New Emphases and Techniques for International Law--The Case of the Boundary Dispute

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This article is doubly experimental. First, it uses a form chosen to focus on how new policy and process adjustments in international law affect inter-nation boundary situations.¹ Second, it presents some adjustments in a categorical, rather than a qualified fashion, to see whether new perspectives can be gained by extending them to their full logical reach. Further, in the form chosen each thesis is presented with an example situation to lend concreteness to the discussion which follows.²

THESIS: Tools for settling inter-nation boundary disputes as well as the boundary rules themselves are faulty if they tend to prevent mutual aid between nations for any extended time, and are best adapted to modern interdependence only when they can foster that mutual aid.

Traditional concepts of international law presumed a world in which nations could be compared to boats in a race; each boat could move fairly only if all followed the rules by yielding properly, by avoiding collisions with other boats, or by avoiding unfair paths across the other boats' bows. In boat races, however, the participants in one boat need not like another's crew; so long as the rules of the race are followed, the only persons with whom cooperation is necessary to succeed are those in the same boat.

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2. A similar use of examples was most effectively employed in Van Alstyne, Justiciability Of International River Disputes: A Study in the Case Method, 1964 Duke L. J. 307.
Transitional international law, on the other hand, asks that a re-examination of rules and tools begin with an awareness that modern nations are "in the same boat" in that the success of the peoples of one nation demands the cooperation of others. A corollary of this proposition is that unless some adjustments are made, some rules or tools designed to keep the nation-boats apart may not be capable of keeping the nation-crews pulling together.

**Situation:** Chile decided to construct an irrigation canal to divert up to 47 per cent of the waters of the Chilean-Bolivian river Lauca. Bolivia sent a diplomatic Note reserving its right to be consulted under the 1933 Montevideo Declaration. Chile began work in 1949 from a plan approved by a mixed commission of experts.

In 1960, Bolivia said the diversion would violate the international law on cross-boundary rivers and insisted that work stop pending settlement of the dispute. Chile, on the other hand, contended that no violation was involved and work stoppage would infringe her sovereignty; however, she ultimately agreed to negotiate.

In 1962, the canal was ready for use. Bolivia, however, took the dispute to the Organization of American States. She was remitted by the OAS to seek other means of settlement; meanwhile, Chile began using the Lauca waters. Bolivia severed relations and did not resume them until the following year.3

This dispute is not atypical of those arising under an international law structured upon rules governing rights in boundary disputes. Both sides agreed that the Montevideo Declaration was the starting point; both agreed to negotiate; both agreed that under international law Chile could not divert a cross-boundary river if Bolivia would be seriously harmed; and both agreed that if only minor harm would come to Bolivia, Chile would be required to make some compensation therefor.4 Their disagreements, however, were factual and their techniques of adjustment led to increased aggravation and a reduced mutual aid climate.

After preliminary posturing, similar to that in the *Rio Lauca* situation, other projects for joint use of cross-boundary rivers, such as the Nile development scheme between the Sudan and the United Arab Republic, and the Indus Waters Treaty between Pakistan and India have

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However, these projects which resulted from conflicts between upstream “sovereignty” and downstream “rights,” were possible only at the expense of years of diplomatic energy expended during these postures.

This outcome is the natural, not the unexpected result. Yet, it is definitely an undesired one resulting from the older traditional international law approaches to cross-boundary river development. Under these approaches, if a proposal to develop a river is looked upon conceptually as a “dispute,” the four “ations” of traditional international law — negotiation, arbitration, litigation and retaliation—pose, at the very least, the specter of diverted diplomatic concern; and at the very worst, as in the Rio Lauca situation, the possibility of a complete rupture of joint efforts. If such unwanted results are likely, is it not fair to ask whether merely increased refinement of dispute-settling mechanisms for this type of problem is the desired direction in which the international law of cross-boundary river development should go? If, on the other hand, all developments of cross-boundary rivers are looked upon conceptually as “exploitations of international resources,” it is both possible and logical to expect cooperative rather than adversary procedures to be brought into play. For example, the role of the World Bank as a party to the Indus Waters Treaty is a harbinger of what can come from such a shift in viewpoint. However, this would mean a large rather than a small shift. Moreover, it would be the sort of shift that would replace internation equivalents of our own current six-state dispute (together with the earlier unilateral water-diversion precedents such as the dispute in New Jersey v. New York) with internation equivalents of our Tennessee Valley Authority.

