these utilizations. Article 7 deals only with process.[67]

Similarly, Professor Stephen McCaffrey supports a non-textual interpretation. Professor McCaffrey states, regarding the no-harm rule that, "on its face it still seems to impose most of the obligations on the upstream State and give most of the rights to the one downstream."[68] McCaffrey also makes the following assertion:

> Such a strict and isolated application of the no-harm rule could lead to a situation in which the later-developing upstream State found itself unable to make significant use of the portion of the international watercourse within its territory because doing so would be likely to interfere with established uses in its downstream neighbor, causing significant harm to that State in violation of the rule.[69]

In their views, the treaty would not permit new uses of the watercourses; rather, it would only favor existing uses of international watercourses and, consequently, the rights of lower riparian States.[70] This deduction explains why commentators and concurring individuals believe such imbalance needs to be equalized and corrected.[71] Professor McCaffrey states:

> The upstream State has a basic right to an equitable share of the

---

[67] *Primacy*, *supra* note 45, at 232.

[68] MCCAFFREY, *supra* note 45, at 410.

[69] *Id*. at 411.

[70] Charles C. Bourne, *The International Law Commission's Draft Articles on the Law of International Watercourses: Principles and Planned Measures*, *in* THE LAW OF INTERNATIONAL WATERCOURSES: THE UNITED NATIONS INTERNATIONAL LAW COMMISSION'S DRAFT RULES ON THE NON-NAVIGATIONAL USES OF INTERNATIONAL WATERCOURSES 43-44 (Nat. Res. Law Ctr., Univ. of Colo. Sch. of L. 1991); Joseph W. Dellapenna, *Treaties as Instruments for Managing Internationally-Shared Water Resources: Restricted Sovereignty vs. Community of Property*, 26 CASE W. RES. J. OF INT'L L. 27, 39-40 (1994); Patricia Wouters, *The Legal Response to International Water Conflicts: The UN Watercourses Convention and Beyond*, 42 GERMAN Y.B. OF INT'L L. 293, 309-10 (1999).

[71] *Primacy*, *supra* note 45, at 224-25; MCCAFFREY, *supra* note 45, at 410-11; Dellapenna, *supra* note 70, at 39-40.

> resources of an international watercourse–a right that is not inconsistent with, and that is therefore not trumped by, a properly understood obligation to prevent harm to the downstream State.[72]

Professor McCaffrey explains: "This situation need not arise if the basic rules–equitable utilization and no-harm–are understood and applied in a way that is consistent with their underlying rationales".[73]

In addition, Professor Joseph Dellapenna argues:

> Logically, the no appreciable harm principle prohibits any meaningful use by an upper-riparian State, turning the principle into merely a variant form of the absolute integrity claim. That position, while frequently advocated by lower-riparian States, has never been adopted by actual international decision-makers. Furthermore, as the State seeking to initiate a new use would generally be cast in terms of the one creating the "injury", absolute integrity favors more highly developed States at the expense of their less developed neighbors, particularly as lower basin States tend to develop earlier and faster than upper basin States. Such a situation is hardly conducive to achieving the developmental equity proclaimed under various United Nations banners.[74]

Furthermore, Professor Bourne states:

> In short, Draft Article 7 resurrects the discredited doctrine of prior appropriation; it entrenches the rights of those who first utilize the waters of an international watercourse. While this doctrine is popular with downstream States, where first developments usually take place, it is politically and legally unacceptable to upstream States. In practice, it may be invoked in negotiations, but it is not accepted or applied as a principle of law in the settlement of watercourse disputes. Draft Article 7, therefore, should be seen as an aberration. There is merit in retaining it, but only with the addition of the exception clause advocated by Judge Schwebel and Professor McCaffrey, that is to say, a clause that would make the no appreciable harm rule subordinate to the principle of equitable utilization. Otherwise, it should be deleted. It is retrogressive, not progressive development of the law of international watercourses. The international community should not accept a law whose application may in some instances result in decisions that will be inequitable and

---

[72] MCCAFFREY, *supra* note 68, at 411.

[73] *Id.*

[74] Dellapenna, *supra* note 70, at 39-40; *see also* AMERICAN SOCIETY OF INTERNATIONAL LAW, CONTEMPORARY INTERNATIONAL LAW ISSUES: OPPORTUNITIES AT A TIME OF MOMENTOUS CHANGE: PROCEEDINGS OF THE SECOND JOINT CONFERENCE HELD IN THE HAGUE, THE NETHERLANDS, JULY 22-24, 1993, at 391 (Martinus Nijhoff, René Lefeber ed., 1993).

> unreasonable. The proper touchstone for determining the legal validity of utilizations of the waters of international watercourses should be the reasonable use and management of these waters, judged in the light of all relevant factors.[75]

The concern of prior appropriation is no longer an issue, and the need to infer a hierarchy between equitable utilization and no-harm to address this problem is unnecessary. The UN Watercourses Convention resolved the issue of imbalance on the basis of prior appropriation[76] as it prohibits the claim of a use over another on the basis of prior appropriation.[77] As new users tend to be upper riparians and established users are lower riparians, Article 10(1) of the 1997 Watercourses Convention eliminates the rule of prior appropriation, which states: "[i]n the absence of agreement or custom to the contrary, no use of an international watercourse enjoys inherent priority over other uses."[78] Article 10(2) of the 1997 Watercourses Convention states: "[i]n the event of a conflict between uses of an international watercourse, it shall be resolved with reference to Articles 5 to 7, with special regard being given to the requirements of vital human needs."[79] By inferring a hierarchy in the interpretation of Article 5 and 7 to ensure that equitable utilization is emphasized, the balance is tilted in favor of equitable utilization at the cost of no-harm which is contrary to the text of the treaty and without legal basis. Furthermore, this interpretation creates an absurdity into the treaty, undermining its intended purpose of combating pollution of international rivers.[80]

---

[75] Bourne, *supra* note 70, at 44.

[76] *See* EDITH BROWN WEISS, THE EVOLUTION OF INTERNATIONAL WATER LAW, *in* 331 COLLECTED COURSES OF THE HAGUE ACADEMY OF INTERNATIONAL LAW (Brill & Nijhoff eds., Hague Acad. of Int'l L. 2009).

