No. 143, Original

In The
Supreme Court of the United States

STATE OF MISSISSIPPI,

Plaintiff,

v.

STATE OF TENNESSEE; CITY OF MEMPHIS, TENNESSEE; AND MEMPHIS LIGHT, GAS & WATER DIVISION,

Defendants.

On Exceptions To Report Of The Special Master

AMICUS CURIAE BRIEF FOR THE INTERNATIONAL LAW COMMITTEE OF THE NEW YORK CITY BAR ASSOCIATION IN SUPPORT OF NEITHER PARTY

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STATEMENT OF INTEREST OF *AMICUS CURIAE*[1]

The New York City Bar Association ("City Bar"), through its International Law Committee, submits this *amicus curiae* brief to the Court for the purpose of providing the Court with principles of international law that the Court may find of interest with regard to the questions presented in this case. The City Bar takes no position on the particular merits or outcome of this case as between the parties.

The New York City Bar Association is a private, non-profit organization of more than 25,000 members who are professionally involved in a broad range of law-related activities. Founded in 1870, the City Bar is one of the oldest bar associations in the United States. The City Bar seeks to promote reform of the law and to improve the administration of justice in support of a fair society and the public interest in our community, our nation, and throughout the world through its more than 150 standing and special committees. The City Bar's International Law Committee addresses all matters of public and private international law, including the practice of international law, issues concerning international tribunals and international dispute resolution, the contents of customary international law, and

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[1] No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amicus curiae*, its members, or its counsel made a monetary contribution to its preparation or submission. The parties have consented in writing to the filing of this brief.

the role and presentation of international law in U.S. courts.

SUMMARY OF ARGUMENT

Neither the Court nor, indeed, any international tribunal as far as this *amicus* is aware, has ever been squarely confronted with the matter of first impression presented in this case: When is a groundwater aquifer a transboundary resource, and should transboundary groundwater be subject to the doctrine of equitable apportionment?

The City Bar respectfully submits that in answering these questions, the Court should consider principles of international law, and in particular should consider provisions of the United Nations 1997 Convention on the Law of the Non-Navigational Uses of International Watercourses (the "UN Watercourses Convention" or "Convention"),[2] and the United Nations International Law Commission ("ILC") 2006 Draft Articles on "The Law of Transboundary Aquifers" (the "ILC Draft Articles"),[3] which aim to tailor the principles of the Convention specifically to groundwater.

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[2] U.N. G.A. Res. 51/229, 21 May 1997, 36 I.L.M. 700.

[3] The ILC Draft Articles on the Law of Transboundary Aquifers were subsequently attached to a UN General Assembly Resolution. *See* U.N. G.A. Res.63/124, 11 December 2008 ("The Law of Transboundary Aquifers") *available at*: https://undocs.org/en/A/RES/63/124 [accessed February 24, 2021].

If the Middle Claiborne Aquifer (the "Aquifer"), as described in the Report of the Special Master,[4] were to underlie two or more sovereign countries outside the United States, the use of this transboundary groundwater resource would be governed by international water law. The UN Watercourses Convention—a framework treaty that sets out principles applicable to the use of international freshwaters—codifies the existing norms of customary international law relevant to the questions facing this Court. The ILC Draft Articles, in turn, are an authoritative application of those principles specifically to groundwater. These documents define transboundary water resources—including transboundary groundwater resources—and provide that such resources should be allocated according to "equitable and reasonable" principles that are fundamentally similar to the Court's doctrine of equitable apportionment.

The City Bar respectfully submits that this case should be decided, in part, by taking into consideration principles of international law. Specifically, the City Bar respectfully urges the Court to consider Articles 2, 5 and 6 of the UN Watercourses Convention,[5] and ILC

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[4] Report of the Special Master, November 5, 2020 ("Report").