8. 283 U.S. 336 (1931). For other cases involving equitable apportionment situations
It is suggested that this adversary-to-cooperative shift is required at the present time in light of the overlapping nature of the two types of problems raised in international boundary law, namely, problems of inter-national use of world resources, and problems of inter-nation exercise of jurisdiction. To ensure better use of world resources, techniques consistent with mutual aid are often vital. Therefore, those traditional techniques which mar a mutual aid climate may be self-defeating. Further, diplomatic techniques used only to adjust disputes over jurisdictional lines, if they mar or bar a general mutual aid climate, can also prevent better use of resources even by neighboring states whose progress depends on such aid.

Some traditional international law techniques carry tendencies to produce climates in which this mutual aid is less likely to occur. Since such climates create virtually all of the bars to cooperation in time of war, absent only its physical destruction, it may well be time to identify the techniques which lead to aid-reducing or "unfriendly" acts as inconsistent with emergent world public order, and seek to replace them with techniques more likely to be aid-inducing or "friendly." For example, in the Rio Lauca situation, the initial Bolivian Note was sent to preserve a claimed "right" to be consulted on an agreed development of the cross-boundary river Lauca. This implied that Chile had been "wrong" in the first place to begin such a study without consultation. However, Chile insisted that she had a "right" to act unilaterally. At this point, each diplomatic service was convinced of the other's unreasonableness.

An exchange of diplomatic Notes insisting upon some "right" or protesting some "wrong"—traditional as it may be—is in fact the equivalent of one little boy saying: "Put up your fists!" while another boy responds, "O.K., if that's the way you want it!" The truth is that this is not the desired result of either party. Rather, it is hoped that the Note will accomplish the desired end—the resumption of friendlier cooperation by instant apologetic recognition of the ignored "right," or an end to the violation itself. But such a Note, by its very nature, often dooms its sender to disillusionment and reduces or ends inter-nation mutual aid.


10. While this term was first used by Professor Myres McDougal in a policy context in McDougal, Studies in World Public Order (1960), and in a coercion-control context in McDougal, Law and Minimum World Public Order (1961), the usefulness of such a fresh approach suggests its extension to the development of coercion-free climates as well. Compare McDougal & Burke, op. cit. supra note 1, at 25.

11. A similar point was reached in the dispute between Bolivia and Peru over Bolivia's
In the Rio Lauca situation, on Bolivia’s insistence eight years later, Chile agreed to follow the Montevideo procedure by referring the factual questions to a mixed commission of experts. In 1949, the project was at last begun, apparently without protest. However, the two foreign services were not through, for in 1953, a Note from Bolivia claimed that Chile had been “wrong” not to conclude a formal agreement with Bolivia. The Chilean response in 1954 was that such an agreement was only required when injury to the downstream state could be deduced; it implied a “right” in Chile to conclude no formal agreement and a “wrong” in Bolivia to protest. Again, each side was convinced of the other’s unreasonableness.

Four years later the Bolivians called for a new mixed commission to assess changes in the first plan. Thus, in 1960, renewed activity in the Chilean foreign office resulted in a second commission which reported that the modified works did not amount to a change in plan. In short, there was a technical assessment of who was “right” and who was “wrong” in the matter. It was not altogether surprising, therefore, to find that a new Bolivian Note had been sent in October 1960, charging Chile with an international law violation. Nor was it surprising to find the Note followed by a Chilean rejoinder. However, considerable diplomatic energy, to say nothing of mutual exasperation, ended in 1962 with Bolivia’s reference of the dispute to the OAS. The result: Chile opened the Lauca waters diversion, and Bolivia severed diplomatic ties. Here, Bolivia’s very decision to take the dispute to the OAS for dispute settlement required her to call Chile’s actions “aggression.” This in turn led to Chilean “retaliation” in the form of an order to use the waters at once. The final aid-reducing act was Bolivia’s rupture of diplomatic ties.

This was not the necessary result of the “rights” posturing of traditional international law. Undoubtedly, other factors shaped these nations’ responses as well. It was, however, a foreseeable result, given the “accepted” adjustment techniques involved.

**Thesis:** Resort to international, political, arbitral, and judicial bodies may result in aid-reducing or “unfriendly” acts, rather than in aid-inducing or “friendly” acts.

The experience of the Organization of American States in the Rio Lauca trans-boundary waters dispute is illustrative of the possible need to unilateral grant of a concession to use waters along the boundary of Lake Titicaca. In that situation, it was Peru who protested the unilateral action while Bolivia insisted that she had a right to take such action. See Moreno, *Las explotaciones petrolíferas en las fronteras internacionales*, 1959 *Anuario Hispano-Luso-Americano de Derecho Internacional* 92, 97-98.