[77] 1997 Watercourses Convention, *supra* note 11, at art. 10(1).

[78] *Id.*

[79] *Id.*, at art. 10(2).

[80] The ILC in its annual report to the UN General Assembly in 1972 noted that "The problem of pollution of international waterways was of both substantial urgency and complexity. Accordingly, the General Assembly requested the Secretariat to continue compiling the material relating to the topic with specific reference to the problems of the pollution of international watercourses." *See Documents of the 24th Session*, [1972] 2 Y.B. Int'l L. Comm'n 324, U.N. Doc. A/8710/Rev.1. (1972). The issue of pollution was sufficiently serious that it prompted the drafting of the convention to address these issues of water quality. The drafting process began following the U.N. General Assembly Resolution 2669 (XXV) of December 8, 1970, which mandated the ILC to study customary rules regulating the uses of international watercourses other than for navigational purposes for the codification and progressive development of the law. *See* G.A. Res. 2669 (XXV) (Dec. 8, 1970), *reprinted in* [1971] 2(2) Y.B. Int'l L. Comm'n 207, U.N. Doc. A/CN.4/SER.A/1971/Add.1 (Part 2).

V. THE CASE FOR A TEXTUAL INTERPRETATION OF THE TREATY

Presently, in the field the focus of the debate on the hierarchy is not on the text of the treaty. In fact, interpretation of the treaty has detracted from what the treaty says on the matter. To "have due regard for the provisions of Articles 5 and 6" refers to the requirement of balancing the equitable utilization and no-harm rules, and it does not mean Article 7 is inferior to Article 5.[81] The result of this interpretation has been that the no-harm rule could not operate as a rule in its own right and was subordinated to the equitable utilization rule.[82] Effectively, this approach serves as a guise for the freedom to exploit fresh water resources without due regard to the environment and the environmental protection of fresh water resources. The two rules need to refocus on the text of the treaty that provides an equal basis for determining water rights and obligations, eliminating the need to infer a hierarchy between them. The treaty is clear and binding on States.[83] The ordinary meaning approach to treaty interpretation is appropriate to interpreting this treaty given the clear wording of the text.

In respect to the relationship between equitable utilization and no-harm rules, the treaty does not state that equitable utilization takes precedence over no-harm. Article 7(2) states:

> Where significant harm nevertheless is caused to another watercourse State, the States whose use causes such harm shall, in the absence of agreement to such use, take all appropriate measures, having due regard for the provisions of articles 5 and 6, in consultation with the affected State, to eliminate or mitigate such harm and, where appropriate, to discuss the question of compensation.[84]

Where there is no ambiguity in the words in question and it is possible to give effect to a provision using the words in their natural and ordinary meaning, interpretation of the text is not permitted to give the words some other meaning.[85] The ICJ decision in the *Second Admissions* case adopted the interpretation principles of Vattel, who said, "it is not allowable to interpret what has no need of interpretation" since "what he has sufficiently declared in a treaty we assume to be the truth."[86] The text of the treaty is what

---

[81] 1997 Watercourses Convention, *supra* note 11, at art. 7(2).

[82] *Id.*

[83] *Id.* at arts. 5-7.

[84] *Id*. at art. 7(2).

[85] Competence of the General Assembly for the Admission of a State to the United Nations, Advisory Opinion, 1950 I.C.J. 8 (Mar. 3).

[86] EMER DE VATTEL, THE LAW OF NATIONS: OR, PRINCIPLES OF THE LAW OF NATURE, APPLIED TO THE CONDUCT AND AFFAIRS OF NATIONS AND SOVEREIGNS 244-45 (England, Sweet, Stevens, & Maxwell 1834).

separates "permissible from impermissible interpretations."[87] Interpreting a hierarchy between the rules of no-harm and equitable utilization is not only contrary to the treaty as it is written; it is giving the words of the treaty a different meaning.

The crucial issue of non-hierarchy matters because as international lawyers we are required to start with the text of the treaty.[88] International courts emphasize "interpretation must be based above all upon the text of the treaty."[89] In the present case of Articles 5, 6 and 7 of the 1997 Watercourses Convention, the treaty as it is written is clear, precluding the need to look beyond its text to discern the meaning of the words that are unambiguous.[90] The words "having due regard to" in Article 7 following the textual approach requires closer examination of the international jurisprudence on "due regard."[91] The term "due regard" appears in different treaties. Although it is possible "due regard" in one treaty may have a different interpretation of the term as compared to the term contained in another treaty, in fact "due regard" in each branch of international law (international civil aviation law, law of the sea, and outer space law) all denote the balance of multiple rights and obligations.[92] While "due regard" has been understood as an obligation, the due regard obligation is short of a general customary rule of "due regard" that might be relevant to treaty interpretation applying the rule of interpretation in Article 31(3)(c) of the VCLT. Nevertheless, interpretation of the treaty requires adhering to the ordinary meaning of "due regard".

According to Vattel's fourth principle "that what is sufficiently declared in the treaty is assumed to be the truth."[93] It can be assumed that the

---

[87] Ingo Venzke, *The Role of International Courts as Interpreters and Developers of the Law*, 34 LOY. OF L.A. INT'L & COMPAR. L. REV. 99, 102 (2011).

[88] *See* Gerald Fitzmaurice, *The Law and Procedure of the International Court of Justice 1951-4: Treaty Interpretation and Other Treaty Points*, 33 BRIT. Y.B. INT'L L. 203, 209-10 (1957); JAMES CRAWFORD, BROWNLIE'S PRINCIPLES OF PUBLIC INTERNATIONAL LAW 379 (Oxford Univ. Press, 8th ed. 2012); Fuad Zarbiyev, *A Genealogy of Textualism in Treaty Interpretation, in* INTERPRETATION IN INTERNATIONAL LAW 251, 255-57 (Andrea Bianchi et al. eds., 2015).

[89] *See* Territorial Dispute (Libya v. Chad), Judgment, 1994 I.C.J. 6, 21-22 (Feb. 3) (upheld in Maritime Delimitation and Territorial Questions between Qatar and Bahrain (Qatar v. Bahr.), Judgment, 1995 I.C.J. 6, 18 (Feb. 15)); *see also* Wintershall Aktiengesellschaft v. Argentine Republic, ICSID Case No. ARB/04/14, Partial Award, at ¶¶ 78-79 (Dec. 8, 2008) (favoring the textual approach by international tribunals in the following cases); Anglo-Iranian Oil Co. (U.K. v. Iran), Judgment, 1952 I.C.J. 93, 104 (July 22).

