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The Convention on the Law of the Non-Navigational Uses of International Watercourses 1977: A Way towards Regional Cooperation on Trans-boundary Water Disputes

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ABSTRACT

The paper presents perspectives from Asian subcontinent to address the issue of “Transboundary Water Disputes” which are set to increase in near future due to decades of bad water management, overuse, population stress and climate change etc. The shared water resource are mostly governed by specific multilateral agreements / treaties etc entered into by concerned states. However, these agreements do not provide for concrete enforcement mechanism or default liabilities of non compliant state. Furthermore the agreements and treatise are often influenced by asymmetric political power connotations. When it comes to using a water resource, each riparian state wants to build dams, reservoir to achieve maximum utilization from water but ignores its adverse affect on other riparian states as well as the water resource itself. Absence of a dedicated regional institution for settlement of transboundary water dispute is to be noted too.

The paper then explores and discuss key provisions of The Convention On The Law Of The Non-Navigational Uses Of International Watercourses 1977, which is the only global instrument which codifies modern law principles for settling dispute and sharing of an International Shared Watercourse. It also calls for harmonizing existing and future water agreements with the convention to make them more comprehensive by incorporating principles and measures such as equitable and reasonable utilization of water, obligation to not to cause significant harm, fact finding commissions and establishing a joint institution for dispute settlement.

It is argued in the end that the convention ratified or otherwise can provide a way forward towards more peaceful settlement of transboundary water disputes while promoting spirit of cooperation and community of interest among nations with respect to optimal utilization and preservation of shared water resource. The same is necessary of present time and future generations.

Keywords : transboundary water dispute, water dispute settlement, convention on the law

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of the non-navigational uses of international watercourses 1977, equitable and reasonable utilization, principles of allocating shared water, hydro politics, hydro-cooperation

I. INTRODUCTION

Freshwater is a precious commodity and its possession bestows power rendering it as a strategic commodity in geopolitical context. But what happens when there is a shortage of this precious commodity and what happens if the same is being shared between more than one nations. The Middle East, North Africa and South Asia are all projected to experience water shortages over the coming years because of decades of bad management and overuse. By the year 2040, the situation may become worse when whole of Asia, a region shared by world's two most populated countries will face extreme level of water stress². One of them being India which has already fallen into the high water stress category³. The end result of it all is the inevitable water crisis which gives way to increasing water conflicts and disputes between countries, within countries or communities over access to the water resources.

(A) *Transboundary Water Disputes*

It is important to understand that water as a global common resource often does not respect national boundaries hence the term 'Trans-boundary Waters' which means any surface or ground waters which are located across boundaries of two or more States⁴. Approximately 40 percent of the world's population lives in river and lake basins that are shared between two or more countries. There exists 263 transboundary lake and river basins which cover nearly one half of the Earth's land surface and account for an estimated 60 per cent of global freshwater flow.⁵ In Aisan subcontinent, India's trans-boundary riparian policies affect four countries - Pakistan, Nepal, Bhutan and Bangladesh - on three river systems - the Indus, the Ganga and the Brahmaputra-Mehgna. China's riparian policies affect nine countries to the south - Pakistan, India, Nepal, Bangladesh, Myanmar, Laos, Thailand, Cambodia and Vietnam - on five river systems - the Indus, the Ganga, the Brahmaputra, the Salween and the Mekong. *Thus the*

² Water stress occurs when the demand for water exceeds the available amount during a certain period or when poor quality restricts its use. Water stress causes deterioration of fresh water resources in terms of quantity and quality; see "Understanding Water Scarcity: Definitions And Measurements", *Global Water Forum* (7th May, 2012), available at: <http://www.globalwaterforum.org/2012/05/07/understanding-water-scarcity-definitions-and-measurements/>

³ TianyiLuo and Robert Young (et al.) "*Aqueduct Projected Water Stress Rankings*." Washington, DC: World Resources Institute, (2015) , available at :<http://www.wri.org/publication/aqueduct-projected-water-stress-country-rankings>;<http://www.wri.org/resources/data-sets/aqueduct-projected-water-stress-country-rankings>

⁴ Article 1, Convention on the Protection and Use of Trans-boundary Watercourses and International Lakes, 1992.

⁵ See UN Water for Life Decade , Transboundary Waters ; available at : www.un.org/waterforlifedecade.

population, income, and livelihood of millions of people worldwide are interlinked and interdependent.