[5] Articles 2, 5 and 6 of the Convention are discussed in more detail below. In summary, they provide that: "a system of surface waters and groundwaters constituting by virtue of their physical relationship a unitary whole and normally flowing into a common terminus," "parts of which are situated in different States," should be utilized "in an equitable and reasonable manner." Convention, Arts. 2(a), (b), 5. What is "equitable and reasonable" should take "into account all relevant factors and circumstances,"

Draft Articles 2 through 5,[6] when deciding whether the Middle Claiborne Aquifer should be subject to the equitable apportionment doctrine.

ARGUMENT

I. INTERNATIONAL LAW CAN ASSIST THE COURT WITH NOVEL QUESTIONS OF INTERSTATE WATER LAW

The parties dispute the criteria for determining whether the Middle Claiborne Aquifer is an interstate resource, and, if the Aquifer is found to be an interstate resource, whether the groundwater in this Aquifer

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including the seven enumerated in Article 6, with the "weight" afforded to each "determined by its [relative] importance." *Id.* at Art. 6.

[6] The ILC Draft Articles provide that an "aquifer" is "a permeable water-bearing geological formation underlain by a less permeable layer and the water contained in the saturated zone of the formation," and an "aquifer system" is "a series of two or more aquifers that are hydraulically connected"; and an aquifer or aquifer system is "transboundary" if "parts of [it] are situated in different States." ILC Draft Articles, Art. 2(a), (b), (c). "[A] State in whose territory any part of a transboundary aquifer or aquifer system is situated," then "has sovereignty over th[at] portion . . . within its territory," but it must "exercise its sovereignty in accordance with international law and the [ILC Draft Articles], which include the obligation to "utilize [the] transboundary aquifer[]or aquifer system[] according to the principle of equitable and reasonable utilization." *Id.* at Arts. 3, 4. What is "equitable and reasonable" should "tak[e] into account all relevant factors, including the nine enumerated in Article 5, with the "weight" afforded to each "determined by its [relative] importance." *Id.* at Art. 5.

should be subject to the equitable apportionment doctrine. Internationally, states have long wrestled with the same questions: When is groundwater a transboundary resource such that it should be regulated by international law? And how should transboundary groundwater be allocated among the different states?

These questions have been answered by the international community in two recent articulations of international law: a multilateral treaty on transboundary waters (the UN Watercourses Convention) and the ILC Draft Articles on transboundary aquifers. These sources establish that an international aquifer with the characteristics ascribed by the Special Master to the Aquifer would be subject to international law, with the effect that the groundwater within it would be subject to the international principle of "reasonable and equitable utilization."

In interstate water disputes, the States of Mississippi and Tennessee are treated as sovereigns. In these circumstances, the Court has a long history of acknowledging and looking to international law and practice, as appropriate. The City Bar respectfully submits that it is appropriate here, for the purposes of answering these questions of first impression, that the Court look to principles of international law and treaty practice.

The Court has previously looked to international law when it has considered questions of interstate surface water law. When considering whether the doctrine of equitable apportionment should also apply to

interstate groundwater, the Court may find helpful principles of international law that apply to transboundary groundwater. These principles are found in a multilateral framework treaty, in regional treaties, and in an influential distillation of principles by the ILC.

II. "THE EXIGENCIES OF [THIS] PARTICULAR CASE DEMAND" THAT THE COURT CONSIDER INTERNATIONAL LAW

Controversies between states over borders and interstate water resources "were withdrawn from the States by the Constitution." *Kansas v. Colorado*, 185 U.S. 125, 141 (1902) (*Kansas I*). When adjudicating those disputes, the Court sits "as it were, as an international, as well as a domestic tribunal." *Id.* at 146-47. As such, the Court applies "Federal law, state law, and international law, *as the exigencies of the particular case may demand*." *Id.* (emphasis added).

A. The Sovereign Status of the Parties Makes It Appropriate to Look to International Law and Practice

The interstate surface water jurisprudence of the Court was born out of a recognition that States are quasi-sovereigns. As such, the principles and practice of international law may be particularly relevant to the resolution of disputes between states with regard to their interstate resources.