12. Contrast this situation with the Lake Titicaca dispute where a mixed commission was created only after Peru’s insistence.

create alternatives to accepted dispute-handling channels. As noted previously, the Rio Treaty for mutual assistance provides for collective actions against dangers to the peace. Hypothetically, this requires the foreign office of State B (the protesting state wishing to obtain an OAS settlement forum) to charge State A (the diverting state) with endangering the peace, or with an act of "aggression." The Bogota Pact for peaceful solution of disputes provides only a few of the Rio Pact states with a set of mechanisms less political but far less speedy. The irony here is that the presumed "pacific" dispute-settlement by negotiation and arbitral channels may bring with it the same sort of "unfriendly" aid-reducing acts as were involved in the Rio Lauca situation, while the speedier settlement by an immediate congress of states, such as the OAS, requires this very aid-reducing climate as its ticket of entry. In fact, a decision other than remittance to slower pacific procedures may require a strong outward show of armed hostility.

SITUATION: Nicaragua and Honduras set up a mixed commission of arbitrators to fix their boundary. The disagreeing commissioners asked the King of Spain to fix the boundary for the final stretch of land extending to the Atlantic. In his 1906 award, the King set up a river boundary thalweg-line from the mouth of the Rio Coco. In 1912, Nicaragua declared the award a nullity.

In 1957, Honduras used the river as a boundary for a new department haply named "Gracias a Dios." In May of the same year, Honduras cabled the OAS Council that Nicaraguan forces had "crossed" her river boundary. Under OAS influence, both states agreed to submit their dispute to the World Court for final settlement. The court held (14-1) the King's award binding upon Nicaragua.

From the standpoint of the actual military threat involved if Honduras were to evict Nicaragua from the disputed territory, the OAS may have initially been the appropriate organization to handle this particular boundary problem. Understandably, the OAS sought only to resolve the military aspects; it conceived the reference of the dispute to the World Court as being a "pacific" resolution of a clearly aid-reducing climate existing between two American states in sore need of cooperative action.

Nowhere is this cooperation more needed than on a long river boundary such as the Rio Coco, or in an area such as that made up by the Central American States in light of their renewed aim to work toward a


16. The Rio Coco is also known as the Rio Segovia.
mutually beneficial common market.\textsuperscript{17} However, reference of this dispute to the World Court which is now formulated by even more of the world's most eminent jurists,\textsuperscript{18} had the momentary effect of directing the two foreign services to a different forum in which to assume their postures of "right." The court's decision in confirming Honduras' "right" to the disputed territory, but denying her request for additional relief, left both parties unsatisfied; however, this was not as crucial as the fact that the presumed "pacific" court proceedings gave rise to the same aid-reducing or "unfriendly" climate as was produced by the initial military confrontation.\textsuperscript{19}

In cases involving river boundary disputes, such as the Rio Coco situation, the old rules provide adequately-matured concepts of where the boundary will lie. In dealing with the Rio Coco situation, the Spanish King used the currently accepted "thalweg" or mid-channel rule.\textsuperscript{20} This rule which divides a river boundary in the middle of the river rather than in the middle of its deepest navigational channel has been accepted by the Chinese People's Republic in its recent treaties with Burma and Nepal.\textsuperscript{21}

Under the "thalweg" rule, disputes are more likely to involve fact questions such as whether the treaty adequately identified the river, or whether the river has changed its course. For example, in cases where a river had changed its course, the boundary may, as in the cited Chinese treaties with Burma and Nepal, remain the same.\textsuperscript{22} The advantage of the "thalweg" rule which permits free navigation to both co-riparians, is thus partially lost and an element of impermanence is automatically built into unsurveyed parts of the boundary. On the other hand, the traditional rule provides that the boundary line will remain the same if a river changes its course suddenly, but will move with the river if it changes its course slowly. This rule opens up yet a different kind of dispute. A typi-

\textsuperscript{17} Similar efforts toward a Central American Union have been tried since 1823 without enduring success. See Ireland, Boundaries, Possessions and Conflicts in Central and North America and the Caribbean 73-79 (1941).

\textsuperscript{18} See Fenwick, Inter-American System of Collective Security, 8 Cursos Monograficos 63, 88 (1960). For a further discussion on the respective memorials of the parties see 1 Case Concerning the 1906 Arbitral Award Made by the King of Spain — Pleadings, Oral Arguments, and Documents 62, 203-04 (I.C.J. 1960). For the oral argument of Mr. Sanson-Tenn in this case see id. at 213-19; for the reply of M. Rolin see id. at 482-83.

\textsuperscript{19} As of June 1964, the Honduran government still occupied part of the territory under dispute.

\textsuperscript{20} Cf. New Jersey v. Delaware, 291 U.S. 361 (1934); Arkansas v. Tennessee, 246 U.S. 158 (1918). For an illustration of early British adoption of this rule, see the Law Officer's reports on the Argentinian river boundary in 1847 reported in McNaIr, International Law Opinions 302 (1956).

