

INTERNATIONAL LAW AND TRANSBOUNDARY WATER RESOURCES

A Framework for Shared Optimal Utilization

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A framework for sharing ...

... less easily perceived precisely where international law and cooperation are most needed ...



BASIC CONCEPTS

- a) IWL as a **framework for sharing** enhancing the **optimal utilization** of transboundary water resources for all co-riparians
- The economic and policy conceptual framework of the community of interest concept: the no-0 **game theory** and practice (Guide; Benvenisti)
 - The legal representation of the **community of interest** concept in IWL
- b) IWL as a century-long process **dismantling absolute sovereignty claims** (from slide 6 onward)

A framework for sharing in the sense of the “community of interest” legal concept



“The community of interest in a navigable river becomes the basis of a common legal right, the essential features of which are the perfect equality of all riparian States in the use of the whole course of the river and the exclusion of any preferential privilege of any one riparian State in relation to the others”. (River Oder Case, PCIJ, 1929)

*“[m]odern development of international law has strengthened this principle for the **non-navigational uses** of international watercourses as well, as evidenced by the adoption of the Convention of 21 May 1997 on the Law of Non-Navigational Uses of International Watercourses by the United Nations General Assembly”.*
(Gabcikovo-Nagymaros Case, ICJ, 1997)



International water law as a process dismantling absolute sovereignty theories

- Absolute territorial sovereignty theory
- Absolute territorial integrity theory
- The Harmon Doctrine ... “buried, not praised”
(*McCaffrey, 1996*)
- The three-pronged pillar of IWL: the equitable utilization, no-harm and cooperation principles: their interdependence

A FACTUAL PREMISE WITH LEGAL CONSEQUENCES

The inter-dependence between water quantity and water quality issues:

“Suffice it to recall that a decreased flow in the watercourse leads to a reduced capacity of the water to absorb pollutants, while pollution may restrict the uses of the watercourse [hence, the quantity of water otherwise available for those uses]” (Tanzi-Arcari)

Guide to Implementing the UNECE Water Convention,
Para. 249, footnote 86.

A LEGAL PREMISE WITH POLITICAL CONSEQUENCES

- Entitlement to a right - corresponding to a legal obligation – involves the obligation that such a right is not abused by his holder. “According to *the abuse of right doctrine*, “a State may not “*exercis[e] a right [...] in a way which impedes the enjoyment by other States of their own rights (...)*” (Kiss).
- The general legal principle of “good neighbourliness” leads to the same result insofar as it is maintained that “(...) *the principle of law of voisinage holds to the effect that the exercise of one’s own rights should not prejudice the rights of one’s neighbours*” (Swiss Federal Tribunal, 1900).

Constraining sovereignty for the mutual benefits and public interest of all the parties involved

- All international legal rules involve some kind of self – imposed constraint on State sovereignty for the pursuit of a material, or immaterial interest, individual and collective (e.g., EEZ);
- The equitable utilisation, no-harm and cooperation rules impact on the sovereignty of the States by:
 1. translating the “community of interest” concept into legal rules;
 2. pursuing the shared interest in the optimal utilisation in a non 0 sum perspective, more beneficial to all parties involved;
 3. adding a long term economic and environmental dimension to the legal protection they afford;
 4. incorporating sustainability in the equitable utilization principle;
 5. Making cooperation the catalyst for the case-specific application of the other two general principles

Synergies between two multilateral instruments codifying and such rules

- The UN 1997 Convention on the Law of the Non-navigational Uses of International Watercourses
- The UNECE 1992 Convention on the Protection and Use of Transboundary Watercourses and International Lakes

The equitable and Reasonable Utilization Principle /1

Art. 5, 1997 NY UN Convention

1. Watercourse States shall in their respective territories utilize an international watercourse 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 utilization thereof and benefits therefrom, taking into account the interests of the watercourse States concerned, consistent with adequate protection of the watercourse.
2. Watercourse States shall *participate* in the use, development and protection of an international watercourse in an equitable and reasonable manner. Such participation includes both *the right to utilize* the watercourse and *the duty to cooperate in the protection and development* thereof, as provided in the present Convention.

The equitable and Reasonable Utilization Principle /2

The 1992 UNECE Water Convention, Article 2 (2)(c) and (5) (c):

“[...] 2. The Parties shall, in particular, take all appropriate measures:

(c) To ensure that transboundary waters are used in a reasonable and equitable way, taking into particular account their transboundary character, in the case of activities which cause or are likely to cause transboundary impact;

[...] 5. In taking the measures referred to in paragraphs 1 and 2 of this article, the Parties shall be guided by the following principles:

(c) Water resources shall be managed so that the needs of the present generation are met without compromising the ability of future generations to meet their own needs”.

