THE 1997 WATERCOURSE CONVENTION AND ITS RELEVANCE TO BANGLADESH-INDIA WATER SHARING ISSUES

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Conflict over equitable utilisation of a shared natural resource like the water of an international river is nothing new, particularly in the regions where the available water falls far short of the demands of the riparian States. In this regard, the Ganges water dispute between Bangladesh and India provides a classic example of the contentiousness of the issues involved in the use of an international river. Nearly four decades have elapsed before the two countries concluded a fifth agreement in 1996 to find a long-term solution of the dispute. The agreement, however, provides only a limited arrangement for the water sharing of the Ganges River and Bangladesh and India are yet to succeed in resolving the question of utilisation of waters of most of the remaining common rivers.[1]

The major cause behind the failure of Bangladesh and India in finding a comprehensive solution to their water-sharing disputes lies mostly in their reluctance to embrace the recently developed norms of relevant international law. The two states had even disregarded many major

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1 For example a Joint Committee of Experts of the two States, in its meetings in the early 1986, underscored the immediate need for sharing of at least nine common rivers namely the Ganges, the Teesta, the Muhuri, the Manu, the Gumti, the Khowai, the Brahmaputra, the Dharla and the Dudh Kumar. Among them, no substantive progress has yet been achieved in reaching arrangements for sharing of the last seven rivers. See, in this regard, Islam, M. N., Equitable Sharing of The Water of the Ganges, Applicable Procedural Principle and Rules Under International Law and Their Adequacy, Unpublished PhD thesis, School of Oriental and African Studies, University of London, 1999, at pp. 244-249; Rangachari, R, and R. R. Iyer, "Indo-Bangladesh talks on the Ganga waters issue" in Verghese, B. G., and R. R. Iyer, (eds), Harnessing the Eastern Himalayan Rivers, Regional Co-operation in South Asia, New Delhi, 1993, at p. 186.

provisions of the 1994 final drafts of a global convention, which later was adopted in 1997, in negotiating the terms of 1996 Ganges River Treaty.[2]

The 1997 Watercourses Convention[3] laid the foundation of many later Watercourses agreements including one that was concluded between India and Nepal on the Mahakali River.[4] It has been hailed as an efficient and near-comprehensive instrument for sustainable resolution of the river disputes in many parts of the world.[5]

The strength of the 1997 Watercourse Convention is rooted in its emphasis on the observance of the procedural principles for achieving equitable solution of water utilisation disputes. In order to pave the way for harmonisation of the earlier treaties it has also explained its relationships with the existing treaties governing the uses of international watercourses. However, Bangladesh and India, the common riparian of a very large number of international rivers, have yet to comprehend the opportunities the Convention has offered to review earlier agreements particularly the very significant 1996 Ganges Treaty, and to conduct fresh negotiations for unresolved river disputes.

This article aims at examining the desirability and scopes of application of the relevant provisions of 1997 Convention for effectuating an equitable utilisation of the Ganges and other major common rivers between Bangladesh and India. It comprises of three parts. First: it analyses the content of the 1997 Watercourses Convention to illustrate its efficiency as a framework convention. Second: It examines the extent to which the 1997 Convention, as a treaty instrument, can be said to be potentially applicable to the Ganges case. While doing that, it compares the 1997 Convention to 1996 Ganges Treaty and examines the areas of application of the

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2 Islam, M. N., supra note 1, at pp. *256-260.* See also, Sands, P.,, "Bangladesh-India, Treaty on sharing of the Ganges waters at Farakka, Introductory note", 36 *(*1997) International Legal Material 519-521.

3 See the text of the 1997 Convention in 36 (1997) International Legal Material 700.

4 Treaty between His Majesty's Government of Nepal and the Government of India concerning the integrated development of the Mahakali River, 12/2/96, in 36 (1997) *ILM*, 531. A stringer reference to the 1997 Convention is found in Mekong River Treaty of 1997. For text, see, The Agreement on co-operation for the sustainable development of the Mekong River Basin, 5/4/1995 in 34 (1995) International Legal Material 864. For a brief comparison between these treaties and the Ganges Treaty, see, Islam, Supra Note 1, pp. 277-279.