[90] 1997 Watercourses Convention*, supra* note 11, at arts. 5-7.

[91] CHONG, *supra* note 7, at 180. *See* Chapter 5 for detailed discussion on the "international jurisprudence on due regard." *Id.* at 180-244.

[92] *Id.* at 180-244.

[93] DE VATTEL, *supra* note 86, at 245.

text of Article 7 is the truth; therefore, if a party wishes to interpret "a hierarchy" in the express words "having due regard for," that party is constrained by the international jurisprudence on textual interpretation of the treaty. International tribunals and courts have applied the words "having due regard for," which do not infer a hierarchy.[94] The party may not enforce the party's subjective interpretation of the treaty and may not retrospectively apply "further" intentions not originally expressed in the treaty.[95] This would be contrary to the text, and object and purpose of the treaty.[96] The international jurisprudence discussed in this Article has shown this to be the case.[97] The ICJ in the *Second Admissions* advisory opinion stated:

> The Court considers it necessary to say the first duty of a tribunal which is called upon to interpret and apply the provisions of a treaty, is to endeavor to give effect to them in their natural and ordinary meaning in the context in which they occur. If the relevant words in their natural and ordinary meaning make sense in their context, that is an end of the matter. If, on the other hand, the words in their natural and ordinary meaning are ambiguous or lead to an unreasonable result, then, and then only, must the Court, by resort to other methods of interpretation, seek to ascertain what the parties really did mean when they used these words.[98]

---

[94] *See, e.g.*, Fisheries Jurisdiction (Spain v. Can.), Judgment, 1998 I.C.J. 432, 463-64 ¶ 76 (Dec. 4); Fisheries Jurisdiction (U.K. v. Ice.), Judgment, 1974 I.C.J 3, 29, 34 ¶¶ 68, 79(4)(c) (Jul. 25); Fisheries Jurisdiction (Ger. v. Ice.), Judgment, 1974 I.C.J. 175, 198, 206 ¶¶ 60, 77(4)(c) (Jul. 25).

[95] DE VATTEL, *supra* note 86, at 244.

[96] *See* Interpretation of Peace Treaties with Bulgaria, Hungary and Romania (Second Phase), Advisory Opinion, 1950 I.C.J. 229 (July 18) (interpretation of treaties beyond their natural and ordinary meaning may be "contrary to their letter and spirit").

[97] *See* Conditions of Admission of a State to Membership to the United Nations (Article 4 of the Charter), Advisory Opinion, 1948 I.C.J. 57, 63 (May 28); Competence of the General Assembly for the Admission of a State to the United Nations, Advisory Opinion, 1950 I.C.J. at 8 (The ICJ applying the Polish Postal Service in Danzig, Advisory Opinion); *see also* Polish Postal Service in Danzig, Advisory Opinion 1925 P.C.I.J. (ser. B) No. 11, at 39-40 (May 16); Appellate Body Report, United States—Import Prohibition of Certain Shrimp and Shrimp Products, ¶¶ 114-15, WTO Doc. WT/DS58/AB/R (adopted Oct. 12, 1998); Territorial Dispute (Libya v. Chad), Judgment, 1994 I.C.J. 6, 22 ¶ 43 (Feb. 3); Wintershall Aktiengesellschaft v. Arg. Republic, ICSID Case No. ARB/04/14 at 48 ¶ 82; ICS Inspection & Control Serv. Ltd. (U.K.) v. Arg. Republic, PCA Case Repository No. 2010-9, Award on Jurisdiction, ¶ 88 (Feb. 10, 2012); Rights of Nationals of the United States of America in Morocco (Fr. v. U.S.), Judgment, 1952 I.C.J. 176, 195 (Aug. 27).

[98] Competence of the General Assembly for the Admission of a State to the United Nations, Advisory Opinion, 1950 I.C.J. at 8. *See also* Polish Postal Service in Danzig, Advisory Opinion 1925 P.C.I.J. (ser. B) No. 11, at 39 (May 16).

The ICJ in the *Second Admissions* advisory opinion found no ambiguity in the words in question and gave effect to a provision using the words in their natural and ordinary meaning.[99] As such, the Court is not permitted to give the words some other meaning and was correct in refusing to look at the *travaux préparatoires* of the UN Charter to discern the meaning of the words already clear to the Court.[100] Such refusal is consistent with Vattel's philosophy of avoiding unnecessary interpretation[101] and accepting the meaning of words as they are presented.[102] Interpretation of Article 7 must not overlook the text, but more fundamentally, the treaty as it is written needs to be followed. The Annex VII arbitral body in *Chagos Marine Protected Area Arbitration* interpreted the words "shall have due regard to" in Article 56(2) of the 1982 Law of the Sea Convention (UNCLOS) according to the ordinary meaning of the words. [103] The tribunal decided:

> [T]he ordinary meaning of "due regard" calls for the United Kingdom to have such regard for the rights of Mauritius as is called for by the circumstances and by the nature of those rights. . . . The Convention does not impose a uniform obligation to avoid any impairment of Mauritius' rights; nor does it uniformly permit the United Kingdom to proceed as it wishes, merely noting such rights. Rather, the extent of the regard required by the Convention will depend upon the nature of the rights held by Mauritius, their importance, the extent of the anticipated impairment, the nature and importance of the activities contemplated by the United Kingdom, and the availability of alternative approaches. In the majority of cases, this assessment will necessarily involve at least some consultation with the rights-holding State.[104]

---

[99] Competence of the General Assembly for the Admission of a State to the United Nations, Advisory Opinion, 1950 I.C.J. at 8.

[100] *Id.*

[101] DE VATTEL, *supra* note 86, at 244.

[102] MYRES S. MCDOUGAL ET AL., THE INTERPRETATION OF INTERNATIONAL AGREEMENTS AND WORLD PUBLIC ORDER, 78-79 (Martinus Nijhoff 1994).

