# International Rivers Law and Riparian/Co-Basin State Rights

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# INTRODUCTION

Water has never respected the political boundaries drawn by man. The mobility of this natural resource, coupled with the absolute dependence of peoples upon it, and its frequent scarcity make the application of international law rules and regulations on the utilization of waters flowing across political frontiers a vital necessity.

International rivers law - that body of laws governing the rights and obligations of states to use the waters of a river that either separates or passes through more than one state - has undergone significant change over the past one hundred and fifty years, reflecting underlying changes in the international economic, political, and technological orders.

In the nineteenth century, the primary function of international rivers was navigation. Accordingly, international rivers law reflected this concern, and focussed on particular international rivers and the rights of riparian states.[1] However, in the twentieth century, and with the rise and growing importance of different types of economic uses of water resources, international rivers law has had to expand in scope to reflect the new perception of water as a multiple-use developmental resource. The law now focusses on the entire river or drainage basin and the rights of co-basin states.

Furthermore, the basic framework of riparian/co-basin state relations has also been altered. Changes in economic and political orders have increased the pressure on water resources by a large number of independent state actors. The result has been that nineteenth century absolute notions of inviolable sovereign rights have gradually given way to the acceptance of the need for

restrictions on sovereignty over shared resources. Hence today, the concept of limited territorial sovereignty and equitable utilization provide the basic framework of co-basin state relations.

It is the purpose of this paper to explore some of the more salient features of the broad international legal concept of riparian or co-basin state rights which has emerged to regulate the economic activities of sovereign states and their nationals in international river basins.[2] We will begin by tracing the evolution of international river law in the nineteenth and twentieth centuries, and then go on to examine the concepts that prevail today and as they are articulated in the 1966 Helsinki Rules on the Uses of the Waters of International Rivers.

## Evolution of the Conceptual Framework of International Rivers Law

Throughout history, the arbitrary political division of a unitary drainage basin has lead to international problems regarding the interests of each state located within the basin, and the manner in which the competing or conflicting interests of such states should be resolved. In an attempt to institutionalize the permissibility of riparians to use the waters of international rivers, there have emerged four main (and conflicting) theories of drainage basin rights:

1) absolute territorial sovereignty
2) territorial integrity
3) limited territorial sovereignty
4) the community of water states (or, co-riparian states in the waters of an international river)

These theories - the first two being late nineteenth century and early twentieth century constructs, the latter two issuing from the post 1911 period[3] - are very instructive, not only because they illuminate the prevailing notions regarding the rights of riparian states in international rivers, but also because they reflect the predominant perception on state sovereignty, in general, within the legal framework.

The first of these theories absolute territorial sovereignty, found its expression in the "Harmon Doctrine" of 1895, promulgated in light of a dispute between the United States and Mexico over the diversion and use of the Rio Grande. The doctrine typified an intransigent affirmation of sovereignty, according to which every state could apply to the water resources within its territory any measures in pursuit of its own interests, irrespective of the harmful consequences brought to bear beyond its frontiers.[4] Thus, as in the Rio Grande dispute, an upper riparian (the United States) had the right to use

or alter the flow of an international river in its territory without regard to the needs of the lower riparian (Mexico).

The second absolute notion of rights - territorial integrity - logically issued from the natural flow doctrine of pre-twentieth century Europe.[5] The latter expressed the principle that water should be allowed to continue to flow uninterrupted. In practice, therefore, a state had the right to demand the continual natural flow of waters from upstream countries, but could not itself restrict the flow of the river to the downstream territories. Hence, territorial integrity operated to the sole advantage of the lower riparian, conferring upon it the absolute right to receive the continued unaltered flow of the river, and enjoining it with no obligations to other states.

Needless to say, both of these concepts expose the absence of notions of reciprocal rights and duties under international rivers law prior to the twentieth century. Moreover, they render inoperable the simultaneous development of co-basin states, with regard to water usage.