\textsuperscript{21} For the text of these treaties see 1 Indian J. Int'l L. 695 (1961). However, The 1963 Chinese People's Republic Treaty with Pakistan retains the older "middle of the riverbed" line which is still the rule elsewhere for non-navigable streams. See Official Documents, People's Republic of China-Pakistan-Agreement on the Boundary Between China's Sinkiang and the Contiguous Area, 57 Am. J. Int'l L. 713 (1963).

\textsuperscript{22} Ibid.
cal example is the dispute in the Chamizal Tract Arbitration between the United States and Mexico. There, the United States refused to accept a 1911 mixed commission finding that part of the changed course was due to accretion and part to sudden changes of direction. This created a grievance which, until a recent agreement to relocate the river itself was obtained, taxed diplomatic relations between the two neighbors for over half a century.

From these cases and disputes on river boundary locations, two facts bearing on our mutual-aid emphasis emerge. First, the place of the boundary (mid-center v. mid-channel) and the rule for change of course (remain-the-same v. shift-with-the-river) can readily be handled in boundary agreements, or by recourse to adequate precedents. To the extent that provisions in boundary treaties attempt to establish ground rules in advance, they appear to cut down the temptation of the parties to obtain a favorable judicial sanction for some other rule during aid-reducing or “unfriendly” court proceedings. It should be borne in mind, however, that observance of such rules does not always carry with it a willingness to restrain self-interest. For example, a continued “thalweg” rule presumes that the navigational rights will remain of primary importance to both countries. Is this necessarily true? Where would the primary interest lie if a change in the river’s course were to lay bare a rich ore deposit? It might be well to reappraise the provisions for reference of long “pacific” struggles to legal channels. Possibly the priority interest in mutual aid has now come to carry with it a priority interest in fixity of boundaries. Under favorable mutual aid, navigational interests could be secured irrespective of the boundary line. But, the problem would be to develop an international waterway administration to secure navigational interests during periods of tension between the two states. Without such an administration, the change in favor of fixed boundaries intended to avoid disruptions of needed joint activity would bring the possibility of new disputes and new types of disruptions.

Second, once the rules themselves are agreed upon, the nature of these disputes shifts to fact questions. Several consequences flow from this shift. For instance, when a negotiation between foreign services or a case before an arbitral body is pending, the assumption of adversary postures on the facts involved (the “put up your fists” attitude) still

23. For the minutes of the meeting of the Joint Commission on the Chamizal Arbitration see Judicial Decisions Involving Questions of International Law, The Chamizal Arbitration Between the United States and Mexico, 5 AM. J. INT’L L. 782, 812 (1911).


25. If the treaty provision conflicts with precedent, it will supersede the general international law rule. Case of the Diversion of Waters from the River Meuse, P.C.I.J., ser. A/B, No. 70 (1937).
tends to reduce the mutual aid climate between the boundary nations. This position was presented in the Honduras-Nicaragua situation. Thus, no advance ground rules in treaties or speedy legal decisions interpreting the applicable rules will dissipate disagreements over the facts in time to avoid disrupting on-going cooperative efforts. In most cases, a treaty agrees either to the rule itself or to a method of settling disputes. Consequently, only a new mechanism which combines the settlement of the boundary with on-going mutual aid programs, can serve to increase joint development between neighbors consistent with international law and the preservation of peace.

It is true that where there is a strong historical bond between adjoining states, a given boundary dispute may not prevent joint projects from going forward. For instance, an outstanding dispute over the diversion by the City of Chicago of some of Lake Michigan’s Canadian-American boundary waters did not prevent the building of the St. Lawrence Seaway; nor did it interfere with completion of recent plans to develop the Columbia River whose basin lies partly in British Columbia, Canada, and partly in the American states of Washington, Oregon, Idaho, and Montana. However, even in such instances some of each nation’s reservoir of diplomatic energy and talent must, under existing techniques, be diverted to the outstanding dispute. Finally, it cannot be estimated whether a more cooperative climate might have existed if there had been some mechanism available to eliminate “rights” posturing.

**Thesis:** Arbitral and judicial tribunals are least likely to risk aid-reducing or “unfriendly” climates when the disputes are ones in which:

(a) friction between the parties is, at the beginning, the lowest, and
(b) the stakes are lowest in terms of the economic value, strategic value, and population of the place in dispute.

