

Chapter three

Source of international water law

Introduction

- Article 38 (1) of the statute of the ICJ lists different sources, which are generally accepted, as the sources of PIL: w/c is applicable to IWL
- (1). The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply:
 - (a) International conventions, whether general or particular, establishing rules expressly recognized by the contesting states;
 - (b) International custom, as evidence of a 'general practice' 'accepted as law';
 - (c) The general principles of law recognized by civilized nations;
 - (d) Subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.

substantive norms under IWL

- The law of international watercourses provides a framework for managing the sustainability of transboundary waters that cross national borders
- The 1997 United Nations Convention on the Law of the Non-Navigational Uses of International Watercourses is the only treaty governing shared freshwater resources that is of universal applicability.
- There are more than 400 agreements that govern international cooperation on transboundary watercourses.

- In addition to these treaties, rules of customary international law confer specific legal entitlements and impose obligations on watercourse states.
- The overarching rule of treaty and customary law is the principle of equitable and reasonable use, which is a right and duty on all watercourse states governing transboundary watercourses and requires states to take all appropriate measures not to cause significant harm.

- Substantive rules comprise legal norms that establish the rights and obligations of watercourse states.
- Under both customary international law and treaty law, states are entitled to equitable and reasonable use of shared water resources but states must also take all appropriate measures to prevent causing significant harm to other watercourse states.

- ✓ Equitable & reasonable utilization
- ✓ No Significant harm
- ✓ Protection of Ecosystems
- ✓ limited territorial sovereignty
- These substantive rules are operationalized through rules of procedure, such as the **exchange of information, prior notification, and consultations.**

The Principle of the Equitable and reasonable Utilization

- This principle provides that each State in an international drainage basin has a right under general international law to utilize the basin and an equal right to use the waters of that basin.
- Specifically, each State is entitled to a reasonable and equitable share in the beneficial uses of the waters of the drainage basin concerned.
- The principle of equitable utilisation requires consideration of the legitimate rights and interests of all users of such waters reflecting the emerging view that international water bodies should be managed by 'shared regulation' rather than by a single State.

- In 1929, the Permanent Court of Justice in a case concerning the International Commission on the River Oder concluded that riparian States shared a “natural community of interest” and, therefore, a “common legal right” in the equal use of both contiguous and successive rivers.
- The Helsinki Rules on the Use of Waters of International Rivers of 1966 drafted by the International Law Association embodied this concept and adopted the notion of equitable utilization.

- According to **Article IV** of the Rules, each State is entitled within its territory to a reasonable and equitable share in the beneficial uses of the waters of an international drainage basin.
- The Helsinki Rules have been superseded by the 1997 UN Convention on Non-navigational Uses of International Watercourses.
- **Article 5** of the UN Convention provides for Watercourse States in their respective territories to utilize an international watercourse in an equitable and reasonable manner.

- The UN Convention (Article 6) provide factors for determining equity:
- Geographic, hydrographic, hydrological, climatic, ecological and other factors of a natural character;
- The social and economic needs of the watercourse States concerned;
- The population dependent on the watercourse in each watercourse State;
- The effects of the use or uses of the watercourses in one watercourse State on other watercourse States;
- Existing and potential uses of the watercourse;
- Conservation, protection, development and economy of use of the water resources of the watercourse and the costs of measures taken to that effect;
- The availability of alternatives, of comparable value, to a particular planned or existing use.

- Berlin Rules which arose from a Berlin Conference that was held for the revision of the Helsinki and other International Law Association Rules on International Water Re-sources.
- **Art 12 (1)** of the Berlin Rules on Water Resources (2004), Basin States shall in their respective territories manage the waters of an international drainage basin in an equitable and reasonable manner having due regard for the obligation not to cause significant harm to other basin States.

- The Agreement on the Nile River Basin Cooperative Framework 2009 which provides for principles of development and protection the Nile River System establishes the principle of equitable and reasonable utilization of the waters of the Nile River System under **Article 4.**

Principle of no significant Harm

- The no-harm rule derives its normative foundation from *sic uteretur ut alienum non laedas*, or the good neighbourliness principle.
- Countries must avoid causing significant harm to others in utilization of shared water resources
- The type of harm is qualified by the term significant which is defined as the real impairment of a use, established by objective evidence.
- The “significant” threshold excludes mere inconveniences or minor disturbances that States are expected to tolerate, in conformity with the Legal rule of good neighbourliness”

- The obligation “not to cause significant harm” also derives from the theory of limited territorial sovereignty
- The theory of limited territorial sovereignty stipulates that all watercourse States have an equal right to the utilization of a shared watercourse and but they must also respect the sovereignty of other States to equal rights of use.
- The duty “not to cause significant harm” is a due diligence obligation of prevention, rather than an absolute prohibition on transboundary harm.

- **Article 7 of the UN Watercourses Convention** codifies and clarifies the scope of the duty “not to cause significant harm”
- **Art 5 of the Agreement on the Nile River Basin Cooperative Framework 2010** similarly provides for the principle of preventing the causing of significant harm to other States of the Nile River Basin.
- The obligation involves taking appropriate measures even where harm was resulting from natural causes such as floods, water-borne diseases, erosion, drought or desertification.

- This was confirmed by the ICJ decision in the **Pulp Mills on the River Uruguay Case** which included the need to conduct an EIA.

The Principle of the Protection and Preservation of Ecosystems of International Watercourses

- The principle of protection and preservation of ecosystems is recognized by International Water Conventions.
- **Articles 20 and 22 of the 1997 UN Watercourses Convention** recognize the principle of protection and preservation of ecosystems.

- **Article 20** requires States to ‘individually and, where appropriate, jointly, protect and preserve the ecosystems of international watercourses.’
- **Article 22** restricts the introduction of **alien species** into an international watercourse which may have effects detrimental to the ecosystems of the watercourse resulting in significant harm to other watercourse States.

- **Art 7 of the Agreement on the Nile River Basin Cooperative Framework 2010** provides for the principle of protection and conservation of ecosystems.
- The principle is that Nile Basin States take all appropriate measures, individually and, where appropriate, jointly, for the protection and conservation of the Nile River Basin and its ecosystems.
- The eco systems protection was also recognized by the ICJ in the **Gacikovo-Nagymaros Project Judgment of 25 Sept. 1997 para.53 (Hungary/Slovakia),**

- Substantive rules are contained in several agreements. The challenge is how to implement them. This requires developing basin specific rules for their implementation.