SETTLEMENT OF INTERNATIONAL WATER LAW DISPUTES IN INTERNATIONAL DRAINAGE BASINS (1981). By B.R. Chauhan. Erich Schmidt Verlag, Berlin. Available from Eric Schmidt Verlag, D-4800 Bielefeld-1, Post Fach, 7330, Federal Republic of Germany. Pp. 480. Price DM 89.

IN THE years between the wars, river law seemed to be centred round the great European rivers and the impact of the conventions relating thereto, together with the regulation of the St. Lawrence under the auspices of the International Joint Commission between Canada and the United States. Since then, accompanying the increasing interest in environmental protection and pollution control, the world has become concerned with a variety of rivers that flow through more than one country and the decision of the arbitral tribunal in relation to the Indus basin reminded international lawyers that there was a great specialist field of study in relation to the use and regulation of drainage basins. Professor B.R. Chauhan has concerned himself with water problems for some thirty years and has now put on record the result of his labours in a monograph—*Settlement of International Water Law Disputes in International Drainage Basins*, published in 1981.

For the author's purposes, waterways constitute "the highways of waterborne commerce, communication and transportation; the agents of hydroelectric power, irrigation and sanitation, the mainstay and primary source of food for river cultures; and the constant servants of mankind through their many associated uses. They consist of the rivers, streams, inland and oceanic passages, estuaries, lakes, shipping lanes and all other natural or man-made water courses, navigable or otherwise."[1] To illustrate this definition he has added tables of international drainage basins comprising rivers (only 95 of them) ; lakes (15 but not including Lake Lanoux, which has formed the subject of international arbitration); and 39 waterfalls, in description of which he becomes almost rhapsodic.[2] A drainage basin is of international concern when those resources are shared by two or more states. The author suggests that, rather than seeking some idealistic catch-all, we must recognize the emotional and economic issues that affect state approaches, as "a pragmatic and humanitarian approach for the settlement of international water law disputes is the need of the

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1. B.R. Chauhan, *Settlement of International Water Law Disputes in International Drainage Basins* 39-40 (1981).
2. *Id.* at 42.

hour."[3] In this connection one must of course bear in mind how easy it is to confuse legal with political disputes,[4] aware of the fact that what confronts us here is "an intermixture of factors which to certain extent can place the international water disputes in the category of legal disputes also as they affect the rights and claims of the contestant states but for their greater part, such disputes possess elements which largely will push them in the category of political disputes as they affect the life interests, economic development and prosperity of the concerned states. Besides, these disputes, on account of their economic implications involve humanitarian aspects also as the preservation, exploitation and utilization of the water resources in question is tagged with questions of life and death of the series of generations of the population of the respective states."[5]

From a practical point of view, the author suggests that one of the most important considerations in regard to international legal regulation is determination of the order of priorities of the different water uses, and, while holding that there are no customary rules on the subject, he suggests that "because of its direct use and utility for human life, the uses of water for domestic purposes and sanitation should be given priority."[6] As to treaty law, he is of opinion that here too, even though particular treaties may prescribe some priority in respect of the drainage basins with which they are concerned, there are no definite legal principles which may be drawn, but he is of opinion that the treaties do intimate that domestic use is of the highest priority.[7] He emphasizes that it must be borne in mind that "the multilateral specific treaties also lay down rights and obligations only for the parties to those treaties and have, as such, not as yet been able to make any contribution in the form of creating or laying down any norms in this field."[8] He also contends, without however examining such world court decisions as affected the Danube, the Elbe or the Rhine, that "no legal norms can be deduced for the problem of the determination of the order of priority for different uses of water in international law" from the awards of international courts and tribunals.[9] Moreover, after a comprehensive survey of the laws of some forty or fifty states, he concludes that there are no uniform legal norms concerning priority of use "which could be said to have found application in all the main legal systems of the world and which, consequently, could be employed in the field of international water law as 'general principles of law recognised by civilised nations," which would in accordance with article 38 of the Statute of the

3. *Id.* at 56.
4. *Id.* at 127-30.
5. *Id.* at 131.
6. *Id.* at 159.
7. *Id.* at 171.
8. *Id.* at 172.
9. *Id.*, at 177.

International Court of Justice constitute rules of international law.[10] Regardless of what custom, treaty or judicial decision may say, "[t]he differences of circumstances and situations, in different international drainage basins...do not make it possible, even for future, to lay down a strict order of priority for different uses of water, which could be treated as binding on a universal basis for ever and for all rivers and lakes etc., in all the international drainage basins of all the parts of the globe . . . . [Moreover], [t]he humanitarian and economic aspects of the problem also do not make it desirable or advisable to lay down such strict and rigid legal rules in the field for future."[11]