The Court acknowledged in *Colorado v. Kansas*, 320 U.S. 383 (1943), that "the relative rights of States" in interstate water disputes "involve the interests of quasi-sovereigns." *Id.* at 392; *see also Nebraska v. Wyoming*, 325 U.S. 589, 616 (1945) ("controversies between States over the waters of interstate streams involve the interests of quasi-sovereigns" (quoting *Colorado*, 320 U.S. at 392)). Here, the State of Mississippi likewise argues that the states are "foreign to each other for all but federal purposes." State of Mississippi's Exceptions to the Report of the Special Master, February 22, 2021 ("MS Exceptions") at 40 (citing *Rhode Island v. Massachusetts*, 37 U.S. 657, 720 (1838)); *see also id.* at 45 (the Court "serves as a substitute for the diplomatic settlement of controversies between sovereigns and possible resort to force." (quoting *Kansas v. Nebraska*, 574 U.S. 445, 453-54 (2015) (internal quotations omitted)).

The Court has also recognized that in interstate disputes, it is appropriate to look to principles of international law. *See, e.g.*, *Arkansas v. Tennessee*, 310 U.S. 563, 570 (1940) (looking to international law regarding whether one state may acquire a right in land in another state following "open, long-continued and uninterrupted possession of territory"); *Michigan v. Wisconsin*, 270 U.S. 295, 308 (1926) (same).

As the Court pointed out in *Kansas v. Colorado*, 206 U.S. 46 (1907) (*Kansas II*):

> the relations between [States] depend . . . upon principles of international law. International

> law is no alien in this tribunal. . . . International law is part of our law, and must be ascertained and administered by the courts of justice of appropriate jurisdiction, as often as questions of right depending upon it are duly presented for their determination.

Id. at 91 (internal quotation omitted).

Mississippi alleges, in this case, that upon its admission as a state to the United States, it "*became an absolute sovereign under the law of nations* over all lands and waters within its borders, subject only to the authority ceded to the federal government under the Constitution." MS Exceptions at 20-21 (emphasis added) (citing U.S. Const. amend. X; *PPL Montana, LLC v. Montana*, 565 U.S. 576, 590-91 (2012)). Mississippi's claim that Defendants "have no right to interfere with Mississippi's exclusive jurisdiction and authority as a sovereign over water located in Mississippi," *id.* at 41, is thus rooted in international law.

B. The Court Acts as an "International Tribunal" in Interstate Disputes

Kansas II was the first decision of the Court that articulated the doctrine of equitable apportionment in the context of interstate surface water disputes. There, the Court opined that:

> One cardinal rule, underlying all the relations of the States to each other, is that of equality of right. Each State stands on the same level with all the rest. It can impose its

> own legislation on no one of the others, and is bound to yield its own views to none. Yet, whenever . . . the action of one State reaches through the agency of natural laws into the territory of another State, the question of the extent and the limitations of the rights of the two States becomes a matter of justiciable dispute between them, and this court is called upon to settle that dispute in such a way as will recognize the equal rights of both and at the same time establish justice between them.

Kansas II, 206 U.S. at 97-98 (1907). The Court ultimately found in that case that while Kansas had not "made out a case entitling it to a decree," Kansas would be entitled to relief if Colorado's depletions resulted in "the substantial interests of Kansas [] being injured to the extent of destroying the equitable apportionment of benefits between the two States resulting from the flow of the river." *Id.* at 117-18.

The concept of equitable apportionment of surface water was thus born out of the international legal principle of sovereign equality,[7] as adapted to our federalist system.[8] The Court sits in an identical position today,

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[7] The sovereign equality of states is a bedrock principle of international law. *See, e.g.*, U.N. Charter, Art. 2, Para. 1 ("The Organization is based on the principle of the sovereign equality of all its Members") *available at*: https://www.refworld.org/docid/3ae6b3930.html [accessed 24 February 2021].

