



International Environmental Law

Final Exam Notes Unit 200801

Prescribed textbook:

Philippe Sands and Jacqueline Peel, *Principles of International Environmental Law*, (Cambridge University Press, 3rd ed, 2012).

Chapter 8

Freshwater resources

In 1997 a global framework Convention on the Law of Non-Navigational Uses of International Watercourses was adopted, elements of which are broadly recognised to reflect customary law.

Current Threats to freshwater resources: increased use and declining quality as a result of pollution. Future threats include climate change and population growth.

Lake Lanoux Arbitration Case (Spain v. France)

Summary: Lake Lanoux is situated in southern France near the border of Spain. The lake is fed by several streams that all originate in France. Water flows out of the lake in a single stream that joins the Carol River before crossing into Spain. In the 1950's, France began developing a plan to divert water from Lake Lanoux over a 789 meter drop to generate hydroelectric energy. Even though France promised to return the diverted water to the Carol River, Spain pressed France to arbitrate the dispute because Spain believed the plan would violate its water rights under a series of treaties signed in 1866. The arbitration tribunal issued an award in 1957, which rejected Spain's arguments because the French plan promised not to alter the volume of water entering Spain through the Carol River. Although France would not have been allowed to unilaterally promote its legitimate interests at the expense or injury of neighboring states, the tribunal did not identify a foreseeable injury to Spain. Further, the Tribunal stated that the 1866 treaties did not constitute a reason to subjugate the general rule that standing and flowing waters are subject to the sovereignty of the state where they are located.

Tribunal said: "France is entitled to exercise her rights; she cannot ignore Spanish interests. Spain is entitled to demand that her rights be respected and that her interests be taken into consideration".

ILA: 1966 Helsinki Rules and Beyond

The **Helsinki Rules** on the Uses of the Waters of International Rivers is an international guideline regulating how rivers and their connected groundwaters that cross national boundaries may be used, adopted by the International Law Association (ILA) in **Helsinki**, Finland in August 1966.

The Rules govern the use of the waters of an international drainage basin except as otherwise provided by applicable treaty or custom and provide that each basin state is entitled to a reasonable and equitable share in the beneficial use of the waters in accordance with the relevant factors in each case. States are obliged to prevent new forms of water pollution or any increase in the degree of existing pollution which would cause 'substantial injury' in the territory of other basin states, and to take all reasonable measures to abate existing pollution. Violation of these obligations creates a responsibility for the injury caused or requires negotiations to reach an equitable settlement.

ILC: 1997 Watercourses Convention

The 1997 Convention applies to uses of international watercourses and their waters for purposes other than navigation, and encourages watercourse states to enter into watercourse agreements. It establishes a framework of general principles to guide the behaviour of states, and its general approach has been noted with apparent approval by the ICJ.

ILC 2008: Articles on Transboundary Aquifers

IN 2008 the ILC adopted its draft articles on the law of transboundary aquifers, drawing largely from the approach of the 1997 Watercourses Convention. The articles provide that each aquifer state 'has sovereignty over the portion of a transboundary aquifer or aquifer system located within its territory' and shall exercise its sovereignty in accordance international law and the present draft articles.

Gabcikovo-Nagymaros Project (Hungary/Slovakia)

Facts: In 1977, Hungary (P) and Czechoslovakia (D) signed a Treaty for the construction of dams and other projects along the Danube River that bordered both nations. Czechoslovakia (D) began work on damming the river in its territory when Hungary (P) stopped working on the project and negotiation could not resolve the matter which led Hungary (P) to terminate the Treaty. Hungary (P) based its action on the fact that the damming of the river had been agreed to only on the ground of a joint operation and sharing of benefits associated with the project, to which Czechoslovakia (D) had unlawfully unilaterally assumed control of a shared resource. Hungary (P) claimed that Czechoslovakia (D) violated the provisions of a treaty when it appropriated the waters of the Danube River to construct a dam.

Synopsis of Rule of Law: Watercourse states shall participate in the use, development and protection of an international watercourse in an equitable and reasonable manner.

Issue: Shall watercourse states participate in the use, development and protection of an international watercourse in an equitable and reasonable manner?

Held: Yes. Watercourse states shall participate in the use, development and protection of an international watercourse in an equitable and reasonable manner. Hungary (P) was deprived of its rights to an equitable and reasonable share of the natural resources of the Danube by Czechoslovakia (D) and also failed to respect the proportionality that is required by international law. Cooperative administration must be reestablished by the parties of what remains of the project.

Discussion: The Court's decision was that the joint regime must be restored. In order to achieve most of the Treaty's objectives, common utilization of shared water resources was necessary. Hence, the defendant was not authorized to proceed without the plaintiff's consent.

