

What does international law say about water allocation?



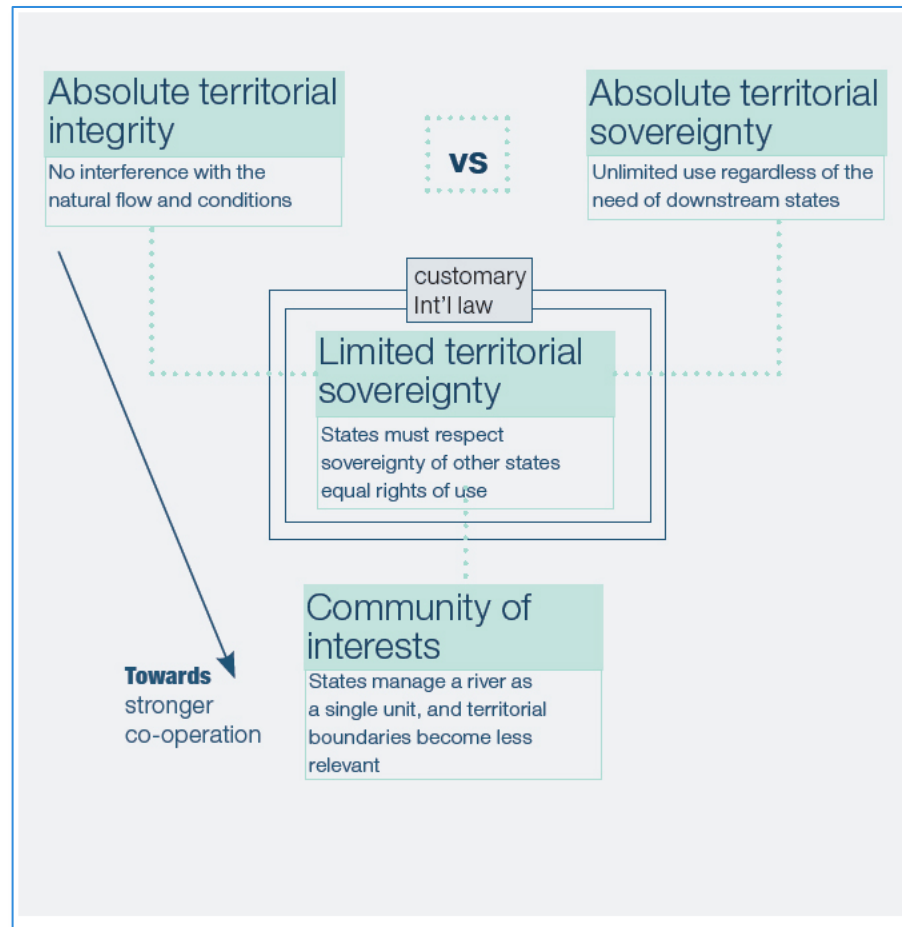
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Water Allocation Workshop, 16th October 2017, Geneva



Overview

- Four theories of allocation
 - Absolute territorial sovereignty
 - Absolute territorial integrity
 - Limited territorial sovereignty
 - Community of interests
- Convergence
 - Equitable and reasonable utilisation
 - No significant harm
- Which use takes priority?
- Dynamic nature of legal principles
- Key points

Four theories of allocation



Absolute Territorial Sovereignty

- Judson Harmon, US Attorney General, (US v Mexico) 1895

“The fact that the Rio Grande lacks sufficient water to permit its use by the inhabitants of both countries does not entitle Mexico to impose restrictions on the USA which would hamper the development of the latter’s territory or deprive its inhabitants of an advantage with which nature had endowed it and which is situated entirely within its territory. To admit such a principle would be completely contrary to the principle that USA exercises full sovereignty over its national territory”



By Knusser - Own work, Elevation data from SRTM, drainage basin from GTOPO [1], U.S. stream from the National Atlas [2], all other features from Vector Map., CC BY-SA 3.0, <https://commons.wikimedia.org/w/index.php?curid=11218868>

Absolute Territorial Integrity

- Right of lower riparians to insist on a continuation of the full flow of waters of natural quality from upper riparians
- Could potentially be a right of veto for downstream riparians on upstream developments
- The legal significance of absolute territorial sovereignty/ integrity

“Both doctrines are, in essence, factually myopic and legally ‘anarchic’: they ignore other states’ need for and reliance on the waters of an international watercourse, and they deny that sovereignty entails duties as well as rights”

McCaffrey 2001, p135

Limited Territorial Sovereignty

The River Meuse Dispute (Holland v Belgium, 1856)

“The Meuse being a river common both to Holland and to Belgium, it goes without saying that both parties are entitled to make the natural use of the stream, but at the same time, following general principles of law, each is bound to abstain from any action which might cause damage to the other. In other words, they cannot be allowed to make themselves masters of the water by diverting it to serve their own needs, whether for purpose or navigation or of irrigation”

(quoted in Smith 1931)

Limited Territorial Sovereignty

- **Rio Declaration on Environment and Development, 1992**

“States have, in accordance with the Charter of the United Nations and the principles of international law, the sovereign right to exploit their own resources pursuant to their own environmental and developmental policies, and the responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other States or of areas beyond the limits of natural jurisdiction.”