[8] *Cf. Puerto Rico v. Sánchez Valle*, 136 S. Ct. 1863, 1871 n.4 (2016) ("That principle of 'equal footing,' [among States] we have held, is essential to ensure that the nation remains 'a union of States [alike] in power, dignity and authority, each competent to

again confronting matters of first impression, this time concerning a transboundary groundwater resource. The City Bar respectfully submits that it is thus appropriate, once again, to look to international law for guidance.

C. The Court Has Looked to International Treaty Practice to Construe an Interstate Water Compact

In *Texas v. New Mexico*, 462 U.S. 554 (1983), the issue was the role of the Court to adjudicate interstate disputes over the Pecos River. There, the Pecos River Compact, 63 Stat. 159 (1949), only explicitly granted the Pecos River Commission "broad powers to make all findings of fact necessary to administer the Compact." *Id.* at 560.

New Mexico argued that the Court's role was limited to judicial review of Commission decisions, with "no authority to act de novo or assume the powers of the Pecos River Commission"—with the effect that upstream state New Mexico could, in effect, "deny water" to Texas. The Court disagreed, looking to international practice to support its finding that "no one State can control the power to feed or to starve, possessed by a river flowing through several States." *Id.* at 566-67, 569 & n.15 (citing "Bannister, *Interstate Rights in Interstate Streams in the Arid West*, 36 Harv. L. Rev. 960, 979-980 (1923) (describing practice in international

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exert that residuum of sovereignty not delegated to the United States.'") (quoting *Coyle v. Smith*, 221 U.S. 559, 567 (1911)).

law)" and Frankfurter & Landis, *The Compact Clause of the Constitution—A Study in Interstate Adjustments*, 34 Yale L. J. 685, 701 (1925)). The Bannister passage cited by the Court includes the following statement:

> A reference to the practice of nations in respect to international streams will be helpful by way of analogy, since no one is likely to argue that a member state of the United States should be treated any worse than one nation, in international practice, treats another in respect to international streams.

Bannister, 36 Harv. L. Rev. at 979.

As the Court looked to international law in *Kansas II* when formulating the doctrine of equitable apportionment—and to international treaty practice in *Texas v. New Mexico* when construing an analogous interstate water compact—the Court should also look to international law in this case, which again presents interstate water issues of first impression. A body of international law has developed that grapples with the definition and governance of transboundary groundwater. The Court was correct to look to international law and practice when faced with the issue of how to resolve the allocation of surface water between the States of Kansas and Colorado in 1907. It is likewise appropriate, here, to look to international law and practice with regard to how to define and administer interstate groundwater.

III. INTERNATIONAL LAW PROVIDES A FRAMEWORK FOR ALLOCATING TRANSBOUNDARY GROUNDWATER

The State of Mississippi asserts that "subsurface complexities" are irrelevant to its claim, which is focused only on "*the specific groundwater* that was in Mississippi at the time it was taken by Defendants' cross-border pumping." MS Exception at 33 (emphasis in original). As regards the subsurface complexities, Mississippi states that there is variation in the composition of the Aquifer, creating what are essentially multiple aquifers. Report at 20; *see also* MS Exception at 32-33 (noting "the geographic, geologic, and hydrologic distinctions between the Sparta Sand (located primarily in Mississippi) and the Memphis Sand (barely located in Mississippi)"). The State of Mississippi, therefore, argues that the groundwater in Mississippi should not be considered an interstate resource, and that equitable apportionment should not apply.

The Special Master found, however, that the Aquifer is an "interstate" resource, and thus, "equitable apportionment is the appropriate remedy for the alleged harm." Report at 2. To arrive at this finding, the Special Master found that:

(i) The Aquifer "is a single hydrogeological unit" (Report at 20) and "is underneath several states." *Id.* at 17 (the "Aquifer Theory");

(ii) "[N]atural flow patterns indicate that the water inside the Aquifer would ultimately—even if slowly—flow across [the state] borders." *Id.* at 11; *see also id.* at 24-25 (the "Flow" theory);

(iii) "[E]ffects seen in Mississippi [of pumping in Tennessee] show that there is an interconnected hydrogeological unit that crosses the Mississippi-Tennessee border." *Id.* at 21 (the "Pumping Effects" theory); and

(iv) The Aquifer "and the groundwater contained within it are interstate resources because the unit is hydrologically connected to interstate surface waters." *Id.* at 25 (the "Surface Connection" theory).