In an attempt to transcend the shortcomings of these two concepts and account for the expanding uses of international waters within a more 'complex' international political and economic environment, the Institute of International Law, at its Madrid Convention of 1911, on, "International Regulation Regarding the Uses of International Watercourses for Purposes other than Navigation"[6] enunciated a new principle of limited territorial sovereignty over international rivers of a contiguous variety, and advocated the institutionalization of the concept of equitable utilization.

Today, the limited territorial sovereignty principle predominates, and governs the rights of riparian states in international rivers. However, before

examining this principle and the adjunct concept of equitable utilization, we must digress briefly to elucidate another major twentieth century development - the adoption of the drainage basin approach as the basis for studying non-navigational uses of international watercourses.

It was recognized that as rivers do not respect national/political boundaries, but flow freely where they will, given the laws of nature, and because of the increasing importance of non-navigational uses of international waters, the inclusion of the entire drainage basin in planning development was a more 'rational' approach.

According to the International Law Association, a drainage basin is,

> "...an area within the territories of two or more States in which all the streams of flowing surface water, both natural and artificial, drain a common watershed terminating in a common outlet or common outlets either to the sea or to a lake or to some inland place from which there is no apparent outlet to a sea."[6]

And the advantages of employing the term drainage basin is that it "...emphasizes the unitary nature of an international watercourse as a shared common resource while the use of a concept such as boundary rivers [7] emphasizes the fragmentation of the natural unity of a fresh water system as a consequence of the existence of political boundaries".[8] Hence, the conceptual base for the body of general international law principles and rules applicable to international watercourses or drainage basins stem from the geographical principle of the coherence of the basin or system of waters [plus the legal principle: sic utere tuo ut alienum non laedas - 'one must so use his own as not to do injury to another'[9]].

Although the basin approach is an improvement over its predecessor, it

remains somewhat inadequate in that it does not recognize that as long as national boundaries survive, the economy of an international drainage basin cannot be treated as a unit in isolation from the national economies of which it is necessarily a part. A theory of international water law, in this day and age, must take cognizance of the fundamental fact that the problems of the utilization of water resources involve economic and political factors that transcend the limits of drainage basins.

Let us now return to our discussion of the competing theories of basin rights.

The nineteenth century absolute notions of sovereignty gave way, in the twentieth century, to the recognition of the reciprocal sovereign rights of the states that have an interest in the same international water resource. The theory of limited territorial sovereignty was elaborated upon by the Institute of International Law in its 1961 Salzburg Declaration on, "...the Use of International Non-Maritime Water",[10] in which it states that the right of use of waters flowing across or through territory is limited by the right of use of other states with the same river or watershed. The corollaries emanating from this theory are twofold:

1) A state has a duty not to cause 'substantial' damage to other states managing the same resource and,
2) disagreements regarding the extent of rights of use must be settled on the basis of 'equity', taking into consideration the needs of the states in question, as well as other factors.

The first of these corollaries falls under the rubric of the Law of Nations as it applies to state territory. In his, International Law: A Treatise, the eminent scholar and lawyer, L.Oppenheim, writes that,

> "...the flow of not-national, boundary, and international rivers[11] is not within the arbitrary power of one of the riparian States, for it is a rule of International Law that no State is allowed to alter the natural conditions of its own territory to the disadvantage of the natural conditions of the territory of a neighbouring State. For this reason a State is not only forbidden to stop or divert the flow of a river which runs from its own to a neighbouring State, but likewise to make such use of the water of the river as either causes danger to the neighbouring State or prevents it from making proper use of the flow of the river on its part."[12]

H.Lauterpacht stresses that International Law does not treat property as an absolute right, but rather, as, "...a bundle of rights capable of modification, division, and adjustment".[13] And furthermore, the territorial (property) relations of states are analogous to the property relations of individuals. Hence, when discussing the territorial relations of states, one must not identify the exercise of sovereign rights over and within a territory with the notion of an absolute and indivisible territorial ownership. To reiterate, sovereignty is, according to International Law, divisible and modifiable.