Apart from the issue of priority, one of the most serious questions that affects the relations between the states sharing an international drainage basin relates to the quantum of water each may take, and the author points out that in assessing so-called existing rights there are differences between basin states which are riparian and those which are not, suggesting that in the case of the latter they can only claim water with respect to the basin "if it can be proved that the said State contributes, through its underground channels, a certain amount of water to that basin,"[12] although basin states can "confer certain rights expressly through a treaty or impliedly through tacit forbearance."[13] Among the matters which have to be considered in assessing quantum are the catchment area, population, length of the river bed or water surface area of the lake, the respective contribution of the claimed quantum into the flow of the basin, existing rights and equitable factors, such as future needs, economic structure, historic uses, climatic conditions, dependency of the state in question upon the waters under discussion etc.[14] In so far as boundary basins are concerned, the author suggests that the two most important factors to be considered are equal and equitable sharing.[15]

The chapter on the preservation and restoration of water quality is of major interest from the point of pollution, both natural and manmade, and the control thereof. He reminds us that "a use of water does not mean a use of it in whatever form or with whatever content it may be available. But it rather means the use of water with that quality content which is necessary for a particular specific use," so that the quality of water for drinking is very different from that for industrial purposes.[16] He draws attention to the Federal German Immissions Protection Act 1974 and suggests that developing countries which have not yet evolved a legal control system of their own in so far as pollution is concerned, might do

10. *Id.* at 205.
11. *Id.* at 207.
12. *Id.* at 220.
13. *Ibid.*
14. *Id.* at 221-30.
15. *Id.* at 233.
16. *Id.* at 239.

well to plan such measures well in advance.[17] He provides summaries of national legislation and international agreements in this field.[18] While the provisions of these measures "do not, in themselves, reflect any settled norms of international water law they can serve as guidelines for similar future"[19] regulatory measures on the international and the national level.

The conflicting claims upon water supply and the efforts of states to make use of international drainage basins easily lead to conflict, and the author leans to the view that the proposals for pacific settlement to be found in the Draft Convention on the Law of the Sea could serve as a guide for the settlement of at least some water disputes, and he sees the peaceful settlement of such disputes as making a concrete contribution to economic potential and to the welfare and prosperity of humanity.[20] He draws attention, however, to the fact that not too much can be expected by way of judicial settlement, since states tend to "prefer an elastic mode of settlement of international disputes through direct or diplomatic methods rather than through the medium of rigid judicial settlement."[21] While this may be true today, there is certainly evidence to the contrary with regard to international river settlement during the nineteenth century and the inter-war years. Moreover, the author himself lists no less than 46 agreements which provide for judicial settlement of international water law disputes,[22] while his list of those which provide for settlement of such disputes by negotiation only contains 25 items.[23]

While it may be important to examine the decisions of national tribunals in water disputes in seeking for a common approach, one should never overlook that "the mere fact that a municipal judge declares to have borrowed a rule from international law carries no authority whatsoever for the jurist or lawyer of the field of international law to treat such a pronouncement or, for that purpose, any other pronouncement of a municipal court as a rule of international law if such a rule has not already been accepted as a genuine rule of international law as such."[24] In the same way one must be careful not to base too much weight as an "analogy" on decisions in this field by courts of a federal state,[25] but in many cases the court in question takes a lead from international law or regards itself as applying rules of quasi-international law, in which case the decision does acquire some authority at least as a guide. For this reason, one is inclined

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17. *Id.* at 243.
18. *Id.* at 262-82.
19. *Id.* at 382.
20. *Id.* at 319.
21. *Id.* at 367.
22. *Id.* at 361-66.
23. *Id.* at 377-80
24. *Id.* at 407.
25. *Id.* at 407-08.

to suggest that perhaps the author goes a little far when he states that "the decisions of municipal-federal courts..., even in the form of inter-state compacts, . . . are without any evidentiary value in our search for prevailing rules of international law."[26]

The author is of opinion that the most profitable method of solving international water law disputes is the treaty which "will not only operate as a final solution for the existing dispute but in addition to that it will bring stability in the fluid situation of international relations" and "it will also prevent the future disputes from getting flared up."[27] With respect, this is a somewhat sanguine analysis, for it ignores the problem of language and treaty interpretation. It would be true if one could guarantee that every word of the treaty is clear and is understood equally by both sides with no possibility of there ever being any conflict over the meaning of its terms. For the same reason, it is suggested that he pays too much attention to the Helsinki Rules of the International Law Association. One cannot get away from the fact that this is an unofficial body, and even if some of its codifications do occasionally become the basis of formalised international agreements, it does not alter their status in any way that "several publicists are treating the Helsinki Rules as a part of international law."[28] Until some states or some international tribunal in its decision accepts such a view as *opinio juris ac necessitatis* it is feared that the Helsinki Rules have no greater status than the suggestion put forward by any writer on any issue of international law. Reaffirmation of the rules by the International Law Association or its Water Law Committee cannot give them any status that they do not possess as of right, nor is their status altered by the fact that some international agreements reflect similar assumptions, particularly if all that is required is prior consultation.[29]

The author has provided us with a useful and comprehensive survey. No student of international water law disputes can in future afford to ignore it, while states may find useful precedents for their guidance. It is unfortunate that there is no index.

*L.C. Green**

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26. *Id.* at 410.
27. *Id.* at 416.
28. *Id.* at 427.
29. *Id.* at 433.

*LL.B., LL.D., F.R.S.C., University of Alberta, Edmonton, Alberta, Canada.