[103] Chagos Marine Protected Area Arb. (Mauritius v. Gr. Brit.) 31 R.I.A.A. 359, 571 ¶ 519 (Perm. Ct. Arb. 2015) ("In the Tribunal's view the ordinary meaning of "due regard" calls for the United Kingdom to have such regard for the rights of Mauritius as is called for by the circumstances and by the nature of those rights. [. . .] The Convention does not impose a uniform obligation to avoid any impairment of Mauritius' rights; nor does it uniformly permit the United Kingdom to proceed as it wishes, merely noting such rights. Rather, the extent of the regard required by the Convention will depend upon the nature of the rights held by Mauritius, their importance, the extent of the anticipated impairment, the nature and importance of the activities contemplated by the United Kingdom, and the availability of alternative approaches. In the majority of cases, this assessment will necessarily involve at least some consultation with the rights-holding State.").

[104] *Id.*

The tribunal applied the ordinary meaning of "due regard" in Article 56(2) of UNCLOS and affirmed that it meant to balance the rights and obligations of both Mauritius and the United Kingdom in the exclusive economic zone (EEZ).[105]

A further example is the *Fisheries Jurisdiction Case (U.K. v. Iceland)*. The ICJ in *Fisheries Jurisdiction Case (U.K. v. Iceland)* was faced with reconciling Iceland's preferential fishing rights and the United Kingdom's traditional fishing rights.[106] At the same time Iceland, having those preferential rights, was obligated not to exclude other States of their fishing rights.[107] Exclusion of other States of their rights would be incompatible with the notion of preferential rights as recognized in the 1958 and 1960 Geneva Conferences and it would be inequitable.[108] In balancing the interests of the parties, the Court decided due regard must also be given to the "needs of conservation."[109] The ICJ decided:

> It is one of the advances in maritime international law, resulting from the intensification of fishing, that the former laissez-faire treatment of the living resources of the sea in the high seas has been replaced by a recognition of a duty to *have due regard to* the rights of other States and the needs of conservation for the benefit of all.[110]

Based on the above considerations of the phrase "having due regard for," a natural and reasonable reading of the phrase in its ordinary sense does not remotely invoke a hierarchy between equitable utilization and the no-harm rule. The term does not sustain more than one meaning. According to various dictionary definitions and court interpretations, it is a commonly used idiom with the consistent meaning of "to take reasonable account of."[111] As the ICJ in the *Fisheries Jurisdiction Case (U.K. v. Iceland)*, Article 2 of the Geneva Convention on the High Seas used the words "reasonable regard". It is a term that integrates a mechanism to take into account "what is appropriate in all the circumstances" and incorporates a standard of reasonableness.[112] Following such logic, there is no requirement to go further than the text of

---

[105] *Id*.

[106] Fisheries Jurisdiction (U.K. v. Ice.), Judgment, 1974 I.C.J. Rep. 30, ¶ 69. (Feb. 2). *See also* Fisheries Jurisdiction (Ger. v. Ice.), Judgment, 1974 I.C.J. Rep. 27, ¶ 61 (July 25).

[107] Fisheries Jurisdiction (U.K. v. Ice.), 1974 I.C.J. at 30, ¶ 69.

[108] *Id.*

[109] *Id.* at 31, ¶ 72.

[110] *Id.*

[111] Fisheries Jurisdiction (U.K. v. Ice.), Judgment, 1974 I.C.J. Rep. 30, ¶ 69 (Feb. 2). The ICJ noted in this case that Article 2 of the Geneva Convention on the High Seas used the words "reasonable regard."

[112] Joe Tomlinson et al., *Judicial Review of Public Data Gaps*, JUD. REV. 69, 72 (2023).

the treaty to infer a hierarchy in Article 7 of the 1997 Watercourses Convention. Where the text is clear, there is a duty to apply the treaty as it is written.[113]

A textual interpretation of "due regard" directly impacts the interpretation of the treaty. A textual interpretation will alter the prevailing inaccurate interpretation of the equitable utilization rule and the no-harm rule, and thus has broad impact by: (i) removing the hierarchy that is an erroneous interpretation of the treaty; (ii) restoring a correct interpretation of the treaty; (iii) permitting the appropriate operation of the treaty; (iv) no longer "making lawful" unlawful activities that cause significant harm and have direct implications for the protection of river environments.

VI. INTERNATIONAL JURISPRUDENCE FOR TEXTUAL INTERPRETATION

The text of treaties separates permissible and impermissible interpretations.[114] Textualism has been argued to be the dominant method of treaty interpretation.[115] It is both the starting and arguably the finishing point of interpretation. As the starting point of interpretation, the text is presumed to be "the authentic expression of the intentions of the parties," hence the interpretation is to elucidate the meaning of the text, not to investigate the *ab initio* intentions of the parties.[116] Looking at the words does not disregard the "validity or relevance" of the parties' intentions,[117] but it is looking at "the intention of the parties as expressed in the text, as the best guide to their common intention."[118] Even where there is ambiguity or if the words lead to an unreasonable outcome, the inquiry into the intentions of the parties through other rules of interpretation must not "[depart] from the natural and ordinary meaning, or doing violence to the actual terms of the treaty, or reading into it terms that are not there."[119] The ICJ has also considered cases where the text is ambiguous and has applied the principle of actuality in its textual approach.

VII. APPLYING THE PRINCIPLE OF ORDINARY MEANING

In *Anglo-Iranian Oil Company*, the ICJ considered the question of its jurisdiction, which was limited to the application of treaties or conventions accepted by Iran either "after the ratification of the Declaration" or "at any

---

[113] 1964 Y.B. Vol. 2, *supra* note 61, at 56.

[114] Venzke, *supra* note 87, at 99-131.

[115] Zarbiyev, *supra* note 88 at 257.

[116] 1964 Y.B. Vol. 2, *supra* note 61, at 56.

[117] Fitzmaurice, *supra* note 88, at 209.

[118] CRAWFORD, *supra* note 88, at 379.