From the second corollary of the limited sovereignty theory emerged the doctrine and guiding principle of contemporary international water law - the equitable utilization of international water resources.[14] Within the framework of this concept, riparians are treated on the basis of mutuality. Furthermore, because both depend on the river and its resources, International Law advocates a regime of reciprocal obligations with respect to an equitable apportionment of the waters and its benefits.[15]

Equitable utilization is concerned primarily with three issues:

1) an examination of the social and economic need of the co-basin states,
2) the distribution of waters among the co-basin states such that their basic needs can be fulfilled to the greatest extent possible, and
3) the distribution of the waters in such a way that the maximum benefit

> to each state would be achieved concomitant with the minimum detriment to each.[16]

Equitable utilization is closely connected with the theory of limited territorial sovereignty in that both are designed to permit a riparian to use as much water as it needs consistent with the requirements of other riparians.

> "...where a river flows between or through two or more states...each has a vital interest in the waters and neither state has an absolute right to the waters; on the contrary, in the exercise of its sovereignty it must consider the needs of the neighbouring states."[17]

Hence, implicit in both these concepts is the need for some compromise of interest by all the states concerned.

It should be noted, however, that although the underlying principle of equitable utilization is equality of right, the latter does not imply the equal division of waters. On the contrary, it should "...be construed to mean that riparian States have an equal right to use the waters of such waterway in accordance with their needs."[18] And because needs are often conflicting, especially in situations of relative water scarcity, rules are required to facilitate the apportionment of the resource.

Before turning to an examination of the Helsinki Rules on the Uses of the Waters of International Rivers, we must first complete our conceptual framework by briefly mentioning the fourth theory of drainage basin rights.

The community of water states theory is based on the concept of maximum utilization and optimum economic development of an entire river basin regardless of political regimes or state borders. "No one state can dispose of the waters of international rivers without the positive cooperation of the other states located within the river basin."[19] Although this theory is a

logical extension of limited territorial sovereignty and equitable utilization, it has not yet been fully accepted as it implicitly assumes harmoniuos relations and a recognized and mutually agreed upon community of interests between co-basin states. The theory remains, therefore, aspirational in nature.

## The Helsinki Rules on the Uses of the Waters of International Rivers

In 1966, the International Law Association formulated the most comprehensive statement to date of rules on riparian rights, and procedures for the prevention and settlement of disputes. Implicit in the Helsinki Declaration is the general acceptance that existing rules of international law do govern the uses of the waters of international drainage basins, and that the basin as an integrated unit should be taken as the object of consideration when dealing with problems related to usage. Let us turn to an examination of a number of these rules and their implications for co-basin states.[20]

Article IV of the Declaration stipulates that: "Each basin state is entitled, within its territory, to a reasonable and equitable share in the beneficial uses of the waters of an international drainage basin".[21] However, as already mentioned, equality of right does not mean identical share in the use of the waters; hence, certain factors - which are listed in Article V - have to be weighed in determining what is equitable. Moreover, the waters have to be put to 'beneficial' use; in other words, uses which are economically and socially valuable. And once it has been determined that a use is beneficial, it is then necessary to determine:

1) whether the use interferes with a beneficial use in another state,
2) the extent of the interference, if any, with the conflicting use,
3) the extent to which the uses can be reconciled, and if they can't, which uses will prevail.[22]

Among those factors requiring consideration before determining water shares are the following: the geography, hydrology, and climate of the basin; past utilization of waters; and the economic and social needs of each basin state.[23]

Unfortunately, what is absent from the above articles is any explicit mention of the illegality of the diversion of waters beyond the geographical limits of a drainage basin. If, in fact, the drainage basin is recognized to be an indivisible hydrologic unit and is taken as the object of consideration regarding riparian rights to international waters, then it would logically follow that areas lying outside the natural boundaries of the basin itself, although within the political borders of the co-basin state, should not be taken into account when planning the rational development of the waters of that basin.