It does not follow from the preceding arguments about the aid-reducing acts that can accompany traditional resort to diplomatic Notes or international courts, that boundary disputes should never be laid before the World Court. In some cases, it may be clear to all that the relations be-
tween the states involved are so strained that recourse to the World Court will increase the frictions and thus ultimately prevent needed joint activity.\textsuperscript{32} Also, in some cases it may be equally clear that the diverting or possessing state considers the water use or place in dispute so valuable that a legal decision against its interest would be flouted. Here again, resort to the World Court would only intensify the hostile climate and erode the consensual underpinnings of international law. In other cases, however, resolution of the dispute by the World Court may be the only means of reestablishing an aid-inducing or “friendly” climate where diplomacy has failed or where no combined development and dispute settlement body exists.\textsuperscript{33}

\textbf{Situation:} In 1904, Cambodia (through France) and Thailand (then Siam) decided by treaty to run their boundary from a river’s mouth to follow successively: the left shore of a lake, a parallel going east, a river, a meridian, the watershed line along one mountain chain (the Pnom Dang Rek), the crest line of another range, and the Mekong River. A mixed commission’s surveyors were to map out the exact line.

In 1907, Thailand had a French team map out the line. This map, like those used by Thailand in negotiations up to 1958, showed the Buddhist temple on the Preah Vihear cliff in the Dang Rek range as located in Cambodia.

When Thailand claimed the temple on the ground that the watershed line went to the edge of the promontory instead of the map line, Cambodia protested, whereupon the Thais sent a squad of soldiers to the temple. Cambodia laid the dispute before the World Court. The court held (9-3) that the treaty’s aim of final stability demanded adherence without protest to the boundaries set by the maps, even if they did not show the true watershed line.\textsuperscript{34}

The Mekong Basin project in Southeast Asia is one of the most promising ever essayed. It has potentials for flood control, irrigation, and electricity exceeding the Tennessee Valley project in the United States. It promises to tap unexploited timber tracts and deposits of phos-


The International Joint Commission which was set up by the Boundary Waters Treaty with Great Britain adjudicates disputes over boundary water usage under principles of international law. In its Report on the Pollution of Boundary Waters, the Commission was unable to assess the rights or wrongs involved; it became convinced that the waters flowing between the United States and Canada should be treated as a shared natural resource. See Lester, supra note 1, at 843.

phates, iron, tungsten, and tin. However, before these potentialities can be exploited, both an end to hostilities in the region and a sustained climate of mutual aid among Burma, Laos, Thailand, South Viet Nam, and Cambodia must be achieved. While the exact apportionment of borders has been modified since 1904, natural boundary provisions are still the rule in Southeast Asia. Today, the Mekong River forms part of the Burma-Laos and Thailand-Laos boundaries, while the Dang Rek range still forms part of the northern boundary between Thailand and Cambodia.

At first glance, use of "fixed" natural mountain boundaries appears to have solved all problems by clear references to the watershed line for one boundary and the crest line for the other. Use of general international law rules with respect to a watershed line follows a natural division of waters. This line is obtained by establishing the points at which waters on one side flow into one state and waters on the other side flow into the other state. Thus, disputes over upstream use or diversion are avoided from the inception. The advantage of using the crest line, especially where no clear watershed division is present, is that it is readily susceptible to objective determination and is more easily surveyed. However, the Temple Preah Vihear case demonstrates that, even here, a difference between two maps or surveys can feed the fires of dispute. As noted previously, the existence of agreed rules does not avoid disputes; rather, it changes their nature into factual questions. Thus, unless the location of these mountain boundaries can be definitely established for all time, the very mechanisms developed for handling such disputes will determine whether climates favorable to on-going mutual aid can survive.

In the example situation noted above, the river boundaries along the 1904 Treaty border seem, at first glance, to pose familiar shift-of-course and line-of-division problems. The use of a river mouth as a starting point is normally readily suited, in the case of a navigable river, to the "thalweg" mid-channel rule, and in the case of a non-navigable river, to the mid-point rule. Also, possible diversion of waters from a boundary river seems, at first, to pose no problems not already discussed. However, looking at diversion of waters solely in terms of traditional diverting and protesting states obscures the fact that best river basin use may require changes in the course of the boundary river itself. For example, changing a river's course to take advantage of a nearby drop in altitude for added hydroelectric power may require functional rather than legal adaptations. Further, if the plan includes locks for

35. JENNINGS, op. cit. supra note 34.
37. See id. at 532.
38. Cf. Lake Lanoux Case (France-Spain), supra note 4, where Electricite de France proposed a diversion from the Carol River to the Ariège River to take advantage of such a drop.
navigation, the “thalweg” mid-channel rule’s priority for navigational interests might, under traditional analysis, support a decision for a boundary shift. On the other hand, if this shift would change the allegiance of a populous town, a strategic outpost, or a traditional sacred place, the decision might apply the “Chamizal” rule which provides that sudden changes of a river’s course leave the boundary undisturbed.