The Equitable and Reasonable Utilization Principle/3

Art. 6, 1997 NY UN Convention:

1. Utilization of an international watercourse in an equitable and reasonable manner within the meaning of article 5 requires taking into account all relevant factors and circumstances, including:
 - (a) Geographic, hydrographic, hydrological, climatic, ecological and other factors of a natural character;
 - (b) The social and economic needs of the watercourse States concerned;
 - (c) The population dependent on the watercourse in each watercourse State;
 - (d) The effects of the use or uses of the watercourses in one watercourse State on other watercourse States;
 - (e) Existing and potential uses of the watercourse;
 - (f) Conservation, protection, development and economy of use of the water resources of the watercourse and the costs of measures taken to that effect;

The Equitable and Reasonable Utilization Principle/4

(g) The availability of alternatives, of comparable value, to a particular planned or existing use.

2. In the application of article 5 or paragraph 1 of this article, watercourse States concerned shall, when the need arises, enter into consultations in a spirit of cooperation.
3. The weight to be given to each factor is to be determined by its importance in comparison with that of other relevant factors. In determining what is a reasonable and equitable use, all relevant factors are to be considered together and a conclusion reached on the basis of the whole.

The No-Harm Rule/1

Art. 7, 1997 NY UN Convention:

- “1. Watercourse States shall, in utilizing an international watercourse in their territories, take all appropriate measures to prevent the causing of significant harm to other watercourse States.*
- 2. Where significant harm nevertheless is caused to another watercourse State, the States whose use causes such harm shall, in the absence of agreement to such use, take all appropriate measures, having due regard for the provisions of articles 5 and 6, in consultation with the affected State, to eliminate or mitigate such harm and, where appropriate, to discuss the question of compensation”.*

No-harm Rule/2

The 1992 UNECE Water Convention, Art. 2 (1) :

“1. The Parties shall take all appropriate measures to prevent, control and reduce any transboundary impact.”

The Guide: *”The obligation expressed in article 2 (1), applies to various forms of adverse effects to the environment in conformity with the definition of **transboundary impact** under article 1 (2), of the Convention. Such a definition is inevitably abstract, and situation specific, since it assumes that an impact that is significant in one case may not be so in another. Nonetheless, it represents one of the most detailed definitions to be found in a MEA of the significant transboundary harm to be prevented” (p. 30).*

The Relationship Between the Equitable Utilization and No-Harm Principles

“[O]ne complex substantive normative setting of which both rules are part and parcel, being totally entangled with each other” (Tanzi, 1999, p.15).

Compliance with the no-harm rule is essential to the compliance with the equitable utilization principle, just as well as the reverse is true:

UNECE '92: Art. 2 (1)/Art.2 (2), (c) (*see*, slide 12);

UN NY '97: Art. 5 (1): sustainability and consistency of the utilization with adequate protection (*see*, slide 11)

- The non tenability of arguments on an alleged conflict between the two rules in point (Tanzi/Arcari, 2001, pp. 172 ff.)

The Principle of Co-operation/1

Art. 8 , NY Convention:

“1. Watercourse States shall cooperate on the basis of sovereign equality, territorial integrity, mutual benefit and good faith in order to attain optimal utilization and adequate protection of an international watercourse.

2. In determining the manner of such cooperation, watercourse States may consider the establishment of joint mechanisms or commissions, as deemed necessary by them, to facilitate cooperation on relevant measures and procedures in the light of experience gained through cooperation in existing joint mechanisms and commissions in various regions”.

The Principle of Co-operation/2

Art. 2 (6), UNECE Convention:

“The Riparian Parties shall cooperate on the basis of equality and reciprocity, in particular through bilateral and multilateral agreements, in order to develop harmonized policies, programmes and strategies covering the relevant catchment areas, or parts thereof, aimed at the prevention, control and reduction of transboundary impact and aimed at the protection of the environment of transboundary waters or the environment influenced by such waters, including the marine environment”.

A convention is a convention when

...



A convention is legally binding – ***as such*** – only once it has entered into force: i.e. upon a minimum number of ratifications.

Whom would it binding for?

Adopting a Convention within the UNGA is equal to adopting a GA resolution

What legal effects
for a Convention
not in force?



«Modern development of international law has strengthened this principle [of the community of interest in a navigable river among all riparian States] for the non-navigational uses of international watercourses as well, as evidenced by the adoption of the Convention of 21 May 1997 on the Law of Non-Navigational Uses of International Watercourses by the United Nations General Assembly» (Gabcikovo-Nagymaros Case, I.C.J., 1997).

«[...] new norms and standards have been developed, set forth in a great number of instruments over the last two decades. Such norms have to be taken into consideration, and such new standards given proper weight, not only when States contemplate new activities but also when continuing with activities begun in the past. This need to reconcile economic development with protection of the environment is aptly expressed in the concept of sustainable development”.

(Gabcikovo-Nagymaros Case, I.C.J., 1997)





Thank you !