The Special Master found that the Aquifer is thus "part of a single interconnected hydrogeological unit underneath multiple states," and is, therefore, an interstate resource. *Id.* at 11. As to the method to determine appropriate relief, the Special Master found that "[w]hen states fight over interstate water resources, equitable apportionment is the remedy," and "no compelling reason" was presented "to chart a new path for groundwater resources." *Id.* at 26.

The City Bar takes no position as to the correctness of these scientific findings, but, assuming—for purposes of this *Amicus* brief—that these findings are correct, the Middle Claiborne Aquifer meets the criteria set out in international legal instruments described below, to qualify as transboundary groundwater.

A. The UN Watercourses Convention Articulates Relevant Principles of International Law

The UN Watercourses Convention is a framework treaty that sets out principles applicable to the use of international freshwaters. The Convention is considered "an authoritative instrument in the field" of international water law.[9] It entered into force in 2014,[10] and currently has 37 parties.[11] Even before it entered into force, the International Court of Justice ("ICJ") endorsed the Convention as a "[m]odern development of international law."[12] Its text was formulated by the ILC in a 25-year process that was open to participation by all members of the United Nations and its specialized agencies. The draft was then adopted almost verbatim by the United Nations General Assembly on May 21,

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[9] STEPHEN C. MCCAFFREY, THE LAW OF INTERNATIONAL WATERCOURSES (2d ed. Oxford University Press 2007), p. 218. Professor McCaffrey, a leading scholar on international water law, served as the ILC's special rapporteur on the law of the non-navigational uses of international watercourses from 1985-1991. He is cited because "the teachings of the most highly qualified publicists of the various nations" is a recognized source for determining the rules of international law. Statute of the International Court of Justice, Art. 38, ¶ 1.

[10] *Available at*: https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XXVII-12&chapter=27&clang=_en#1 [accessed February 24, 2021].

[11] *Id.*

[12] Case Concerning the Gabčíkovo-Nagymaros Project (Hungary/Slovakia), Judgment of 25 Sept. 1997, 1997 ICJ 7 (reprinted in 37 I.L.M. 162 (1998), ¶ 85.

1997 by a vote of 106 in favor—including the United States—and three against.[13]

With such wide international participation in its drafting and adoption, most of the principles in the UN Watercourses Convention—including those on the "equitable and reasonable utilization" of transboundary water—are considered codifications of existing norms of customary international law.[14]

1. Under the Convention, the Middle Claiborne Aquifer Would be Defined as an "International Watercourse"

The UN Watercourses Convention applies to "international watercourses"—a term that expressly includes groundwater. Article 2(a) of the Convention defines a "watercourse" as "a system of surface waters and groundwaters constituting by virtue of their physical relationship a unitary whole and normally flowing into a common terminus." Convention, Art. 2(a). Article 2(b) defines an "international watercourse" as "a watercourse, parts of which are situated in different States." *Id.* at Art. 2(b). The provisions of the Convention thus apply broadly to groundwater that is transboundary, as well as to groundwater that itself is not transboundary, but which is hydrologically connected

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[13] The voting record is found at https://digitallibrary.un.org/record/284833 [accessed February 24, 2021]. The vote tally was 103 for, 3 against, with 27 abstentions. Three countries who abstained from the vote later stated that they were in favor. UN Doc A/51/PV.99, p. 8.

[14] *See, e.g.*, MCCAFFREY at 218.

to transboundary ground or surface water. As McCaffrey explains:

> the way in which the scope of the UN Convention is defined means that a particular aquifer need not be intersected by a border in order for it to be covered by the Convention's provisions; it is enough that the aquifer be related to surface water that does cross or flow along the border.