5 For example, see, MaCaffrey and Sinjela, "The 1997 United Nations Convention on International Watercourses", 92 (1998)) American Journal of International Law 106.

Convention Third: It would examine the extent to which the provisions of the 1997 Convention can be evaluated as reflective of customary international law and what arguments could be made on the applicability of that 'customary law' to the water sharing disputes between Bangladesh and India.

THE 1997 WATERCOURSE CONVENTION

The 1997 UN Watercourse Convention is the only convention of a *universal* character on utilisation of the international watercourses.[6] It was negotiated by almost every member of the international community including Bangladesh and India and was adopted by a very weighty majority of States. Its strength and scope of applicability outweigh those of other recent conventions concluded regionally[7] or the studies conducted by non-governmental international organisations.[8]

The initiatives for the Watercourse Convention were undertaken by the United Nations General Assembly (UNGA). In a resolution of 8 December 1970, the UNGA recommended the International Law Commission (ILC) to take up a study of the law of the non-navigational uses of international watercourses with a view to its 'progressive

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6 Ibid.

7 For example, the Convention on the Protection and Use of Transboundary Watercourses and International Lake adopted under the auspices of the UN Economic Commission for Europe in 17 March 1992. For text of the Convention see, 31 (1982) International Legal Material 1312.

8 For example, the 'Seoul Rules' of the ILA. These Rules were formulated by the ILA in 1986 mainly as 'complementary' rules to the Helsinki Rules of 1966. See International Law Association, Report of the 62nd Conference, Seoul, 1986, at p. 21 (resolution adopting the Rules) and pp. 231-294 (report of the Committee on International Water Resources Law). The Seoul Rules concern legal aspects of international groundwater and the complementary rules. The complementary rules (ibid., p. 275-285) prohibit 'substantial injury unless be justified as an exception in accordance with the principle of equitable utilisation', require prior agreement for planned measures which involve works or installation in the territory of a co-basin State, provide for suspension of a project during negotiation with a notified State and third-party resolution of the dispute unresolved at bilateral level. As it would be seen later in this chapter, the relevant provisions of the 1997 Watercourse Convention are mostly similar to the Seoul Rules. The Water Resources Committee of ILA is currently studying four topics viz., cross media pollution, water transfer from and into international drainage basin, estuarine zones and remedies. See, International Law Association, Report of the 67th Conference, Helsinki, 1996, at p. 402.

development and codification'.[9] For that purpose, the UNGA also directed the Secretary General of the UN to provide the Commission with his report on 'Legal problems relating to the utilisation and use of international rivers' and also a supplementary report on the same topic.[10] These reports compiled a wide range of existing bilateral and multilateral treaties, decisions of international courts and tribunals, UN member States' domestic legislation and judicial decisions, and studies, declarations and resolutions of international organisations.

The ILC first circulated a questionnaire to the UN members States for seeking their view on the nature and scope of the proposed work.[11] On receiving the reply of twenty-one States, the Special Rapporteur of ILC began the work of formulating the articles on the topic in 1976.[12] The work was reorganised at the ILC's thirty seventh session (1985). Since that session to its forty third (1991) session, the ILC received seven reports from the Special Rapporteur on the topic.[13] At its forty-third session in 1991, the ILC provisionally adopted on first reading a set of draft articles on the topic, and in accordance with its standard procedure, sent the draft articles to the UN member States for their comment and observation.[14] In 1994, the ILC gave the draft articles a second reading in which it took into

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9 UNGA, Resolution 2669 (XXV) of 8 December 1970, para.1; For a background of the work of the ILC on the topic see, McCaffrey, "The International Law Commission adopts draft articles on International Watercourses', 89 (1995) American Journal of International Law, 395-97; See also, *YILC*, (1985), II (2), 68-70, UN Doc. A/40/10 and *YILC*, (1989), II (2), pp. 122-123, UN Doc. A/44/10. The ILC was established in 1946 by the UN General Assembly, under Article 13 (1.a) of the UN Charter, mainly to promote 'progressive development' and 'codification' of international law. On International Law Commission see, Sinclair, The International Law Commission, 1987.