Where a river passes through several states, each state owns that part of the river which runs through its territory, these are called riparian nations- those nations across which, or along which, a river flows and only they have the legal right, apart from an agreement, to use the water of a river. The upper-riparian nations (out of which water flows) often claim “Absolute Territorial Sovereignty” over waters, typically claiming the right to do whatever they choose with the water regardless of its effect on other riparian nations.. Downstream riparian nations (into which river flows) are affected due to this. These states also claim their right to the “equitable and reasonable utilization” of the transboundary river. They desire a more just approach to allocate the waters and often advocate the principle of “no significant harm” desiring water flow upriver to be preserved in its near-natural state until it reaches their downriver territory.⁶ It is to be understood that management of transboundary waters/ rivers does not take place in a vacuum but rather in a complex political and economic framework. Hence, clash of interest causes friction between the states leading to water disputes

(B) Hydro-politics and transboundary water as component of National Security

Water along with food and energy now forms part of the 'New Security Agenda'⁷ and term national security is moving beyond territorial and military framework⁸. Just like oil, it is becoming a source of future conflicts between upper riparian and lower riparian states in a region. It is used as a leverage to exert pressure over neighboring countries with common water sources. There are instances where upstream nations threaten to cut off or cut off downstream flow as pressure tactics. The case in point is Indus river basin between India Pakistan. India, when decided to go ahead with its pending hydro-schemes and projects on the Indus's upper reaches which falls in its territory, insisted that flow will never be affected. This definitely brought Pakistan under pressure which in turn approached the World Bank under the Indus water treaty.

The exploding population, looming water crisis, poor water quality and management, or

⁶ Aletta Brady , “Mid river States: An Overlooked Perspective in the Nile River Basin” *International Water Law Project* (26th September 2016), available at <http://www.internationalwaterlaw.org/blog/category/transboundary-rivers/>

⁷ Institute for Defense Studies and Analyses (IDSA) Task Force Report “*Water Security for India: The External Dynamics*” (2010), p.18.

⁸ In 2013 UN Water Analytical Brief - "Water Security and the Global Water Agenda", it was observed that water is in itself a security risk; and acknowledging water insecurity could act as a preventative measure for regional conflicts and tensions. The report said water security could contribute to achieving increased regional peace and security in the long term. See , Harriet Baigas“ *Water Security & the Global Water Agenda*” A UN-Water Analytical Brief, United Nations University, (2013), p.1

increasing risk of floods /droughts due to climate change might cause regional and sub-regional instability and tensions in respect to a transboundary water resource and will inevitably increase water disputes in future.

Presently the trans-boundary water disputes are generally resolved using negotiations, discussions, bipartite agreements and treaties. An analysis of legal architecture of transboundary rivers show that Asia is home to 57 transboundary river basins. Out of this 25 river basins are covered by some sort of wide or partial agreements for their use, management or allocation. However there are 32 river basins which are still a not covered by any basin agreement⁹. It is important for policymakers to be more aware of possible future conflicts and identify ways to mitigate and avoid the dispute through international water law and international and regional treatise. The paper explores the possible way forward in mitigating future water disputes by adopting *The Convention on the Law of the Non-Navigational Uses of International water courses 1977*.¹⁰, which has now codified the contemporary principles of allocation of shared water resources between two or more states.

II. THE CONVENTION ON THE LAW OF THE NON-NAVIGATIONAL USES OF INTERNATIONAL WATERCOURSES 1977

It was adopted by the United Nations General Assembly on 21 May 1997 for use and conservation of all waters that cross international boundaries, including both surface and groundwater. From the time of its drafting, the Convention took more than 17 years to enter into force on 17 August 2014. It was designed to serve as a framework for more specific bilateral and regional agreements relating to the use, management and preservation of transboundary water resources¹¹. It was also designed to help prevent and resolve conflicts over international water resources and to promote sustainable development. It addresses issues such as flood control, water quality, water pollution and puts an obligation upon states to take measures to protect, preserve, and manage international watercourses and in case of any damage also provides for remedy and compensation.

⁹ United Nations Environment Programme and others, “*Atlas of International Freshwater Agreements*”, p. 51-76. Available at <http://www.transboundarywaters.orst.edu/publications/atlas/>; also cited in UN Watercourses Convention global initiative, online user guide, “The Legal Architecture for Transboundary Waters”. <http://www.unwatercoursesconvention.org/importance/the-unwc-global-initiative/> (accessed on 15th April 2017).

