



National Seminar on International Water Law (Issyk-Kul, September 2013)

UN Watercourses Convention Articles, 5-7, 8, 10

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Theories of Water Utilisation

- Absolute Territorial Sovereignty
- Absolute Territorial Integrity
- Limited Territorial Sovereignty / Equitable (and Reasonable) Utilisation
- Common Management / Community of Interests



Theories of Water Utilisation (2)

- Absolute Territorial Sovereignty:
 - Upper Riparians
 - ‘Harmon Doctrine’
 - Lack of Support in State Practice (US, India, Austria, Chile, Ethiopia, etc.), Publicists
- Absolute Territorial Integrity:
 - Lower Riparians
 - (Common Law) Riparian Rights Doctrines
 - IDI Madrid Declaration (1911)
 - Lack of Support in State Practice (Argentina, Egypt, Spain, Pakistan, Bangladesh, Bolivia, Arab States)
 - *Lac Lanoux Arbitration (Spain v. France)* [1957]



Theories of Water Utilisation (3)

- Limited Territorial Sovereignty / Equitable Utilisation:
 - Sovereign Equality of States / Community of Interest in Shared Water Resources
 - Neighbourship Law
 - The Doctrine of Abuse of Rights
 - Principles of Equity
 - Vague/Flexible – Normatively Indeterminate
 - Balancing of Interests – Factors
 - Widespread Support in State Practice, International / Federal Courts and Tribunals, Declaratory / Treaty Law, Codifications, Publicists, etc.
 - Art. 5 & 6 ERU; Art. 7 Duty to Prevent Significant Harm



Theories of Water Utilisation (4)

- **Common Management / Community of Interests:**
 - Integrated Whole / Economic Unit
 - Recognises Limited Sovereignty - ERU
- **Community of Interests**
 - *River Oder Case* (Navigation); *Gabčíkovo-Nagymaros Case*; *Pulp Mills Case*
 - 1995 SADC Protocol; 2009 Nile Cooperative Framework Agreement, Art. 3(9)
- **Common Management**
 - Rec. 51, 1972 Stockholm Action Plan; Ch. 18, Agenda 21; 1992 UNECE Convention, Art. 9(2); 1997 UN Convention, Arts. 5(2), 8(2), 21, 24, 33.
 - ERU impossible without Common Management Institutions?



Factors re Equitable Utilisation: UN Convention, Arts. 6 and 10

- Population Dependent on Watercourse
 - Human rights dimension
 - Priority of uses (domestic, stock, irrigation, etc.)
 - Vital human needs - 1997 UN Conv. Art. 10(2)
- Social and Economic Needs
 - State / stage of economic development
 - Need related to disputed waters not of basin area (diversions)
 - Irrigable / irrigated land
- Existing and Potential Uses
 - Doctrine of prior appropriation (US)
 - No (property) doctrine of acquired rights
 - 1997 UN Conv., Arts 6 and 10
 - Respect for local custom; dependence / vital human needs; prevention of significant harm
 - Easier to quantify beneficial / other character of existing uses



Factors re Equitable Utilisation

- Conservation, Protection, Development, Economy of Use
 - Distinction between allocation of water volume and competing uses (Narmada Tribunal)
 - Not most productive use (intra-generational equity)
 - Not intentionally / negligently wasteful
- Availability of Alternatives
 - True extent of dependence
 - Alternatives of 'comparable value' – feasibility, practicality, cost-effectiveness
 - Water export restrictions (GATT Art. XX)



Factors re Equitable Utilisation

- Geographic, Hydrographic, Hydrological Factors
 - River Frontage (Colorado River)
 - Drainage Area (Narmada Tribunal)
 - Contribution of Water (Euphrates – Turkey; Nile – Ethiopia)
- Effects on Other Watercourse States
 - Pollution
 - Ecosystems
 - Equitable utilisation takes priority over the prevention of harm



Factors re Equitable Utilisation

- Other Factors
 - Respect for local custom (traditional uses by indigenous / tribal populations; human rights)
 - Conduct of the Parties (failure to object; acquiescence; delay / laches)



Prevention: UNWC, Art. 7

- Duty to Prevent Transboundary Harm (Art.7 UN Conv):
 - Subordinate to ERU
 - IN Conv., Art. 7(2) - compensation
 - *De minimis* exception
 - Due Diligence Obligation (Conduct rather than Result)
 - Substantive Due Diligence (e.g. National Env. Controls)
 - Procedural Due Diligence
 - Duty to Co-operate (Art. 8, UN Conv.):
 - Notify; Consult / Negotiate; Exchange Info, *etc.*
 - Transboundary EIA:
 - Notify
 - Precautionary Principle (e.g. Art. 12 ZAMCOM)
 - Precautionary Principle:
 - Transboundary EIA
 - Standards of Due Diligence / Risk of Trans. Harm
 - Ecosystems Approach



Prevention: Procedural Rules

- Duty to Co-operate (Art. 8 UN Conv.)
- Duty to Notify:
 - Transboundary EIA:
 - Precautionary Principle
 - Ecosystems Approach
 - Joint Commissions
 - Due Diligence
- Duty to Consult / Negotiate in Good Faith:
 - Equitable Utilisation / Prevention of Trans. Harm
- Exchange of Information:
 - Joint Commissions
 - Due Diligence
- Duty to Warn
 - Floods; Pollution Incidents