[119] Fitzmaurice, *supra* note 88, at 210.

time."[120] The Court considered the arguments by the Government of Iran and the United Kingdom. The Government of Iran argued that the Court is limited to the application of treaties or conventions accepted by Iran after the ratification of the Declaration; pointing to the words "*et postérieurs à la ratification de cette déclaration*" after the phrase "*traités ou conventions acceptés par la Perse*."[121] On the other hand, the Government of the United Kingdom argued that the words "*et postérieurs à la ratification de cette déclaration*" referred to the phrase "*au sujet de situations ou de faits*" and thus maintained the Declaration applied to treaties and conventions accepted by Iran at any time.[122]

In hearing both sides, the Court acknowledged that indeed the phrase "*et postérieurs à la ratification de cette déclaration*" may be compatible with both "*traités ou conventions acceptés par la Perse*" and "*au sujet de situations ou de faits*" from a pure grammatical position.[123] Critically, the ICJ moved away from interpreting the text based on pure grammar. The ICJ decided the question on "the natural and reasonable way of reading the text," which was that "*traités ou conventions acceptés par la Perse*" and "*postérieurs à la ratification de cette déclaration*" were linked by the word "*et*" and that the application of treaties or conventions accepted by Iran "at any time" was not the natural and reasonable way of reading the text.[124] In that case, Judge Read disagreed with the decision of the Court, but had wholly agreed with the Court's interpretation based on the principle of actuality and principle of natural and ordinary meaning. He said:

> The fact that jurisdiction depends on the will of the parties makes it necessary to consider what the will of the Persian Government was at the time when it made the Declaration. That will was *expressed in the words used*, and in order to determine it, the first principle must be applied. It is necessary to give effect to the words used in their natural and ordinary meaning in the context in which they occur. The second principle is equally important. It is my duty to interpret the Declaration and not to revise it. In other words, I cannot, in seeking to find the meaning of these words, disregard the words as actually used, give to them a meaning different from their ordinary and natural meaning, or add words or ideas which were not used in the making of the Declaration.[125]

---

[120] Anglo-Iranian Oil Co. (U.K. v. Iran), Judgment, 1952 I.C.J. 93, 103-104 (July 22).

[121] *Id.* at 15.

[122] *Id*.

[123] *Id.*

[124] *Id.*

[125] Anglo-Iranian Oil Co. Case (U.K. v. Iran), Judgment, 1952 I.C.J. 142, 145 (July 22)

The principle of actuality and principle of ordinary and natural meaning as the primary approach in interpretation of the ICJ is reiterated by McNair, Basdevant, Klaestad and Read in their joint dissenting opinion in *Ambatielos*, who said:

> The claims referred to by the Declaration of 1926 are claims "based on the provisions of the Treaty" of 1886. These words should be construed in their natural and ordinary meaning, as has been said over and over again and, in particular, in the Advisory Opinion of the Court on the *Competence of the General Assembly for the Admission of a State to the United Nations*. In our opinion, the natural and ordinary meaning of these words is limited to claims whose legal support is found in the provisions of the Treaty; that is, claims whose validity should be appraised in the light of these provisions; the natural and ordinary meaning of the words, in our opinion, excludes claims whose support must be sought elsewhere. In accordance with the method of interpretation adopted by the Court in the above-mentioned Opinion, we would add that nothing in the Declaration suggests that the Parties intended to confer any other meaning on these words.[126]

These early cases decided by the ICJ all reinforce the primary focus of the Court on the principle of actuality and the principle of natural and ordinary meaning.[127] In fact, the jurisprudence of the Court is conclusive that the textual approach is established law.[128]

VIII. THE INTERPRETATION MUST NOT LEAD TO UNREASONABLENESS

Where the interpretation of the treaty is not according to the ordinary and natural meaning of the words, this may lead to absurd results. In *Polish Postal Service* the Permanent Court of International Justice said:

> In the opinion of the Court, the rules as to a strict or liberal construction of treaty stipulations can be applied only in cases where ordinary methods of interpretation have failed. It is a cardinal principle of interpretation that words must be interpreted in the sense which they would normally have in their context, unless such interpretation would lead to something unreasonable or absurd. In the present case, the construction which the Court has placed on the various treaty stipulations is not only reasonable, but is also supported by reference to

---

(dissenting opinion by Read, J.) (emphasis added).

[126] Ambatielos (Greece v. U.K.), Judgment-Merits, 1953 I.C.J 25, 30 (May 19) (dissenting opinion by McNair, A. et al.).

[127] *Sir Humphrey Waldock's Third Report*, 1964 Y.B. Vol. 2, *supra* note 62, at 55; Fitzmaurice, *supra* note 88, at 212-213.

[128] Waldock, *supra* note 127, at 56.

> the various articles taken by themselves and in their relation one to another.[129]

A further example is in the *Case Concerning Rights of Nationals of the United States of America in Morocco*. There, the ICJ examined the text of the Declarations to decide what the parties had in mind when they used the words "*renonce à réclamer*" (renounces claiming) as "a surrender of all rights and privileges arising out of the capitulatory regime or as temporary undertakings not to claim those rights and privileges so long as guarantees for judicial equality are maintained."[130] The ICJ read the words "taking into consideration the guarantees of judicial equality" and stated:

> These are words which, if given their ordinary and natural meaning, state the consideration which led to the making of the surrender, but they are not words which would *normally be used* if it was intended to make a conditional surrender. The Court is of the opinion that the words "*renonce à réclamer*" must be regarded as an out-and-out renunciation of the capitulatory rights and privileges.[131]

The words need to be interpreted according to their common usage and must not be contrary to their ordinary meaning and treaty's object and purpose. This means the application of any exception to the rule (that is, where the common usage terms cannot be readily interpreted)[132] must be strictly limited, or else it would unduly weaken the authority of the ordinary meaning of the terms.[133] The ICJ in *Advisory Opinion on Interpretation of Peace Treaties (Second Phase)* stated:

> The principle of interpretation expressed in the maxim: *Ut res magis valeat quam pereat*, often referred to as the rule of effectiveness, cannot justify the Court in attributing to the provisions for the settlement of disputes in the Peace Treaties a meaning which, as stated above, would be contrary to their letter and spirit.[134]

In addition, the interpretation of the words in the ordinary and natural meaning must not lead to incongruous results as seen above in the *Anglo-Iranian Oil Company* case where interpreting "*et postérieurs à la ratification*

---

[129] Polish Postal Service in Danzig, Advisory Opinion 1925 P.C.I.J. (ser. B) No. 11, at 39-40 (May 16).

[130] Rights of Nationals of the United States of America in Morocco, (Fr. v. U.S.), Judgment, 1952 I.C.J. 176, 194 (Aug. 27).

