

Tipaimukh Dam

Laws and Legal Principles relating to Transboundary Water Sharing

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Laws and Legal Principles relating to Transboundary Water Sharing Syeda Rizwana Hasan

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Laws and Legal Principles relating to Transboundary Water Sharing

A. Laws, Treaties and Agreements setting legal principles (quality and quantity), institutions

Notable Ones:

1. UN Convention on the Law of the Non-navigational Uses of International Water-course, 1997 – Framework Convention-Needs 35 ratification
2. Convention on the Protection and Use of Transboundary Watercourses and International Lakes (Helsinki, 17 March, 1992)

Preamble and Objectives

Article 1 and 2 of the UN Charter ;
International co-operation, good neighbourliness;
Rio Declaration and Agenda 21;
Utilization, development, conservation, management and protection ;
Optimal and sustainable utilization for present and future generations.

PART II General Principles (Articles 5-10)

Equitable and Reasonable Utilization and Participation and Factors Relevant (Articles 5, 6)-

Optimal and sustainable utilization, *right to utilize-duty to cooperate*, consideration of the interests of the waterstates concerned, adequate protection of the watercourse

Factors

Geographic, hydrographic, hydrological, climatic, ecological factors
Socio-economic needs
Populations Dependant in each State
Effects of the use on other watercourse
Availability of alternatives of comparable values
Existing and potential use
Conservation, protection etc.

All these factors to be considered together and conclusion to be reached on the basis of the whole

PART III Planned Measures (Articles 11-19)

Inform, consult, negotiate, if necessary (Article 11)

Notification to be timely, to contain technical data, information, EIA- to allow understanding of possible effects (Article 12)

Consultation and negotiations to respect the rights and legitimate interests of states

PART IV Protection, Preservation and Management

Protection etc, individually/jointly (Article 20);

Pollution of an international water course defined (Article 21);

No Alien/new species (Article 22) ;

Requires prevention and mitigation of harmful conditions-siltation etc.(Article 27).

2. European Convention (Adopted 17 March, 1992)

Defines Transboundary waters (Article 1 (1)), Transboundary impact (Article 1(2));

Endorses the Principles of Precaution, Polluter Pays, Intergenerational Trust;

More focused on Pollution Control;

Emphasises on bilateral and multilateral involvement;

3. Other Important Regional Treaties

Endorsing the Principles of No Harm, Notification, Prevention of Pollution, Conservation of Rivers

- 1944 Treaty between Mexico and USA over Colorado Basin, further developed in 1973 (a major shift from the first treaty signed in 1904) operation of facilities not to cause “material damage”

- 1963 Act on the Niger Basin “cooperation of any project is likely to have an appreciable effect”

- 1964 Convention and Statute for the Chad Basin- Lake Chad Basin Commission to be notified of all projects

- 1977 Kagera Basin Agreement - Organization for the Management and Development of the Kagera Basin

- The Indus Waters Treaty, 1960- notification

- The Amazonian Cooperation Treaty, 1978- both socio-economic development as well as conservation of environment

- Convention for the Protection of the Rhine, 1976-chemical pollution

- The Agreement on the Cooperation for the Sustainable Development of the Mekong River Basin (between Cambodia, Laos, Thailand and Vietnam), 1995 - The Agreement on the Action Plan for the Environmentally Sound Management of the Common Zambezi River System, 1987

B. Evolution and Validity of the Legal Notions, Principles and Maxims

1. Absolute Territorial Sovereignty
Proponent- US Attorney General Judson Harmon (1895), Dispute between US and Mexico over the waters of Rio Grande

Under the rules, principles, precedents of international law, no obligation on US to let flow waters of the river to Mexico

Sole case: 7 AJIL (1913), page. 653, dispute between Hungary-Austria

Tribunal concluded that international law till then did not develop to the point where upper riparian was obliged to refrain from conduct interfering with the use of river by downstream State. Interest of lower riparian would be considered fairly by the upper riparian as a matter of comity, but not as a matter of legal right.