McCaffrey at 496. The ILC explains that the essential question is whether the groundwater is hydrologically connected to a transboundary body of water: "So long as these components are interrelated with one another, they form part of the watercourse."[15]

Here, the Special Master has found that the Middle Claiborne Aquifer is "a single interconnected hydrogeological unit underneath multiple states," and that "the water inside the Aquifer interacts with, and discharges into, interstate surface waters." Report at 11. Either finding would be sufficient, under the UN Watercourses Convention, to designate the Aquifer as an "international watercourse."

As stated above, the State of Mississippi argues that there is not a single Aquifer, but rather multiple

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[15] ILC, Draft articles on the law of the non-navigational uses of international watercourses and commentaries thereto and resolution on transboundary confined groundwater, *Yearbook of the International Law Commission 1994*, Vol. II (Part Two) at 90 (Commentary to Article 2) ("ILC Commentary"), A/CN.4/SER.A/1994/Add/1 (Part 2), *available at*: https://legal.un.org/ilc/publications/yearbooks/english/ilc_1994_v2_p2.pdf [accessed February 24, 2021].

aquifers. Report at 20. Under the UN Watercourses Convention's definition of a "watercourse," such a distinction would not matter.[16] Elsewhere Mississippi suggests that the groundwater in dispute is "confined groundwater which [does] not discharge directly to the interstate river or stream. . . ." MS Exceptions at 29. For the UN Watercourses Convention to apply, however, it would be sufficient for the groundwater at issue to merely be "interrelated with" interstate surface or groundwater.

2. International Law Requires "Equitable and Reasonable Utilization" of Transboundary Watercourses, Including Groundwater

The cornerstone principle relating to the allocation of international transboundary water is reflected in Article 5 ("Equitable and Reasonable Utilization and Participation") of the UN Watercourses Convention. Article 5 provides that:

> Watercourse states shall in their respective territories utilise an international watercourse

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[16] The Aquifer also falls within the definition of the other major international water treaty—the Convention on the Protection and Use of Transboundary Watercourses and International Lakes, 17 March 1992, 31 I.L.M. 1312 (1992) ("Helsinki Convention"). The Helsinki Convention applies to "any surface or ground waters which mark, cross or are located on boundaries between two or more States." Article 1(1). Based on the findings of the Special Master, the Middle Claiborne Aquifer also meets this definition. *See, e.g.*, Report at 17 ("Experts agree that the Middle Claiborne Aquifer is underneath several states.").

> in an equitable and reasonable manner. In particular, an international watercourse shall be used and developed by watercourse states with a view to attaining optimal and sustainable utilisation thereof and benefits therefrom taking into account the interests of the watercourse states concerned, consistent with adequate protection of the watercourse.

UN Watercourses Convention, Art. 5(1). When determining what is "equitable and reasonable," the Convention requires that "all relevant factors and circumstances" be considered.[17]

This principle of "equitable and reasonable" utilization of transboundary water is an animating principle of the UN Watercourses Convention. The ICJ has held that states have, under international law, a "basic right to an equitable and reasonable sharing of the resources of an international watercourse."[18]

The ILC Commentary on Article 5 of the UN Watercourses Convention explains that the right to equitable use and to the sharing of international watercourses is widely accepted:

> A survey of all available evidence of the general practice of States, accepted as law, in respect of the non-navigational uses of

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[17] UN Watercourses Convention, Art. 6(1). The ILC Draft Articles likewise refer to "taking into account all relevant factors." ILC Draft Article, Art. 5.

[18] Case Concerning the Gabčíkovo-Nagymaros Project (Hungary/Slovakia), Judgment of 25 Sept. 1997, 1997 ICJ 7 (reprinted in 37 I.L.M. 162 (1998)), ¶ 78.