[131] *Id.* at 195.

[132] *See* HUGO GROTIUS, THE RIGHTS OF WAR AND PEACE INCLUDING THE LAW OF NATURE AND OF NATIONS 177 (A. C. Campbell, & M. Walter Dunne trans., 1901) (1624).

[133] 1966 Y.B. Vol. 2, *supra* note 61, at 223.

[134] Interpretation of Peace Treaties with Bulgaria, Hungary and Romania (Second Phase), Advisory Opinion, 1950 I.C.J. 229 (July 18).

de cette déclaration" purely based on its grammar would make it compatible with both "*traités ou conventions acceptés par la Perse*" and "*au sujet de situations ou de faits*" and lead to an incongruous outcome.[135]

The ICJ has deployed the textual approach in interpreting texts of a treaty,[136] particularly where the text is not ambiguous and thus would not be necessary to go further than the ordinary text of treaty.[137]

A. First Admissions Advisory Opinion

The textual approach of interpretation is illustrated in the *First Admissions* advisory opinion.[138] In the *First Admissions* advisory opinion, the ICJ was asked whether a member of the United Nations is permitted to vote on conditions of membership to the United Nation that are not expressly provided in Article 4(1) of the UN Charter.[139] The ICJ answered in the negative and affirmed the approach of interpretation by stating:

> The Court considers that the text is sufficiently clear; consequently it does not feel that it should deviate from the consistent practice of the Permanent Court of International Justice, according to which there is no occasion to resort to preparatory work if the text of a convention is sufficiently clear in itself. [140]

The ICJ was interpreting Article 4(1) which states:

> Membership in the United Nations is open to all other peace-loving States which accept the obligations contained in the present Charter and, in the judgment of the Organization, are able and willing to carry out these obligations.

---

[135] Anglo-Iranian Oil Co. (U.K. v. Iran), Judgment, 1952 I.C.J. 93, 104 (July 22).

[136] *See, e.g.*, Territorial Dispute (Libya v. Chad), Judgment, 1994 I.C.J. 6, 21-22, ¶ 41 (Feb. 3); U.K. v. Iran, 1952 I.C.J. at 104; Conditions of Admission of a State to Membership in the United Nations (Article 4 of the Charter), Advisory Opinion, 1948 I.C.J. 57, 63 (May 28); Polish Postal Service in Danzig, Advisory Opinion 1925 P.C.I.J. (ser. B) No. 11, at 27-28 (May 16); Wintershall Aktiengesellschaft v. Argentine Republic, ICSID Case No. ARB/04/14, Award, ¶¶ 78-79 (Dec. 8, 2008).

[137] *See, e.g.*, Libya v. Chad, 1994 I.C.J. at 21-22, ¶¶ 41, 43; U.K. v. Iran, 1952 I.C.J. at 104; Conditions of Admission to the U.N., Advisory Opinion, 1948 I.C.J. 63 (May 28); Polish Postal Service in Danzig, 1925 P.C.I.J. at 39-40; Wintershall Aktiengesellschaft v. Argentine Republic, ICSID Case No. ARB/04/14, at 46-47, ¶¶ 78-79.

[138] Conditions of Admission to the U.N., 1948 I.C.J. at 63. *See also* Competence of the General Assembly Regarding Admission to the United Nations, Advisory Opinion, 1950 I.C.J. 8 (Mar. 3).

[139] Conditions of Admission to the U.N., 1948 I.C.J. at 61.

[140] *Id.* at 63. *See* also James D. Fry & Agnes Chong, *Membership in the United Nations*, *in* JUDICIAL DECISIONS ON THE LAW OF INTERNATIONAL ORGANIZATIONS 138, 148 (Cedric Ryngaert, et al. eds., Oxford Univ. Press 2016).

From that provision, the court identified five requisite conditions: (i) to be a State; (ii) to be peace-loving; (iii) accept the obligations in the Charter; (iv) to be able to carrying out the obligations; and (v) to be willing to carry out the obligations.[141] Since the ICJ applied a textual approach to interpretation, it affirmed:

> The text of this paragraph, by the enumeration which it contains and the choice of its terms, clearly demonstrates the intention of its authors to establish a legal rule which, while it fixes the conditions of admission, determines also the reasons for which admission may be refused; for the text does not differentiate between these two cases and any attempt to restrict it to one of them would be purely arbitrary.[142]

The decision was also upheld in the *Second Admissions Advisory Opinion*.[143]

B. Second Admissions Advisory Opinion

In the *Second Admissions Advisory Opinion,* the ICJ was asked whether the General Assembly could make a decision to admit a State to the membership of the United Nations without the recommendation of the Security Council.[144] The ICJ reviewed the text of Article 4(2) of the UN Charter which specifies that admission to the UN requires "a decision of the General Assembly upon recommendation of the Security Council."[145] The ICJ adopted the textual approach to arrive at its decision that the General Assembly could not decide to admit a State without the recommendation of the Security Council:

> When the Court can give effect to a provision of a treaty by giving to the words used in it their natural and ordinary meaning, it may not interpret the words by seeking to give them some other meaning. In the present case the Court finds no difficulty in ascertaining the natural and ordinary meaning of the words in question and no difficulty in giving effect to them. Some of the written statements submitted to the Court have invited it to investigate the *travaux préparatoires* of the Charter. Having regard, however, to the considerations above stated, the Court is of the opinion that it is not permissible, in this case, to resort to *travaux préparatoires*.[146]

---

[141] Conditions of Admission to the U.N., 1948 I.C.J. at 62.

[142] *Id.*

[143] Competence of the General Assembly, 1950 I.C.J. at 6.

[144] *Id.* at 5.

[145] U.N. Charter art. 4, ¶ 2.

[146] Competence of the General Assembly, 1950 I.C.J. at 8.

The textual approach of the ICJ in the *Second Admissions Case* followed the Court's approach in the *First Admissions Case*.