This glaring omission from the Declaration can undoubtedly lead to future disputes resulting from conflicting interpretations of the articles in question. In the absence of any statement regarding the illegal character of such a diversion, a state could easily justify, for example, the building of pumps and pipeline systems from within the basin to areas beyond its limits.[24] If the basin approach is to "hold water", it must be made explicit that 'beneficial' uses refer necessarily to those initiated and implemented within the geographical limits of the drainage basin.

Another shortcoming - of article V specifically - is that while the population dependent upon the waters of the basin in each basin state is included as a relevant factor to be considered when determining reasonable and equitable shares, the Declaration fails to distinguish between areas already populated and dependent on the waters of the basin and new areas to be settled in the future and requiring access to the basin waters.[25] This important distinction should be made explicit, and then rules should provide guidance as to which of the two areas has priority of use.

Among the other rules is the stipulation that no use or category of uses has preference over any other, but rather, "a drainage basin must be examined on an individual basis and a determination made as to which uses are more important".[26] And, a basin cannot be denied the present 'reasonable' use of basin waters because of plans of a co-basin state for future use of those waters.[27]

The final article - Article VIII - in the first chapter of the Helsinki Rules states that an existing use is protected only insofar as the factors justifying its continued existence are not outweighed by other factors encouraging the need for its modification or termination. Moreover, "...a use will not be deemed an existing use if at the time of becoming operational it is incompatible with an already existing reasonable use".[28]

This last statement is a particularly interesting one to ponder, especially in light of the riparian states of the Jordan River and the Israeli occupation of the West Bank in 1967. While this specific issue will be explored more fully in another paper, we must here point out that Article VIII fails to state what appears to be a logical consequence of all the rules in the preceding articles: that a use will not be deemed an existing use if at the time of becoming operational, it constitutes a breach of international law.

Although the Helsinki Rules provide a framework within which to examine the rights and obligations of co-basin states, they are frought with limitations and ambiguities. This, one could argue, is due in part to the fact that the rules have not been sufficiently developed nor have their implications been adequately analyzed.

Insofar as the equitable utilization framework is concerned, its positive feature is that it allows for flexibility in which many relevant factors in a particular basin can be considered. However, this same flexibility can lead to major problems of ambiguity. In fact, it appears that it is precisely the flexibility and ambiguity of this principle, concomitant with its neglect of the broader inter-state issues, that limit its utility in resolving international disputes.

An examination of the Helsinki procedures for the prevention and resolution of disputes, corroborates the above assertion, as well. Firstly, the procedures are of a recommendatory, rather than of a mandatory nature. [They advocate resolution through exchanges of information, negotiations, the formation of joint agencies, third party adjudication, mediation, conciliation, etcetera.] A basin state 'should' serve prior notice to a co-basin state of plans for water usage, but there is no obligation to receive prior consent. Co-basin states are 'required' to consult and negotiate for a 'reasonable' time only. There is no obligation to accept any reasonable terms offered, nor is there any obligation to reach an agreement.

In sum, the rules remain both vague, and couched in language that lends itself to manipulation by the states concerned, to suit their own particular perceptions and national interests. And rights and obligations are so limited, that there exists a "wide latitude for actions of individual sovereign states". [29] Hence, what had initially inspired the formulation of the Helsinki Declaration - that is, the systematization and application of rules and procedures on the uses of the waters of international rivers - has been fundamentally undermined.

## CONCLUSION

From the foregoing analysis, we can conclude that one of the major problems with international rivers law is that it has failed to confront two basic issues.