Viewing these problems along such traditional sovereignty-oriented, dispute-centered lines anticipates artificial bars to mutual aid arising during negotiations or submissions. This will be true whether they occur in the formative stage of a plan or after it is underway with the outstanding issues unresolved. This delay, however, is at odds with transitional international law’s commitments to harness these resources for the common good.

Illustrative of the conflict between traditional and transitional international boundary law analysis is the 1904 lakeshore boundary in the Temple Preah Vihear situation. Suppose new dams along the Mekong River would affect shorelevels of the Great Lake referred to in the treaty. When the treaty’s drafters referred to this shoreline, they presumed that they had used a fixed natural boundary. Their use of the shoreline, instead of the mid-line of the lake (which would apply in the absence of any treaty) may have been due to customary occupation of the lake by the Thai, or to a desire to avoid the difficulty of determining the mid-line. There are actually, however, many such shorelines, depending upon whether the lake is in its full or its drained state. Thus, the “fixed” line is in reality, when motive to dispute it exists, as subject to factual dispute as any other.

While instances where a treaty refers to a fictitious or unfixed natural

39. Cf. St. Croix Arbitration (United States v. Great Britain), 2 MOORE’S INTERNATIONAL ADJUDICATIONS 367 (1929), involving a dispute under the Jay Treaty of 1794 to place the Canadian-American boundary along the Schoodic River, in part because this line left the British military post at Presque Isle in English territory.

40. Cf. Note of A. H. McMahon, the British plenipotentiary to Lochen Shatra, the Tibetan plenipotentiary, March 24, 1914, to mark the final frontier between India and Tibet so as to include two sacred places in Tibet if they fell within a day’s march of the British side of the frontier. Sino-Indian Boundary 33 (1962).


42. Cf. INDIAN CONSTITUTION, art. 39, which makes the “proper distribution of the material resources of the Community for the common good” a directive principle having influence on the courts. PYLEE, INDIA’S CONSTITUTION 144-45, 151-52 (1962).

43. See LAUTERPACHT, op. cit. supra note 4, at 533.

44. In the November-May dry season, the Great (or Tonle) Lake’s area is about 1150 square miles; during the summer floods, this area triples. COLUMBIA ENCYCLOPEDIA 2149 (3d ed. 1963).
boundary are becoming rarer, men will, in the future, be able to change natural river or lake boundaries more frequently through the use of modern technology. Moreover, as the use of subsoil resources increases, the importance of these boundaries and therefore the likelihood of disputes over them increases.

The real lesson of the *Temple Preah Vihear* situation is not that natural boundaries in treaties must yield to later maps and other conduct of the parties; rather, it is that today our mutual aid needs to place a higher priority upon boundary stability than upon the original natural boundaries themselves. One possible step, then, in the growth of transitional international boundary law might be the fixing of all boundaries by surveys conducted under international supervision. Whatever may be the present impracticabilities of such a project, any long-range alternative to the aid-reducing or "unfriendly" character of readily foreseeable boundary conflicts should warrant further attention. However, corollary developments will be needed. These might include: (1) internationalized administration of certain water resources to ensure unhampered use of river and lake highways; (2) a shift from littoral "sovereign" rights, subject only to servitudes in others, to freedom of use subject to limited servitudes in the littoral state; and (3) further growth of new techniques to share benefits with other states, not necessarily co-riparians.

The Mekong Basin flood control measures could alter river channels from their present boundary courses. Under traditional riparian sovereignty rules, where the river is a boundary, the "thalweg" rule guaranteed unhampered trips from either bank. By contrast, unhampered movement of other riparians became dependent upon "internationalization" principles which placed servitudes or right-of-use limits on sovereign control from the banks. It has been advocated by some writers that both traditional priorities for navigational uses at the cost of ignoring non-navigational ones, and for littoral states at the cost of subordinating interests of non-riparians, must be reevaluated.

45. In the St. Croix River Arbitration, supra note 39, it was discovered that the "highlands," referred to in the Jay Treaty of 1794 which were thought to divide distinct St. Lawrence and Atlantic watersheds, were non-existent.

46. The present conflict between the diverting state and other shore states along the North American Great Lakes area is illustrative of the conflicts which arise in such a situation. See note 7 supra and accompanying text.

47. Compare existing acceptance of free transit rights on international rivers in Lauterpacht, *op. cit.* supra note 4, at 470, with historical resistance to the pleas of Rivier, Caratheodory, and Calvo for free navigation on International lakes and seas in Lauterpacht, *op. cit.* supra note 4, at 477-78.

48. Illustrative of this situation is the recent agreement by the United States to pay Canada for a share of the power from the American loop of the Kootenai River as it passes through Montana. N.Y. Times, Jan. 23, 1964, p. 12, cols. 3-4.