US Making a Shift

By 1944, US abandoned this principle. The 1944 Treaty between the two countries over the sharing of water of the

rivers Rio Grande, Colorado and Tijuana marked significant departure;**Preamble:** Fixing and delimiting the rights of the two countries over the rivers desirable to obtain the most complete and satisfactory utilization thereof;**Majority Report of the Foreign Committee of the US Senate:** Rights and obligations of the two countries over international streams are mutual and reciprocal;

Secretary of States commenting on the Harmon's notion while addressing disputes with Canada over Columbia river, "hardly the kind of legal doctrine that can be seriously urged in these times."

India always had shifting position: See UNGAOR, 23rd session, 1682nd Mtg, page 19, UNGAOR, 23rd session, 1692, Mtg, page 25, UNGAOR, 31st session, Special Political Committee, 21st Mtg, pages 2-3, India's position on the 1997 UN and China's proposal on Brahmaputra

2. Absolute Territorial Integrity

-Natural Flow theory

-Every state must allow rivers over which it does not exercise unrestricted territorial sovereignty ... to follow their natural course; it may not divert the water to the detriment of one or more of the other States with rights to the river, interrupt, artificially increase or diminish its flow... Max Huber

-Lower riparians invoking this theory: Egypt in 1925 before the Nile Commission, also in Dakar in 1981 at the Interregional meeting of International River Organization.

-Pakistan in the Indus Water Dispute

-Bangladesh in dispute over Ganges: UNGAOR, 31st Session, Special Political Committee, 20th Mtg, pages 3-4

-"Bangladesh was entitled to the natural flow of the Ganges in order to satisfy existing human and ecological needs that could not be met in any other way ... The new use of the water by India contrasted with the existing multiple and interconnecting beneficial use to which it was put by Bangladesh."

-Often criticized as "wasteful" since no development is allowed

3. Limited Territorial Sovereignty

Every riparian state has the right to use the water of an international river flowing on its territory, on condition that such utilization in no way prejudices the rights and interest of the co-riparian states.

Reciprocal rights and obligations

Sovereign rights are relative/qualified because of enjoyment of similar rights by other co-riparians

Accepted principle of general international law – no state can use its territory to the detriment of another's territorial rights and interest

4. No Harm Rule

Latin Maxim:

- sic utere tuo ut Alienum non leadus (sic utere tuo-meaning use your own property in such a way that you do not injure other people's)
- prohibetur ne quis faciat in suo guod mocere possit alieno (it is forbidden for anyone to do or make on his own land what may injure another)
- sic enim debere quem meliorem agrum suum facere ne vicini deteriore faciat (everyone ought to improve his land as not to injure his neighbours)

- Pragmatic concept of sovereignty refined by the obvious fact of community and neighborhood
- - Legally definable interest in the form of equitable rights and interests
- An infraction of that may be characterized as injury
- Injury may be caused by reducing quantity, altering the quality or changing the timing of flow or a combination of these
- Can be inflicted upon water use, environment, aquatic life, ecology
- Causal link between the water use and injury
- Offending State acting beyond equitable entitlement

5. Equitable Apportionment

Please refer to the factors prescribed in the UN Convention, 1977 (Article 6)

“What amounts to a reasonable and equitable share is a question to be determined in the light of all relevant factors in each particular case”

6. Participation

Decisions on the Basis of ‘Rights and Risks’/Participation

Whose rights are being affected?

Who is likely to bear the costs?

C. Regional Experience: South Asia and Beyond

1. South Asia

a. The Indus Waters Treaty, 1960

b. Establishment of the JRC, 1972

c. 1974 Agreement between India and Bhutan on the Chukha Hydro-Electric Project

d. Agreement between India and Nepal on the Sarada Barrage, Tanakpur Barrage and Pancheshwar Project

e. Agreements and MoUs between Bangladesh and India, 1977, 1982, 1985 and 1996 on water sharing of the Ganges

f. Agreement on sharing of the water of Teesta

Basic Featuresa. Indus-

Preamble

- Attaining most complete and satisfactory utilization of the rivers

- Fixing and delimiting the rights and obligations of each country in relation to the other Has defined

Agricultural Use (Article 1(9), Domestic Use (Article 1(10), Non-Consumptive Use (Article 1(11), Interference with the Waters (Article 1(15))”

Obligations not to cause “material damage” (Article IV (2), (3)(a), (6), (9), (10)