> international watercourses—including treaty provisions, positions taken by States in specific disputes, decisions of international courts and tribunals, statements of law prepared by intergovernmental and non-governmental bodies, views of learned commentators and decisions of municipal courts in cognate cases—reveals that there is overwhelming support for the doctrine of equitable utilization as a general rule of law for the determination of the rights and obligations of States in this field.

Yearbook of the International Law Commission 1994, Vol. II (Part Two) at 98. This international principle of equitable and reasonable utilization has its origins in the Court's equitable apportionment jurisprudence.[19]

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[19] *See, e.g.*, McCaffrey at 244–45:

> The decisions of the United States Supreme Court in apportionment disputes between U.S. states comprise what is probably the richest body of practice in the field of equitable utilization that exists on either the national or the international level. Indeed, it seems likely that in large measure the doctrine of equitable utilization owes its very existence, as well as its fundamental meaning, to that body of decisional law.

B. The ILC Draft Articles Tailor the Principles of the Convention to Transboundary Aquifers

In 2006, the ILC adopted nineteen draft Articles on "The Law of Transboundary Aquifers." The ILC Draft Articles aim to tailor the UN Watercourses Convention principles specifically to groundwater.[20] The ILC Draft Articles have not been elevated to the status of a widely-adhered-to multilateral treaty—*cf.* the UN Watercourses Convention—but they are regarded, internationally, as an important milestone in codifying international water law. For example, they have largely been incorporated into the 2010 Guarani Aquifer Agreement among Argentina, Brazil, Paraguay and Uruguay.[21] The ILC Draft Articles have also been incorporated into model transboundary water treaty provisions. *See, e.g.*, Model Provisions on Transboundary

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[20] Gabriel E. Eckstein, *Commentary on the U.N. International Law Commission's Draft Articles on the Law of Transboundary Aquifers*, 18 Colo. J. Int'l Envtl. L. & Pol'y 537, 542-44 (2007).

[21] Acordo sobre o Aquífero Garani [Agreement on the Guarani Aquifer], Aug. 2, 2010, Arg.-Braz.-Para.-Uru., Ministério Das Relações Exteriores [Brazilian Ministry of Foreign Affairs], *available at*: http://extwprlegs1.fao.org/docs/pdf/mul-143888English.pdf [accessed February 24, 2021].

Groundwaters, adopted by sixth Meeting of the Parties of the Helsinki Convention.[22]

1. Under the ILC Draft Articles, the Middle Claiborne Aquifer Would be Defined as a Transboundary Aquifer System

Whether the Middle Claiborne Aquifer is "part of a single interconnected hydrogeological unit underneath multiple states," or whether it is comprised of a number of linked aquifers, is contested in this case. Report at 17-18. In either scenario, the Aquifer would fall within the scope of the ILC Draft Articles as either a transboundary aquifer or a transboundary aquifer system. ILC Draft Article 2(b), (c).[23]

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[22] U.N. Economic Comm'n for Europe, ECE/MP.WAT/40 (2014) *available at*: https://unece.org/DAM/env/water/publications/WAT_model_provisions/ece_mp.wat_40_eng.pdf [accessed February 24, 2021].

[23] ILC Draft Articles, Art. 2 (Use of Terms) provides in relevant part:

> For the purposes of the present draft articles:
>
> (a) "aquifer" means a permeable water-bearing geological formation underlain by a less permeable layer and the water contained in the saturated zone of the formation;
>
> (b) "aquifer system" means a series of two or more aquifers that are hydraulically connected;
>
> (c) "transboundary aquifer" or "transboundary aquifer system" means respectively, an aquifer or aquifer system, parts of which are situated in different States;

The definition of "aquifer system" under the ILC Draft Articles parallels the UN Watercourses Convention definition of "watercourses." The ILC Draft Articles define "aquifer system" as "a series of two or more aquifers that are hydraulically connected." ILC Draft Article 2(b). The Commentary to the Draft Articles explains that "'hydraulically connected' refers to a physical relationship between two or more aquifers whereby an aquifer is capable of transmitting some quantity of water to the other aquifer." ILC Commentary to ILC Draft Article 2.[24]