49. See generally Lauterpacht, *op. cit.* supra note 4, at 470.

For Mekong boundary changes, the most meticulous advance planning will still leave the seeds of future disputes of a type that cannot be settled by existing international law rules and techniques. To pose but one such problem we need only to ask: Is the "thalweg" rule necessarily adequate for a court adjudication here, even though there were no vital interests at stake to increase the likelihood of an aid-reducing climate? Suppose, for example, the location in dispute poses a conflict between ease of navigation and sovereignty over tungsten deposits. Will the traditional techniques for negotiating or litigating the boundary dispute permit the on-going mutual aid needed to exploit both? Questions such as these call for a second look, not just at particular rules such as the "thalweg" rule, but also at the framework of international law which has been constructed to handle boundary river problems. A second look, for example, might yield a conclusion that there is something about international rivers that necessarily lends them to international rather than national exploitation. Current development projects, however, are grounded in "sovereignty" adjustment thinking. Thus, we can expect boundary river problems to be heightened with increased use of water resources.

More than ever, therefore, mutual aid needs demand that the tools of international law be those which permit rather than impede the fulfillment of these needs. Diplomatic posturing and submission of disputes to the World Court should be considered possible tools only when their use will not unreasonably risk a deeper rift or create an aid-reducing climate. It is submitted that such a risk is least likely where the boundary dispute involves an area with (1) no vital strategic interests of the state in possession, (2) no important resources, (3) little population, and (4) little friction between the protesting state and the state in possession. For example, in the Temple Preah Vihear situation, Thailand had stationed a squad of men on the temple grounds for "claim" rather than for "defense" purposes. The miniscule area of the promontory between the surveyed boundary line and the edge of the cliff claimed as the true watershed line by Thailand, had no known deposits of important minerals found elsewhere in those countries. The only population involved consisted of isolated temple keepers. Even here, however, there was a genuine risk of harm to prospective cooperation in view of the general flux of rapprochements between the two governments involved. If ownership of the temple were their only outstanding grievance, the three other factors would warrant the small risk of aid-reduction from legal postures assumed under traditional procedures. An even greater rapprochement between two Benelux partners, Belgium and the Netherlands, accom-

panied successful adjudication of their dispute over several small areas which were surrounded by Dutch territory and had a long history of Belgian administration.62

Quite a different situation is posed, however, where the possession of the disputed area carries with it unilateral control over a river’s mouth, as in the Rio Coco case,63 or unilateral control of passes and connecting roads such as was involved in the Sino-Indian boundary dispute.64 Admittedly, India’s situation in the latter dispute is sui generis in terms of traditional international law, especially in view of the flexible attitude of the Chinese People's Republic toward mapped borders existing prior to "liberation."65

Disputes as to the location of a mountain or river boundary, like those arising over cross-boundary waters, involve aid-reducing or "unfriendly" acts, every bit as uncooperative as those that occur in time of war; war’s physical devastations are, however, absent in the others. The difference is that the violence of war has been looked upon as evil. In wartime, bomb damage can clearly be seen; the shift in battle lines can be marked with small flags. Advances toward and retreats from a joint aid climate cannot, however, be marked.66 Yet, South America has gone for long periods with 25 per cent of its boundary lines unsettled.67 Moreover, the Central American-Caribbean region has also gone for even longer periods with 50 per cent of its boundary lines unsettled.68 Even in the absence of wars between these nations, peace has not always insured the absence of bars to greater cooperation caused by the very on-going nature of their boundary disputes.


53. See note 15 supra and accompanying text.


55. See Weissberg, supra note 34, at 799-801.

56. The mapping techniques used in traditional warfare could well be adapted to the "war for cooperation" necessary to develop mutual aid between nations. The dramatic device utilized by generals who mark the advance or retreat of military forces on a strategic map with colored pins might well be employed to record events and actions which raise or reduce the mutual aid climate between nations in a given geographical area.

57. As late as 1941 these borders were: Argentina-Paraguay, Argentina-Uruguay, Bolivia-Chile, Colombia-Peru, Ecuador-Peru, and British Guiana-Surinam. IRLEND, op. cit. supra note 17, at V.