C. Territorial Dispute Libyan Arab Jamahiriya/Chad

Similarly, the ICJ in *Territorial Dispute Libyan Arab Jamahiriya/Chad* upheld a textual interpretation of the treaty. In *Territorial Dispute Libyan Arab Jamahiriya/Chad*, Libya and Chad disputed the existence of a boundary between them.[147] The ICJ examined whether Article 3 of the 1955 Treaty of Friendship and Good Neighbourliness and Annex I to the treaty resulted in a boundary between the two States.[148] The ICJ determined it would adopt the textual approach in interpreting the treaty. It stated:

> In accordance with customary international law, reflected in Article 31 of the 1969 Vienna Convention on the Law of Treaties, a treaty must be interpreted in good faith in accordance with the ordinary meaning to be given to its terms in their context and in the light of its object and purpose. *Interpretation must be based above all upon the text of the treaty*. As a supplementary measure recourse may be had to means of interpretation such as the preparatory work of the treaty and the circumstances of its conclusion.[149]

The ICJ ruled it had no cause to refer to supplementary methods of interpreting the text. The Court analyzed Article 3 of the 1955 Treaty between the parties and reasoned that the phrase "the parties recognize [reconnaissent] that the frontiers . . .are those that result from certain international instruments" meant the parties had accepted that frontier and undertaken a "legal obligation . . . to respect [the frontier] and to renounce the right to contest it in future."[150] The ICJ affirmed that:

> [I]t has no difficulty either in ascertaining the natural and ordinary meaning of the relevant terms of the 1955 Treaty, or in giving effect to them. In the view of the Court, the terms of the Treaty signified that the parties thereby recognized complete frontiers between their respective territories as resulting from the combined effect of all the instruments listed in Annex 1.[151]

---

[147] Territorial Dispute (Libya v. Chad), Judgment, 1994 I.C.J. 6, 14-15, ¶¶ 18-20 (Feb. 3).

[148] *Id.* at 20, ¶ 37.

[149] *Id.* at 21-22, ¶ 41. *See also* Maritime Delimitation and Territorial Questions Between Qatar and Bahrain (Qatar v. Bahr.), Judgment, 1994 I.C.J. 112, 120-21, ¶ 23 (July 1) (upholding the Libya v. Chad judgment) (emphasis added).

[150] Libya v. Chad, 1994 I.C.J. at 22, ¶ 42.

[151] *Id.* at 22, ¶ 43.

The ICJ interpreted the expression "the frontiers between the territories," as signifying the intention to refer to all the frontiers the text of the 1955 Treaty and in doing so it was determining the content of the undertaking between the parties.[152]

D. Wintershall Aktiengesellschaft v Argentine Republic

In the case *Wintershall Aktiengesellschaft*, a dispute arose between *Wintershall Aktiengesellschaft* and Argentina regarding gas production and exploration concessions granted to the *Wintershall Aktiengesellschaft* and Argentina's obligation to comply with the rights and guarantees granted to German investors under the terms of a bilateral investment treaty between Germany and Argentina.[153] An arbitration was commenced under the International Centre for Settlement of Investment Disputes ("ICSID") Convention. The arbitral tribunal used the VCLT to examine the most-favored nation clause in the bilateral investment treaty between Germany and Argentina and found that it did not permit anything but a textual interpretation of the term "treatment."[154] The tribunal stated:

> The carefully-worded formulation in Article 31 is based on the view that the text must be presumed to be the authentic expression of the intention of the parties. The starting point of all treaty-interpretation is the elucidation of the meaning of the text, not an independent investigation into the intention of the parties from other sources (such as by reference to the *travaux préparatoires*, or any predilections based on presumed intention). Even before the entry into force of the 1969 VCLT (in 1980), the Institute of International Law had adopted a textual approach to treaty interpretation–le texte signé est, sauf de rares exceptions, la seule et la plus récente expression de la volonté commune des parties ("The signed text, is except for rare exceptions, the only and the most recent expression of the common accord [or common will] between the parties.").[155]

The arbitral tribunal in *Wintershall Aktiengesellschaft* also cited Oppenheim's International Law which recognizes that Article 31 of the VCLT adopts a textual approach that is part of the jurisprudence of the ICJ. This implies that interpretation does not revise the content of the treaty, read

---

[152] *Id.* at 22, ¶ 41.

[153] Wintershall Aktiengesellschaft v. Argentine Republic, ICSID Case No. ARB/04/14, Award, ¶¶ 1-2 (Dec. 8, 2008).

[154] *Id.* at ¶ 164.

[155] *Id.* at ¶ 78.

into the treaty provisions that they do not explicitly state, or apply rules of interpretation contrary to the letter or spirit of the treaty text.[156]

The *Wintershall Aktiengesellschaft* case is notable for adopting the approach in the 9th edition of Oppenheim in relation to textual interpretation under Article 31 and recognizing its due incorporation within the jurisprudence of the ICJ. This conflicts with the commonly advanced interpretation of Article 7 of the 1997 Watercourses Convention. Reading into the text of the treaty a hierarchy that is not expressed in the text and revising the content of Article 7 of the 1997 Watercourses Convention by incorporating a hierarchy is contrary to the text, object and purpose of the treaty.[157]

The above cases recognize that the ordinary meaning of the terms must generally prevail.[158] The exceptions would be to establish the meaning of the text where it cannot be readily applied.[159] The exceptions include those factors, which together with the context of a treaty, an interpreter must take into account under the rules set out in Article 31(3) of the VCLT. The exceptions do not apply to the 1997 Watercourses Convention.

The VCLT reflects a "sequential process"–to seek reference to *travaux préparatoires* only when words of the text are "manifestly absurd or unreasonable."[160] When Article 31 of the VCLT is read in conjunction with Articles 32 and 33 it reflects this process of interpretation–that is, first interpret in accordance with Article 31 and then, only as an exception, interpret according to Article 32 and 33 of the VCLT.[161] This seems to be in line with the ILC's interpretation. According to the ILC, the provisions of Article 31 form a single integrated rule. This single integrated rule includes the context of the treaty and matters extending beyond context set out in Article 31(3) of the VCLT. In accordance with the principle of contemporaneity Articles 32 and 33 confirm the rule in Article 31.[162] In the

---

[156] *Id.* at ¶ 81.

[157] *Id.* at ¶¶ 76-78.