Future Cooperation (Article VII)

*Prior Notification of Engineering Project (Article VII (2)

Not establishing any general principles of law or any precedent

Ganges: Agreement dated 5 November, 1977- for five years (suspended by the 1996 Treaty)**MoU dated 7 October, 1982MoU dated 22 November, 1985**

Treaty dated 12 December, 1996 - for 30 years

On need for cooperation, the **5 November, 1977** agreement said:

“desirous of sharing by mutual agreement the waters of the international rivers flowing through the territories of the two countries and of making the optimum utilization of the water resources of their region by joint efforts”

Stressed on finding a fair solution

Agreement does not establish any general principles of law or precedent

Treaty dated 12 December, 1996 - for 30 years, once again repeated

“desirous of sharing by mutual agreement the waters of the international rivers flowing through the territories of the two countries and of making the optimum utilization of the water resources of their region in the fields of flood management, irrigation, river basin development and generation of hydro-power for the mutual benefit of the people of the two countries”

For the mutual benefits for the peoples of two countries

Finding a fair and just solution

1996 Treaty

Article IX

Guided by the principles of equity, fairness and no harm to either party, both the Governments agree to conclude water sharing Treaties/Agreements with regard to other common rivers

Article X- Review of the present treaty based on the principles of equity, fairness and no harm

India’s shifting position

On dispute over Ganges

UNGAOR, 23rd Session, 1682 Mtg, page 19

90 percent of the length of the main channel of the Ganges flowed through India

94 percent of the population in the Ganges basin lived in India

99 percent of the catchment area of the Ganges and 91.5 percent of the entire irrigation potential lay within India

UNGAOR, 23rd session, 1692, Mtg, page 25

“that an upper riparian can use the waters of a river as it pleases, regardless of the situation which that might cause to the lower riparian State”

India’s position on **UN Convention, 1997** aligns with the notion of Absolute Sovereignty

On the other hand, signing of Indus Treaty, opposing Pakistan’s proposal to construct Karnafuli Dam* or opposing China’s proposal to divert waters from Brahmaputra suggest otherwise.

UNGAOR 31st Session, Special Political Committee, 21st Mtg., page 2-3: On Bangladesh’s claim over Ganges

“India, for its part, had always subscribed to the view that each riparian State was entitled to a reasonable and equitable share of the waters of an international river”

UNGAOR 23rd Session, 1682 Mtg., page 19: On Pakistan’s proposal to build Dam

No country has the right permanently to submerge sovereign territories by its project

What principles of international law would support the inundation of a foreign territory by the construction of a barrage on its own territory?

D. Case Precedent-Endorsing the legal maxims and principles

Leading: Gabcikovo-Nagymaros Case decided by the ICJ (37 ILM 162)

Dispute between Hungary and Slovakia over the Danube river

Breach of Agreement (1977) pleaded as Hungary decided to abandon work of construction work (1989)

Slovakia proceeded unilaterally with the Gabcikovo Project that involved the construction of a dam in the Slovak territory that resulted in temporary diversion of water

In the court, Hungary urged ‘protection of environment’ as justification for abandonment

ICJ confirmed the validity of 1977 and found Hungary in breach

ICJ also endorsed the provision of Article 5 (2) of the 1997 Convention and held that Slovakia failed to respect ‘proportionality’ and deprived Hungary of her right to ‘an equitable and reasonable share’

Other Pertinent Cases:

- Wurttemberg and Prussia vs. Baden (3 state of Germany over Danube)

- Lake Lanoux Arbitration (France & Spain)
- The Roya Case (France & Italy)
- The Trail Smelter Case (Washington vs British Columbia (Canada))
- The San Juan River Case (Coasta Rica & Nicaragua)
- Solothurn vs. Aargan: Swiss Case (Swiss case)
- The Gut Dam Arbitration (US & Canada)
- Corfu Channel Case: The UK and Albenia (UK & Albania)
- The Island of Palmas Case: United States vs. the Netherlands (Us vs The Netherland)

E. Implementation, Monitoring, Dispute Resolution

- Committee, Commission (Fact-finding), Arbitration, Mediation, Third Party Resolution, Conciliation, Regional Set Up, International Court of Justice,

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