58. As late as 1941 these borders were: Costa Rica-Nicaragua, Costa Rica-Panama, Dominican Republic-Haiti, Guatemala-British Honduras, Honduras-Salvador, and Honduras-Nicaragua. IRLEND, op. cit. supra note 17. See also notes 16, 18, 19 supra.
PROPOSALS

1. Tools for adjusting boundary disputes must include new devices to replace those traditional devices which create unwarranted risks of "unfriendly" climates, that is, those which mar joint inter-nation aid. For example, protest Notes and their equivalents force states to take unfriendly positions. Such unfriendliness cannot be afforded today between states whose mutual efforts are needed for their own survival. This is particularly true of boundary disputes which, by their very nature, arise between those states most suited for joint efforts. In addition, other adjustment channels must be found to serve in the many situations in which foreign services have traditionally resorted to diplomatic channels of negotiation and protest based on "rights" and "wrongs." Some of the channels which are available at the present time are: (a) the offices of the Secretary-General of the United Nations; (b) the World Bank; (c) the regional development bodies; and (d) the non-governmental organizations which have built up reservoirs of trust and cooperation with the infringing nation. In some cases these are corporations, unions, or a common friend respected by leaders in both nations' governments.

2. The risk of creating aid-reducing climates from legal postures of "right" and "wrong" is lowest in matters which are generally considered by the losing nation as being of less importance. Thus, greater use should be made of the World Court for dispute-settlement in those cases in which non-vital disputes, whether boundary or otherwise, are involved. Disputes over boundaries are most likely to be non-vital if the parties are on relatively close terms and the stake at issue is lowest in terms of its economic, strategic, or population value. This does not prevent any nation from conscious — and in that sense calculated — reduction in use of the "critical interests involved" formula for diplomatic thinking about its own disputes. It must not, however, misjudge the risks involved if it submits issues on a "rights" basis to negotiation or to the World Court where the other nation is in possession and considers a vital interest of its own to be involved.

3. Increased use of the World Court for dispute-settlement may become more feasible if it is accompanied by a shift from "rights-oriented" to "solution-oriented" presentations. Such a shift has occurred in our own domestic law practices in the negligence area. There, our adversary attorneys are more solution-conscious than rights-conscious. They have, for the most part, come to accept opposing arguments about liability as merely a prelude to an amicable settlement that "solves" the injured person's problem without insisting on older concepts of "honor" and legal — by which we mean "abstract" — rights.

4. Priorities favoring joint resource use should replace older sovereign action rules with respect to boundary and cross-boundary river
and lake water use. Also, a custom of co-development schemes by internation or even world bodies should replace concepts of unilateral use subject to co-user rights. Such a custom in international law would avoid the “unfriendly” or aid-reducing acts associated with rules directed to protection against harm from unilateral development instead of the “pulling together” which modern joint aid demands. It is conceivable that a regional or world waters development body with (a) pooled experience, (b) pooled economic resources, (c) proven impartiality, and (d) the ability to represent littoral, co-riparian interests could be entrusted with river or lake developments on a use-centered, rather than a rights-centered basis.

5. The fact must be accepted that functional rather than legal solutions may be required for certain boundary disputes. The “thalweg” mid-channel rule’s priority for navigational interests, for example, may not meet equitable tests of fairness in particular cases. Also, this may be especially true where legal posturing will delay or even prevent the joint development of shared resources under dispute.

6. It is also suggested that in particular instances the swift consensual solutions of a congress of nations — whether regional or through the General Assembly — may be preferable to negotiation or court channels. In other instances, a swift non-political determination by an internationalized development body may avoid the aid-reduction of “unfriendly” traditional posturing.

7. A major step toward pacific “pulling together” might include regional or global “once-and-for-all” boundary surveys under international supervision. Such a step is particularly vital in South and Central America, and Southeast Asia where repeated boundary disputes could mar projects calculated to end needless poverty through resource development. These surveys, accompanied where possible by the actual marking of boundaries, might be entrusted to a United Nations Boundary Commission, subject to some appellate review whether by the World Court or by the Political Committee of the Assembly. In addition, boundaries accepted at the present time by both sides could easily be made permanent, subject of course to improved devices for shared uses and shared benefits from present fluctuating natural boundaries.

CONCLUSION

The foregoing analysis shows the manner in which diplomatic or legal posturing places stumbling blocks in the way of existing plans for joint activities, and inhibits the growth of climates in which new joint projects will mature. The realization that this can and does happen is not new. It is suggested, however, that those international law techniques
which lead to the aid-reducing climates may no longer be valid in our time, no matter how sanctioned by custom they may be.

Techniques such as diplomatic exchanges of Notes, negotiations based upon international law “rights” and “wrongs,” settlement of disputes by memorials and counter-memorials before arbitration courts or the World Court, are imbedded in our thinking about international law. When they succeed in preserving a mutual aid climate, it is partially due to the very fact of their acceptance as the “custom of the trade” in dispute-settlement. There are still many situations in which this two-pronged result may be achieved. It is suggested, however, that when they “succeed” in reducing strife between nations to non-violent levels without creating or preserving a mutual aid climate, it ought to be recognized that success has not really been achieved after all. The nation-boats have only been kept apart; the nation-crews have not learned to like each other.