The ICJ considered the question of the existence of a state of ecological necessity in light of the criteria laid down by the ILC in Article 33 of the Draft Articles on the International Responsibility of States, which the parties had agreed applied. In the ICJ's view, draft Article 33 established five basic conditions for the existence of a state of necessity, which reflected customary international law:

1. The breach of an international obligation must have been occasioned by an 'essential interest' of the state which was the author of the wrongful act;
2. That interest must be threatened by a grave and imminent peril;
3. The act being challenged should be the only means of safeguarding that interest;
4. That act should not have 'seriously impaired an essential interest' of the state towards which the obligation existed; and
5. The state which was the author of that act should not have contributed to the occurrence of the state of necessity.

The ICJ stated that it had no difficulty in acknowledging that the concerns expressed by Hungary for its natural environment in the region affected by The Project related to an 'essential interest' of that state, within the meaning given to that expression in [Draft Article 33]. However the ICJ did not consider that the objective existence of a peril had been established notwithstanding the serious uncertainties raised by Hungary as to the ecological impact of putting in place the barrage system.

Regional Rules

Europe

Rhine - 1976 Convention for the Protection of the River Rhine Against Chemical Pollution.

The Convention requires parties to eliminate chemical pollution of the surface waters of the Rhine basin by those dangerous substances listed in Annex 1 and to reduce pollution by these dangerous substances listed in Annex 2.

The aims of the Convention are as follows:

- sustainable development of the Rhine ecosystem through:
 - maintaining and improving the quality of the Rhine's waters, and its natural function;
 - protecting species diversity ;
 - reducing contamination;

- conserving and improving natural habitats for wild fauna and flora;
- ensuring environmentally sound management of water resources;
- taking ecological requirements into account when developing the waterway.
 - production of drinking water;
 - improvement of sediment quality;
 - flood protection;
 - coordination with measures to protect the North Sea.

The riparian States undertake to:

- cooperate in taking actions to protect the Rhine;
- implement programmes and studies concerning the river;
- identify the causes of and parties responsible for pollution;
- ensure that technical measures liable to have a serious effect on the ecosystem, as well as discharges of waste water and hazardous substances, are subject to prior authorisation;
- reduce the risks of environmental accidents.

The International Commission for the Protection of the Rhine (ICPR) is made up of representatives of the Contracting States. It is chaired by those States in turn. It takes decisions unanimously and communicates them to the Contracting Parties. The tasks of the ICPR are as follows:

- prepare studies and programmes on the Rhine ecosystem;
- make proposals for actions;
- evaluate the effectiveness of the actions carried out;
- coordinate warnings and alerts;
- inform the public as to the state of the Rhine and the results of its work.

1992 Convention on the Protection and Use of Transboundary Watercourses and International Lakes

The Convention on the Protection and Use of Transboundary Watercourses and International Lakes (Water Convention) was adopted in Helsinki in 1992 and entered into force in 1996. Almost all countries sharing transboundary waters in the region of the United Nations Economic Commission for Europe (UNECE) are Parties to the Convention.

The Water Convention strengthens transboundary water cooperation and measures for the ecologically-sound management and protection of transboundary surface waters and groundwaters. The Convention fosters the implementation of integrated water resources management, in particular the basin approach. The Convention's implementation contributes to the achievement of the Millennium Development Goals and other international commitments on water, environment and sustainable development.

The Water Convention requires Parties to prevent, control and reduce transboundary impact, use transboundary waters in a reasonable and equitable way

and ensure their sustainable management. Parties bordering the same transboundary waters have to cooperate by entering into specific agreements and establishing joint bodies. As a framework agreement, the Convention does not replace bilateral and multilateral agreements for specific basins or aquifers; instead, it fosters their establishment and implementation, as well as further development. In 2003, the Water Convention was amended to allow accession by countries outside the UNECE region. The amendment entered into force on 6 February 2013, turning the Water Convention into a legal framework for transboundary water cooperation worldwide. It is expected that countries outside the UNECE region will be able to join the Convention as of late 2015.

Americas

The 1909 Washington Treaty Relation to Boundary Waters and Questions Arising Along the Boundary Between the US and Canada (1909 Boundary Waters Treaty).

The treaty includes one of the earliest treaty provisions on the prevention of pollution and was the first instrument to establish an international institution with competence for pollution matters. The International Boundary Waters Treaty between the United States and Great Britain establishing an International Joint Commission of Americans and Canadians to oversee any issue related to waters on the boundary between the United States and Canada. The treaty was signed on Jan. 11, 1909, calling for an annual meeting of the Joint Commission. These meetings are still being held to regulate use of the waters and also safeguard water quality.

Questions of fishing rights, diversion and use of the shared waters, shipping and other transportation rights, building of dams and bridges, and concern for possible water pollution are within the jurisdiction of the Joint Commission. Cases involving the Great Lakes and the St. Lawrence Seaway, as well as many smaller lakes and rivers, are within the jurisdiction of the commission, which has headquarters in both Ottawa and Washington, D.C.

The treaty of 1909 proposed the commission “to prevent disputes regarding the use of boundary waters and to settle all questions which are now pending between the United States and the Dominion of Canada involving the rights, obligations, or interests of either in relation to the other or to the inhabitants of the other, along their common frontier.”