- **Stockholm Declaration on the Human Environment, 1971 (Principle 2)**

- **Reflection of Customary International Law**

Community of Interest

River Oder Case (UK v Poland), 1929

“This 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 user of the whole course of the river and the exclusion of any preferential privilege of any one riparian State in relation to the others.”

(Para 74)

Gabcikovo-Nagymaros Project (Hungary /Slovakia), 1997

“Modern development of international law has strengthened this principle [community of interest] for non-navigational uses of international watercourses as well, as evidenced by the adoption of the Convention of 21 May 1997 on the Law of the Non-Navigational Uses of International Watercourses by the United Nations General Assembly.”

(Para 85)

Community of Interest – a step further?

- Co-ownership?
 - E.g. Senegal River Basin Development Organisation (OMVS)
 - Guinea, Mali, Mauritania and Senegal
 - Joint ownership and operation of infrastructure
- Co-dependence?
 - Derived from natural unity of a river basin or aquifer system
 - Shared ‘bundle of interests’
 - Navigation, domestic, hydropower, agricultural, recreation, ecosystem
 - Falls short of requiring States to agree
 - Reflected in the principle of equity...

Convergence – Equity and reasonableness

- “Watercourse states shall in their respective territories utilise an international watercourse in an equitable and reasonable manner” (Art 5, UN Watercourses Convention)
- Widely recognized as customary international law
- Reflection of limited territorial sovereignty and (to some extent) community of interest
- What is equitable? Who gets what, when?

Which Use Takes Priority? UN Watercourses Convention

- Aim to achieve optimal and sustainable utilization of watercourse and benefits therefrom consistent with adequate protection of the watercourse (Art 5)
- Take into account all relevant factors and circumstances (Art 6)
 - Physical characteristics
 - Social and economic needs, including population dependence
 - Effects and efficiency of water uses
 - Availability of alternatives
- BUT, no use enjoys inherent priority (Art 10(1))
 - Special regard to vital human needs (Art 10)
 - Protect ecosystems of an international watercourse (Art 20)
 - Take appropriate measures to prevent significant harm (Art 7)

Which Use Takes Priority? UNECE Water Convention

- Parties take appropriate measures to prevent, control and reduce any transboundary impact (Art 2(1))
- In particular, take appropriate measures to (Art 2(2))
 - Ensure waters are used in an reasonable and equitable way
 - Prevent, control and reduce pollution
 - Aim towards ecologically sound and rational water management, conservation of water resources and environmental protection
 - Ensure conservation, and where necessary, restoration of ecosystems
- Be guided by (Art 2(5))
 - Polluter pays principle
 - Precautionary principle
 - Inter-generational equity

Dynamic Nature of Legal Principles

- Assessment of all relevant factors and circumstances changes with
 - Greater cooperation at a basin level
 - Joint legal and institutional arrangements
 - Data and information exchange
 - Joint monitoring
 - Maximize sharing of benefits
 - Advances in scientific tools, methods and methodologies
 - Better ways to value uses and benefits, and assess impacts
 - Developments in State practice
 - Right to water
 - Protection of ecosystems

Provisioning Services	Regulatory Services	Cultural Services
<ul style="list-style-type: none">• Water (quantity and quality) for consumptive use (for drinking, domestic use, and agriculture and industrial use)• Water for nonconsumptive use (for generating power and transport/navigation)• Aquatic organisms for food and medicines	<ul style="list-style-type: none">• Maintenance of water quality (natural filtration and water treatment)• Buffering of flood flows, erosion control through water/land interactions and flood control infrastructure	<ul style="list-style-type: none">• Recreation (river rafting, kayaking, hiking, and fishing as a sport)• Tourism (river viewing)• Existence values (personal satisfaction from free-flowing rivers)
Supporting Services		
<ul style="list-style-type: none">• Role in nutrient cycling (role in maintenance of floodplain fertility), primary production• Predator/prey relationships and ecosystem resilience		

Millennium Ecosystem Assessment, 2005

Key points

- Four theories of allocation have been proposed but international law only recognises limited territorial sovereignty and elements of the community of interest
- Limited territorial sovereignty finds expression in principle of equitable and reasonable utilisation
- Equitable and reasonable utilization central within both UN Watercourses Convention and UNECE Water Convention
 - Neither instrument provides hard and fast rules on who gets what, when?
 - Process by which States can reconcile competing interests, and where possible, maximise benefits from watercourse as a whole
- Interpretation of equitable and reasonable utilization changes over time, which
 - Requires cooperation
 - Interaction between science and law
 - Recognition of developments in state practice

Thanks!

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