The ILC Draft Articles define a "transboundary aquifer" or "transboundary aquifer system" as, "respectively, an aquifer or aquifer system, parts of which are situated in different States." ILC Draft Article 2(c). Thus, the ILC Draft Articles capture not only an aquifer that straddles the border of two or more states; they also capture domestic aquifers that are hydraulically connected to a transboundary aquifer.[25]

> (d) "aquifer State" means a State in whose territory any part of a transboundary aquifer or aquifer system is situated;
>
> (e) "utilization of transboundary aquifers or aquifer systems" includes extraction of water, heat and minerals, and storage and disposal of any substance . . .

Id.

[24] ILC, Draft Articles on the Law of Transboundary Aquifers with commentaries, *Yearbook of the International Law Commission 2008*, Vol. II (Part Two) at 26, A/CN.4/SER.A/2008/Add.1 (Part 2), *available at*: https://legal.un.org/ilc/publications/yearbooks/english/ilc_2008_v2_p2.pdf [accessed February 24, 2021].

[25] Eckstein at 555.

2. The ILC Draft Articles Limit Territorial Sovereignty Over Transboundary Aquifers

The State of Mississippi argues that it "has sole authority to govern 'the appropriation of all water located within its territorial borders.'" Report at 28 (quoting Mississippi's Response in Opposition to Motion for Summary Judgment at 11). The ILC Draft Articles recognize States' sovereignty over their territory, but provide that such sovereignty is limited with respect to transboundary aquifers:

> Each aquifer State has sovereignty over the portion of a transboundary aquifer or aquifer system within its territory. It shall exercise its sovereignty in accordance with international law and the present articles.

ILC Draft Articles, Art. 3 (Sovereignty of aquifer States). The requirement that sovereignty "shall" be exercised in accordance with international law and the ILC Draft Articles is a key limitation. It recognizes that sovereignty over transboundary aquifers is far from unfettered. Most notably, the ILC Draft Articles require that States equitably and reasonably utilize transboundary aquifers and aquifer systems. ILC Draft Articles, Art. 4 (Equitable and reasonable utilization)[26]; *see also*, *id.* at Art. 5 (Factors relevant to

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[26] ILC Draft Articles, Art. 4 provides:

> Aquifer States shall utilize transboundary aquifers or aquifer systems according to the principle of equitable and reasonable utilization, as follows:

equitable and reasonable utilization).[27] This is a significant restriction on, and obligation regarding, the use of transboundary aquifers and aquifer systems, and requires each state, among other things, to respect the interests of other states in shared groundwater resources.[28]

(a) they shall utilize transboundary aquifers or aquifer systems in a manner that is consistent with the equitable and reasonable accrual of benefits therefrom to the aquifer States concerned;

(b) they shall aim at maximizing the long-term benefits derived from the use of water contained therein;

(c) they shall establish individually or jointly a comprehensive utilization plan, taking into account present and future needs of, and alternative water sources for, the aquifer States; and

(d) they shall not utilize a recharging transboundary aquifer or aquifer system at a level that would prevent continuance of its effective functioning.

Id.

[27] The ILC Draft Articles also contain other obligations that place significant restrictions and obligations on the use of transboundary aquifers, including the requirements to not cause significant harm (ILC Draft Articles, Art. 6), to cooperate (ILC Draft Articles, Art. 7), and to exchange data and information (ILC Draft Articles, Art. 8).

[28] *See* Eckstein at 561-62.

CONCLUSION

For the reasons set out in this brief, *amicus* City Bar respectfully urges the Court to:

1. Look to international law as a guide to determining whether the Middle Claiborne Aquifer is subject to equitable apportionment.

2. Consider that, under international law, if the Middle Claiborne Aquifer crossed an international boundary, it would be subject to the principle of "equitable and reasonable utilization," which is fundamentally similar to the Court's doctrine of equitable apportionment.

Respectfully submitted,

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