TRANBOUNDARY WATER AGREEMENTS IN SOUTH ASIA: DOES THE PRINCIPLE OF EQUITABLE AND REASONABLE UTILISATION OF WATER EXIST?

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ABSTRACT

There are different theories and principles of international water law related to transboundary water resources management. One of the most fundamental principles of transboundary water resources management is the idea of equitable and reasonable utilisation of water. This principle reflects the view of regulating the use of international shared water resources. It is introduced by the Helsinki Rules, reinvented by the Draft Articles and finally it is recognised as a treaty law when the Convention on the Law of the Non-navigational Uses of International Watercourses, 1997 had incorporated this principle in Article 5. In applying this principle the standard is not what is an equitable use for the activities of a State from a shared watercourse rather what is equitable in relation to other States using the same. The scope of using the principle of equitable and reasonable utilisation of water depends upon the facts and circumstances of each individual case and also upon other surrounding factors. There are so many transboundary water agreements in South Asian region. This article will examine whether the transboundary water agreements of South Asian region take into account the principle of equitable and reasonable utilisation of water while using water from shared water resources. It will also examine how this principle is evolving in international law and so far how it is working in this region.

I. INTRODUCTION

International water law has developed various doctrines and principles in the evolvement of its phases in the management of shared water resources. The principle of 'equitable and reasonable utilisation of water' is recognised as a customary international law in the famous case of *Gabcikovo Nagymaros*.[1] This principle is also described in the 'Draft Articles on the Law of the Non-navigational Uses of International Watercourses, 1994'as follows:

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[1] The Gabcikovo Nagymaros Case, *Hungary vs Slovakia*, 7, ICJ, (1997); reprinted in 37 ILM 162 (1998).

> "Watercourse States shall in their respective territories utilise an international watercourse in an equitable and reasonable manner. In particular, an international watercourse shall be used and developed by watercourse States with a view to attaining optimal utilisation thereof and benefits there from consistent with adequate protection of the watercourse. Watercourse States shall participate in the use, development and protection of an international watercourse in an equitable and reasonable manner. Such participation includes both the right to utilise the watercourse and the duty to co-operate in the protection and development thereof, as provided in the present articles."[2]

This definition makes it clear that, the principle of 'equitable and reasonable utilisation of water' does not mean that, water should be divided into equitable amount among water sharing States rather it means that, each State is entitled to use that water in an equitable manner and the State will benefit by having optimal utilisation of this water resources and thus it can reach the goal of having sustainable development. The right to use also indicates the duty to co-operate in the protection and development of that shared water resources.

This study will be an analysis of the transboundary water agreements (hereinafter TWAs) of South Asian region which will reveal that, South Asian States have failed to evolve this principle in their TWAs in true sense of optimal using and getting benefit from shared water resources. These TWAs of South Asian region though contain the customary international principle of 'equitable and reasonable utilisation of water', they do not justify its existence though the extent of application of this customary principle goes ahead in international water law arena. There are five more sections in this paper excluding the preface. The first section will examine the principles of customary international law which govern transboundary water resources management and the evolvement of this principle in these customary international laws. The second section will discuss the application of the principle of 'equitable and reasonable utilisation of water' in international Conventions and Rules governing transboundary water resources management. The third section will examine whether this principle is used in the transboundary water agreements (hereinafter TWAs) of South Asian region and how they are using this principle. The fourth section will critically analyse the current scenario of TWAs of South Asian region while having this principle. The last section will describe the concluding remarks.

II. PRINCIPLES OF CUSTOMARY INTERNATIONAL LAWS GOVERNING TRANSBOUNDARY WATER RESOURCES MANAGEMENT

The interest of upper riparian States and the interest of lower riparian States are always conflicting as all of these States want to use water for their own

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[2] The Draft Articles on the Law of the Non-navigational Uses of International Watercourses, 1994, Article 5.

development while using shared water resources without thinking about the interest of other States. Many theories, principles as well as doctrines had been prevailing in transboundary water resources management before the principle of 'equitable and reasonable utilisation of water' came into existence. Three main principles have been put forward to govern the rights and obligations of riparian States over international rivers including 'absolute territorial sovereignty', 'absolute territorial integrity' and 'limited territorial sovereignty and limited territorial integrity'.[3]

In 19th century, various rules came into force which reigned in the management of shared water resources, of which the most famous doctrine was the 'Harmon Doctrine' which was also known as the 'principle of absolute territorial sovereignty'.[4] It suggested that, a State can use water unilaterally from shared water resources without taking into consideration its impact upon other States. In a dispute between USA and Mexico for the water of Rio Grande River, Mr. Judson Harmon opined this in favour of USA.[5] This opinion was highly criticised by subsequent decisions of many international tribunals and had been rejected as it provided a narrow view for settling disputes among States having shared water resources. Another known principle at that time was the 'principle of absolute territorial integrity'.[6] It favours lower riparian States by stating that, if any development work carried out by upper riparian States causes harm to the lower riparian State, the upper riparian State must not run the work. Also an upper riparian State must not restrict the natural flow of water to other lower riparian States.[7] Later on, both of these principles were rejected and one other principle named 'limited territorial sovereignty and limited territorial integrity'[8] had emerged. This principle talked about the rights and duties of the riparian States while using water from shared water resources. It opined that, each riparian

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3 Charles B. Bourne, "International Water Law", in Patricia Wouters (ed), *International Water Law: Selected Writings of Professor Charles B. Bourne*, London, 1997.

4 Mr. Judson Harmon was the Attorney General of the United States of America who gave his opinion in 1895 for the uses of the waters of the Rio Grande between the United States of America and Mexico. The Harmon doctrine stated for unilateral use of water by one State regardless of its impact upon other States which was contrary to the basic principles prevailed in international law which prohibited riparian States from causing harm to other States while using transboundary water as well as ask for cooperation.

5 *United States* vs *Rio Grande Dam & Irrigation Co.,* 174 USA (1899) 690.

6 William L. Griffin, "The Use of Waters of International Drainage Basins under Customary International Law", 53 (1959) Am. j. Int'L L., pp. 50-70, at p. 70.

7 James O. Thoermond and Erickson Shirley, "A Survey of the International Law of Rivers", 16 (1988) Denv. J. Int'l L. &Pol'y, pp. 139-14, at p. 143.

8 It asserts the equality of all riparian States in the uses of the waters of the international river.