Firstly, it has not recognized that today, the sovereign state and its national interests dominate all aspects of international affairs. Because of this 'phenomenon', it becomes difficult to sharply constrain state sovereignty, thus rendering the bindingness of international rivers law inoperative. A 'global' legal framework for co-basin state relations does not appear to be applicable in this day and age. Perhaps then, the development of a legal framework should occur at the basin level, with basin-specific laws and institutions.

Secondly, international rivers law has not dealt with the fact that many of the intitial problems of water resource management of an international hydrosystem stem from the prevalence of adversarial relations between the co-basin states. Hence, for there to be rational administration of an integrated basin development program, or a series of related projects, there must first be some degree of political accord among the states. Only then does a carefully-formulated legal regime, conducive to sustained action, become feasible and operative.

## Endnotes

1) For a discussion of the international river navigation regime which emerged from the 1815 Congress of Vienna, see Vitanyi,B.: The International Regime of River Navigation, Alphen aan den Rijn, Netherlands, Sijthoff & Noordhoff Publishers, 1979.

2) This topic is an exceedingly vast one. In order to make the task of writing this paper more manageable, I have chosen not to deal with the riparian/co-basin issues of pollution, navigation, and timber floating.

3) The first convention on international regulation regarding non-navigational uses of international waterways was held by the Institute of International Law in Madrid in 1911. The Madrid Declaration enunciated, for the first time, the notion of limited sovereignty. For the essential features of the Declaration see, D.Caponera, The Law of International Water Resources, pp.274-275.

4) See J.Lipper, "Equitable Utilization", in Garretson, A.H. et.al., The Law of International Drainage Basins, p.20.

5) See Ludwik Teclaff, The River Basin in History and Law, p.77.

6) International Law Association, Report of the Fifty-Second Conference, p.480.

7) A boundary river is, as the term implies, one that acts as a boundary separating two states. A succesive river is one that extends from within the territory of one state into the territory of another. These terms apply, as well, to situations involving more than two states. It should be clear that most upstream states would favour using the definition of international river (either boundary or succesive) as the basis for studying non-navigational uses of international watercourses, while downstream states would favour the basin approach.

8) S.M. Schwebel, First Report on the Law of the Non-Navigational Uses of International Watercourses, p.18.

9) United Nations Report of the Panel of Experts, Management of International Water Resources, p.25.

10) See, Institut de Droit International, Annuaire de l'Institut de Droit International - Session de Salzbourg, 1961.

11) Not-national rivers run through several states, and are, therefore, owned by more than one state. Boundary rivers separate two states. And international rivers are navigable from the open sea, and at the same time, they either separate or pass through several states.

12) H. Lauterpacht, Oppenheim's International Law, vol.1, pp.474-475.

13) E. Lauterpacht, ed., International Law: Collected Papers of Hersch Lauterpacht, vol.1, p.377.

14) See the section below on the Helsinki Rules, for an elaboration of the propositions underlying this most central concept.

15) D.P. O'Connell, International Law, vol.1, p.617.

16) See supra note 4, p.45.

17) ibid., p.44.

18) ibid., p.33.

19) Michael L. Michael, "The Allocation of Waters of International Rivers", Natural Resources Lawyer, vol.VII, no.1, winter 1974, p.55.

20) The rules I have chosen to dwell upon in this paper, are those which lend themselves to very interesting insights especially when analyzed with respect to the riparian states of the Jordan River, the subject of the next paper.

21) See supra note 6, p.486.

22) ibid., pp.488-489.

23) ibid., p.488.

24) Had the Zionist dream of creating a state as far north as the Litani River come to fruition, the omission from the Helsinki Declaration mentioned above, would have made it legal for Israel to lay down pipelines from the Litani to irrigate the Negev Desert, clearly outside the river basin.

25) See supra note 6, Article V 2f, p.488.

26) ibid., Article VI, p.491.

27) ibid., Article VII, p.492.

28) ibid., Article VIII, p.493.

29) Kevin Henry, The Development and Regulation of International River Basins under International Law, p.26.

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