¹⁰ Convention on the Law of the Non-Navigational Uses of International Watercourses (hereinafter UN Water convention), adopted by the General Assembly of the United Nations on (21st May 1997). Entered into force on: (17th August 2014) , See General Assembly resolution 51/229, annex, Official Records of the General Assembly, Fifty-first Session, and Supplement No. 49 (A/51/49). available at : http://legal.un.org/ilc/texts/instruments/english/conventions/8_3_1997.pdf

¹¹ Article 3 of the UN Convention, *supra* note 9

The UN convention is the only global instrument which codifies modern law principles for settling disputes and sharing of an International Shared Watercourse. It has following principles incorporated, which are also “ Pillars “ of international law on shared water resources:

(a) Substantive principles :

- Principle of equitable and reasonable utilization
- Obligation to not to cause significant harm
- Duty to cooperate

(b) Procedural principles:

- Duty to exchange information
- Duty to notify
- Principle of Consultation and negotiate.

(A) *Principle of equitable and reasonable utilization and participation (Article 5 and Article 6)*

Article 5 states that basin states shall utilize an international watercourse in an “equitable and reasonable manner” in their respective territories. This duty is further supplemented by putting an obligation on them to use and develop the watercourse in such a way so that they can “optimally and sustainably utilize” it while ensuring adequate protection of the watercourse. Thus the convention lays down the right of the states to utilize the watercourse as well as duty of the states to cooperate and participate in development and protection of the international watercourse. It aims to reconcile conflicting interests across international borders, so as to ‘provide the maximum benefit to each basin state from the uses of the waters with the minimum detriment to each.’¹²

The principle have two main elements:

- First it seeks to determine the “lawfulness” of the proposed use of water, by establishing the objective (which should be equitable and reasonable) sought to be achieved by the states.

¹² The concept of limited territorial sovereignty is strongly reflected in the principle of equitable and reasonable utilization , see Article IV of the Helsinki Rules on the Uses of the Waters of International Rivers, adopted by the International Law Association at the 52nd Conference, Helsinki, Finland, August 1966, reprinted in S Bogdanovic, *International Law of Water Resources : Contribution of the International Law Association (1954-2000)* (Kluwer Law International 2001) at 89.

- Secondly, to determine the reasonableness of use i.e. whether use qualifies as “equitable and reasonable “, and to balance the needs of each state, it takes into consideration various prescribed factors like – geography, hydrology, climate, or historical, social, economic elements in relation with a basin state, dependent population, effect of particular use on the watercourse and feasible alternatives, whether any measures are taken to preserve or develop the watercourse etc.¹³ (as laid in Article 6).

(B) Principle to “Not to Cause Significant Harm”

Article 7 “Obligation not to cause significant harm,” requires that member states “in utilizing an international watercourse in their territories take all appropriate measures to prevent the causing of significant harm to other watercourse states” and compensate sharing states for any such harm¹⁴.

According to Stephen McCaffrey (special rapporteur of ILC draft committee) this is “the most controversial provision” of the Convention, with conflict stemming from the fact that a state may have legitimate uses for a watercourse in its nation that can negatively impact other nations.¹⁵ For example: upstream State A has not significantly developed its water resources because of its mountainous terrain. The topography of the downstream states on the watercourse, B and C, is flatter, and they have used the watercourse extensively for irrigation for centuries, if not millennia. State A now wishes to develop its water resources for hydroelectric and agricultural purposes. States B and C cry foul, on the ground that this would significantly harm their established uses.¹⁶

(C) Duty to Cooperate and Duty to Exchange Information

The duty to cooperate in resolving disputes, or in utilization of waters is reflected in Article 8 of the convention which states that “*Watercourse States shall cooperate on the basis of sovereign equality, territorial integrity, mutual benefit and good faith in order to attain optimal utilization and adequate protection of an international watercourse.*”¹⁷

Article 9 talks about duty to exchange information of readily available data and information on the condition of the watercourse regularly. This helps in enhancing mutual cooperation.

¹³ Article 6 , UN Convention , *supra* note 9

¹⁴ Article 7 , UN Convention, *supra* note 9

¹⁵ Stephen McCaffrey “*The UN Convention on the Law of the Non-Navigational Uses of International Watercourses: prospects and pitfalls.*” World Bank Technical Paper (1998), p.19-21; available at :https://www.unece.org/fileadmin/dam/env/water/cwc/legal/unconvention_mccaffrey.pdf also see “*Introductory Note On The UN Convention on the Law of the Non-Navigational Uses of International Watercourses*” available at : <http://legal.un.org/avl/ha/clnuiw/clnuiw.html>

¹⁶ *Ibid.*

¹⁷ Article 8 , UN Convention, *supra* note 9

(D) Principles of Notification, Consultation and Negotiation

These principles are found under Article 11 to 18 of convention. Accordingly every riparian state in an international watercourse is entitled to prior notice, consultation and negotiation in cases where the proposed use by another riparian of a shared watercourse may cause serious harm to its rights or interest. However, naturally, most upstream countries often oppose this principle.

