

tional structure for resolving disputes to make it workable. The final approach possible is usually called a regime of restrictive sovereignty or special custom, based on the principle that there is a specific right to a quantity of water, sometimes measured by historic patterns of use, sometimes by various possible measures of need per capita, or for irrigated acreage, or the like. The Johnston Plan came close to accomplishing that and at least for a time seemed to have been, in fact, a special custom. In this context, clearly, special custom is highly unstable as a determinant of rights.

Disputes over water in the Middle East are essentially settled the way most disputes between Israel and its neighbors are settled, by the law of vendetta: you do it to me, it will be done back to you. The remarkable thing is that, in a sense, this law of vendetta has worked. There is already a high level of tacit cooperation over water. With rare exceptions, there has been de facto agreement that water facilities are not proper targets. Airplanes are blown up, bus stations are bombed, airports are machine-gunned. When have you heard about water facilities being attacked? The other countries are too vulnerable themselves to Israeli counterstrikes against their water facilities to tolerate attacks by anybody against Israeli water facilities, and they do not imagine for a minute that it would not lead to retaliation. In fact, it did lead to retaliation the one time the happened. When the Palestine Liberation Organization (PLO) was first starting its terrorist campaign around 1969-70, it began by attacking water facilities. The Israelis responded by bombing the East Ghor Canal and the Maqarin Dam. This led rather directly to what is still remembered in the Middle East as Black September. Jordan put an end to those attacks by expelling the PLO.

So there is a law, if you will, that protects water facilities, but it is not a legal system that anyone should feel comfortable about. What is necessary is an initiative by someone, probably from outside the region, to get the states in the region back to talking constructively about water, because they all are going to face disaster in the near future. If you take water away, you are not just changing a boundary, you are destroying a culture. They have got to start doing something together, unless one of them thinks that it can meet its own needs by literally destroying the others.

DISCUSSION

HOMER G. ANGELO:* Concerning the role of financial considerations in any possible future settlement, what plans have been set by the World Bank or others as possible inducements to the parties either to consolidate what they have or to make some new arrangements?

Professor NAFF: There have been no comprehensive plans along those lines and that is because there has been no comprehensive approach or plan to solving the problems in the region. That is obviously the only way there is going to be a permanent stable solution. Realistically, that is not going to be possible, because of the political obstacles to such a comprehensive approach, but there could be incremental progress involving the principal actors. For example, among the riparians who share the Jordan there would be a comprehensive plan. In the last year, the Israeli economy reached such a critical condition that a rescue operation had to be mounted, and there was some suggestion then that in order to solve the problem of the Jordan, in particular between the Israelis and the Jordanians, nothing less than a restructuring of the economies of those two sovereign states was necessary. Israel, for example, uses 80 percent of its water supply for agricultural irrigation. It uses 20 percent of its total energy supply just to move water around. That is an extremely uneconomic way to

*Professor of Law, University of California at Davis.

use water, so there needs to be a restructuring. The feeling among some people was that the economic crisis was a wonderful opportunity to try to persuade the Israelis that since the United States was going to come to the rescue of their economy, we ought to sequester a certain amount of the aid that we give to Israel specifically for the process of restructuring. Perhaps Israel would then devote only 50 percent of its economy to agriculture and reduce that kind of need for water. There are many other considerations, but today there is no overall financial plan by any international or national body to deal with the problem.

Professor KOLARS: The International Monetary Fund (IMF) refused to loan money to the Turks for their dam on the Euphrates River until a trilateral riparian agreement could be reached. This may have slowed the construction a bit but failed to stop it because, curiously enough, other Arab lending organizations and even members of the IMF loaned Turkey money independently for that project. The work went ahead, and the effort to require Turkey to take account of its neighbors' legal claims was not successful.

Professor DELLAPENNA: Although there has been no international institutional financing for major waterworks in the Middle East, there has been a lot of external capital involved. Syria is supported by the Soviets. The Soviets and the Saudis and the World Bank were all involved to some degree in the Euphrates Dam in northern Syria on the Euphrates. Saudi Arabia is generally credited with having mediated the dispute between Syria and Iraq which arose when the dam began to fill the reservoir, immediately diminishing the flow of Euphrates water into Iraq. That external financing has been largely based on a project-by-project approach rather than attempting to tie it into what really is essential, developing a river basin or even a regionwide regime. I did not mention, for example, the political implications of the factual information that was put forth today. A significant part of Israel's water needs are dependent upon control of the West Bank aquifers, because of the flow down from the West Bank aquifers into the coastal aquifers. Even if there were no other problems, it would make it extremely difficult for a country that is running very close to 100 percent water consumption to surrender control of the West Bank. Professor Naff earlier mentioned President Sadat's proposal to provide Israel water from the Nile, which was intended as a trade-off. If one bears in mind the very critical water shortages that many river basins face, and not just particular countries within a river basin, then perhaps one should begin thinking on an even grander scale, in terms of area-wide or regional cooperation, rather than merely in a single basin.

Professor MCCAFFREY: It has been emphasized several times that in order for any lasting resolution to these problems to occur, a couple of things are needed: first, an institutional mechanism, such as a commission; and second, some kind of in-place agreed-upon dispute settlement mechanism. In the course of reviewing between 100-200 agreements in preparing my current report for the ILC, I was struck by the number of commissions that have actually been agreed to in treaties between states—principally bilateral treaties but sometimes basin-wide treaties—for the monitoring and management of the regime that is created by the treaty. These are not all modern phenomena; some go back a number of years, such as the Danube Commission or the Rhine Commission. Dispute settlement agreements are not so common, but there are more of those than one would expect as well. The Evensen report in 1984 contained a set of dispute settlement provisions which I think probably are a necessary component of any overall package, and these provisions essentially would have required the states concerned to submit any dispute over the interpretation or application of the articles

to conciliation. Thereafter, of course, they could refer the dispute to the ICJ. These are mechanisms that are not at all unheard of in treaty regimes throughout the world.

Another point we have not even touched on is of passing interest. There is a whole body of Islamic water law, and it would appear to be of relevance here. The only work I have looked at closely on this is the U.N. Food and Agriculture Organization book of some years ago on Muslim water laws. At the time that Islamic water law was codified, people were not even thinking of manipulating these huge rivers. Therefore, most Islamic water law refers to point sources and very small streams. I would hope that any group of Islamic jurists who are trying to project their principles into control of the Nile or Euphrates would look into this.

EDWARD M. LEIGH*
Reporter

*Of the District of Columbia Bar.