[158] Polish Postal Service in Danzig, Advisory Opinion 1925 P.C.I.J. (ser. B) No. 11, at 39-40 (May 16); Conditions of Admission of a State to Membership in the United Nations (Article 4 of the Charter), Advisory Opinion, 1948 I.C.J. 63 (May 28); Competence of the General Assembly Regarding Admission to the United Nations, Advisory Opinion, 1950 I.C.J. at 8; Territorial Dispute (Libya v. Chad), Judgment, 1994 I.C.J. 4, 21-22, ¶ 41 (Feb. 3); Wintershall Aktiengesellschaft v. Argentine Republic, Case No. ARB/04/14, at 46-47, ¶ 78. *See also* 1966 Y.B. Vol. 2, *supra* note 61, at 223.

[159] *See* GROTIUS, *supra* note 132, at 177.

[160] 1966 Y.B. Vol. 2, *supra* note 61, at 223. *See* also James D. Fry, *Remaining Valid: Security Council Resolutions, Textualism, and the Invasion of Iraq*, 15 TUL. J. INT'L & COMP. L. 609, 617-18 (2007).

[161] *See* Zarbiyev, *supra* note 88, at 257.

[162] 1966 Y.B. Vol. 2, *supra* note 61, at 220-23.

case of *ICS Inspection and Control Services Limited v. Republic of Argentina,* the tribunal applied the principle of contemporaneity to establish the ordinary meaning of the text.

E. ICS Inspection and Control Services Limited

The tribunal in *ICS Inspection and Control Services Limited,* considered whether there existed an arbitration agreement between the parties under the most-favored nations provision in the bilateral investment treaty between Argentina and the UK. The respondent (Argentina) argued there was no agreement, and that the tribunal did not have jurisdiction over the matter because the treaty did not establish any clear intention for the most-favored nations clause to serve as a dispute settlement provision.[163] Argentina argued:

> According to Article 31 [of the VCLT], the starting point for treaty interpretation is the ordinary meaning of the text, rather than attempting to extrinsically determine the intent of the parties. Thus, when the ordinary meaning of the text is clear, there should be no resort to other means of interpretation.[164]

The tribunal upheld this argument and examined phrases of the provision (such as "treatment") within the bilateral investment treaty in accordance with its ordinary meaning at the time the treaty was concluded.[165] The tribunal applied this principle of contemporaneity to examine sources of what the term "treatment" meant.[166] However, when determining the meaning of the term "treatment," it was certain that clear and unequivocal intent could be discerned from the ordinary meaning of the text.[167] The tribunal concluded that the term "treatment" required that the host State's legal regime complied with international rules and regulations, and did not cover dispute settlement between the parties.[168] The tribunal in *ICS Inspection and Control Services Limited* did not depart from the text of the treaty as it

---

[163] ICS Inspection and Control Servs. Ltd. (U.K. v. Arg.), PCA Case Repository No. 2010-9, Award on Jurisdiction, ¶ 84 (Perm. Ct. Arb. 2012).

[164] *Id.* at ¶ 88.

[165] *Id.* at ¶¶ 283-88.

[166] This reflects Vattel's fifth principle of treaty interpretation. The fifth interpretation principle is "every treaty must be interpreted by certain fixed rules to determine its meaning, as naturally understood by the parties concerned at the time when the deed was drawn up and accepted." *See* DE VATTEL, *supra* note 86, at 246.

[167] U.K. v. Arg., PCA Case Repository No. 2010-9, at ¶ 286.

[168] *Id.* at ¶ 296.

showed that the purpose of applying the principle of contemporaneity was to apply the text of the treaty.[169]

In summary, in relation to the interpretation of a hierarchy, the international jurisprudence demonstrates that where a treaty's words are clear, a textual interpretation is appropriate to discern the meaning of the treaty. In the case of the 1997 Watercourses Convention, there is a direct authority showing the application of the words "having due regard for" could be applied in its ordinary meaning of the words in the case of the *Chagos Annex VII arbitration*.[170] In that case, the international arbitral tribunal had no problem applying the text in the ordinary sense of the words. Hence, there is no requirement to go further than the text of the treaty to infer a hierarchy in Article 7 of the 1997 Watercourses Convention. Where the text is clear, there is a duty to apply the treaty as it is written.[171] The international jurisprudence supports this approach as shown in the above cases, which aligns with the principle that "it is the duty of the Court to interpret treaties, not revise them."[172] Where words are clear, an interpreter is required to stay within the rules as written.[173]

IX. CONCLUSION

This Article makes the case that a textual interpretation of the global water treaties is appropriate. The text of Article 7 of the 1997 Watercourses Convention is clear, and a textual interpretation of the relevant treaty provisions is logically and legally preferable over any interpretation of a hierarchical relationship. A textual interpretation of the 1997 Watercourses Convention reveals that the equitable utilization and no-harm rules are non-hierarchical. Consequently, there should be no subordination of the environmental protection of international rivers to river allocation rights. A correction in the doctrinal understanding of these major obligations directly removes the structural imbalance of the rules and thus restores the obligation for the environmental protection of international rivers as a non-subordinated obligation. The relationship of the two rules is one of balance in accordance with the words "having due regard to" in Article 7 of the 1997 Watercourses Convention and the international due regard jurisprudence evidenced by the

---

[169] Polish Postal Service in Danzig, Advisory Opinion 1925 P.C.I.J. (ser. B) No. 11, at 39-40 (May 16).

[170] Chagos Marine Protected Area Arb. (Mauritius v. Gr. Brit.) 31 R.I.A.A. 359, 571 ¶ 519 (Perm. Ct. Arb. 2015).

[171] *Sir Humphrey Waldock's Third Report*, 1964 Y.B. Vol. 2, *supra* note 62, at 10.

[172] Interpretation of Peace Treaties with Bulgaria, Hungary and Romania (Second Phase), Advisory Opinion, 1950 I.C.J. 229 (July 18).

[173] Rights of Nationals of the United States of America in Morocco (Fr. v. U.S.), Judgment, 1952 I.C.J. 176, 195 (Aug. 27).

the *Chagos Annex VII Arbitration* and the *Fisheries Jurisdiction Case (U.K. v. Iceland)*. Any application of the treaty in relation to the implementation of cooperation must balance allocation rights with the environmental protection of international rivers. Balancing allocation rights and utilization of water resources with the protection of shared rivers aligns with the sustainable development objectives of the treaties. Accordingly, States, international organizations and river bodies should be required to adjust their policy from solely focusing on allocation and utilization to an approach that balances both allocation and protection.