The aim of these procedural rules are to inform about the proposed project in detail, notify, and respond to the possible effect of such use. The core of these procedural underpinnings is to encourage the transparency of a proposed project and to ensure that it is for maximizing the benefits with no significant adverse effects to the other watercourse states. The ICJ has explicitly supported the view in numerous cases that states are under the obligation to consult and negotiate in the event of any conflict whatsoever in undertaking any project on an International Water Course.¹⁸

(E) Dispute Settlement and Compensation for Transboundary Harm

Article 33 of the Convention offers mechanisms for dispute settlement between watercourse States, including negotiation, mediation, conciliation. It calls to establish Joint Watercourse Institutions as a forum for dispute settlement by the states. Submission of the dispute can also be made to an impartial fact finding commission (with one member nominated by each concerned party and one member from different nationality) in case negotiations fail. It also stresses upon adopting arbitration or conciliation to reach an agreement. Where all above alternatives are exhausted or where such intuition is not established, parties can submit their dispute to the International Court of Justice by adjudication.

Article 32 gives locus standi to people natural or juridical, who have suffered or are under a serious threat of suffering significant transboundary harm as a result of activities related to an international watercourse. It states that the watercourse State shall not discriminate on the basis of nationality or residence or place where the injury occurred, in granting to such people, in accordance with its legal system, access to judicial or other procedures, or a right to claim compensation or other relief in respect of significant harm caused by such activities carried on in its territory.

¹⁸ *North Sea Continental Shelf Cases* 1969 ICJ 1, *Fisheries Jurisdiction* 1974 ICJ Rep 3 and *Gavcikovo-Nagymaros case* 1997 ICJ Rep 7.

III. CONCLUSION: FROM HYDRO POLITICS TO HYDRO COOPERATION

There is an optimistic opinion that water, by its very nature, tends to trigger cooperation rather than conflict¹⁹. Where earlier it was feared that it would trigger conflicts and wars, now it is seen as an opportunity to bring out peace and cooperation among the world community with respect to water resources. A recent report "Water Cooperation for a Secure World" published by Strategic Foresight Group concludes that active water cooperation between countries reduces the risk of water disputes. This conclusion is reached after examining trans-boundary water relations in over 200 shared river basins in 148 countries.²⁰ Despite the complexity of the problems, water disputes can be handled diplomatically. Nations value regional, bilateral and multilateral agreements because they make international relations over water more stable and predictable. However, what is important now is the peaceful settlement of the emerging water disputes which are increasing internationally as well as at national level due to the looming water crisis, climate change and population boom.

There is a consensus among experts that international watercourse agreements between states need to be more concrete, setting out measures to enforce treaties and incorporating comprehensive dispute resolution mechanisms. The Convention on the Law of the Non-Navigational Uses of International Watercourses can serve as a potential instrument to realize this need.

The convention promotes entering into multilateral agreements with respect to shared water resources by harmonizing such agreements with the basic principles of the present Convention. It serves as a model blueprint of provisions which can be adopted by states to reach at a more comprehensive and efficient agreement/treaty in accordance with modern principles on shared watercourse. It sheds the age-old principles of absolute riparian rights and promotes more inclusive and peaceful settlement of water disputes based upon spirit of cooperation among states. It highlights the need to approach water resources as a component of "community" and a part of "human security".

Unfortunately the treaty has been ratified by only 36 countries with India, China, Pakistan, Bangladesh, Nepal, Bhutan etc being non-signatory to this convention, remain outside its scope²¹. The insufficient attention that was paid to the Convention following its adoption have

¹⁹ Peter H Gleick "Water and Conflict: Fresh Water Resources and International Security." International Security vol-18 (no.1) (1993) p.79-112

²⁰ Strategic Foresight Group Report "Water Cooperation for a Secure World" (2013) ;

available at :http://www.strategicforesight.com/publication_pdf/20795water-cooperature-sm.pdf

²¹ Current status of United Nation's Convention on the Law of the Non-Navigational Uses of International Watercourses and its Entry into Force,

contributed to misunderstanding and low levels of awareness among states and international actors of the Convention's content and value.

However this should not undermine its potential to influence the shared water agreements between states by providing a comprehensive framework to protect and promote the optimal and sustainable utilization of international watercourses for present and future generations. It is only by establishing joint mechanisms, fact finding commissions, regional institutions for dispute settlement and by developing joint measures and procedures for optimally utilizing the water resource, one can move towards "regional integration" and "integrated management of transboundary waters".