10 For the text of these reports, see II:2 (1974) YILC, 33-357.

11 For the questionnaire, see II:1 (1974) YILC, 303-304.

12 II:1 (1976) YILC, 147. The Commission later received replies from 11 more States, see, ibid., 1978, II (1) 253; ibid., 1979, II (1), 178; ibid., 1980, II(1), 253; and ibid., 1982, II (1), 192.

13 The seven reports of the Special Rapporteur, McCaffrey are available as follows: Preliminary Report,II:1 (1985) YILC, 87; Second Report, II:1 (1986) YILC, 87; Third Report, II:1 (1987) YILC, 15; Fourth Report, II:1 (1988) YILC, , 205; Fifth Report, II:1 (1989) YILC, 91; Sixth Report, II:1 (1990) YILC, 41; Seventh Report, II:1 (1991) YILC, 45.

14 For the text of the articles provisionally adopted on first reading, see, *YILC*, (1991), II (2), 66-70. For detail review of these articles, see "Doman Colloquium on the Law Of International Watercourses: Review of the ILC's draft rules on the Non-navigational Uses of International Watercourses", in 3 (1992) *Colo. JIELP*.

cognizance the comments of member States and the proposals of the then Special Rapporteur, R. Rosenstock.

The final draft articles adopted by the ILC in 1994[15] were submitted to the 49th session of the General Assembly. The General Assembly passed a resolution to authorise its Sixth Committee to convene as a Working Group of the Whole to elaborate a convention on the basis of those draft articles.[16] The Working Group took two sessions (first from 7 to 25 October, 1996 and the next from 24 March to 4 April, 1997) to complete the elaboration of a framework convention before recommending the UN General Assembly to adopt that convention.[17] On 21 May 1997, the General Assembly adopted the convention entitled 'Convention on the Law of the Non-navigational Uses of International Watercourses' [hereinafter the Watercourse Convention or the 1997 Convention or the Convention] by a vote of 103 in favour [including Bangladesh] to 3 against with 27 abstention [including India and Pakistan].[18] The Watercourse Convention was opened for signature on the same day and remained open for signature until 20 May 2000 (Article 34). It will enter into force on the 19th day following the date of deposit of the 35th instrument of ratification, acceptance or accession with the UN Secretary General (Article 36).

The Convention sets forth the general principles and rules governing non-navigational uses of international watercourses in the absence of specific agreements among the States concerned and provides guidelines

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15 For the text of the draft articles adopted in 1994 and the commentaries of the ILC to these articles, see, Report of the ILC on the work of its 46th session, UN, *GAOR*, 49th session, supplement no. 10, pp. 197-327, UN. Doc. A/49/10 (1994) [hereinafter *1994 ILC Report*]. Reproduced in 24 Environmental Policy and Law, 335-368. For a review of the 1994 draft articles, see, McCaffrey and Rosenstock, "The International Law Commission's draft articles on International Watercourses: An Overview and Commentary', 5 (1996) *RECIEL* 89-96.

16 Resolution no. 49/52, para. 3, in UN, *GAOR*, 49th sess, supplement no. 49, vol. 1, p. 293, UN Doc. A/49/49 (1994).

17 The Sixth Committee passed a draft resolution (A/51/L.72) which provided for the adoption and opening for signature of the draft convention contained in paragraph 10 of the Report of the Sixth Committee convening as the Working Group of the Whole, 11/4/97, (A/51/869). It was understood in the General Assembly that the draft convention formed an integral part of the draft resolution. See, UN, *GAOR*, 51st session, 99th plenary meeting, 21/5/97, p.2.

18 UN, *GAOR*, ibid. p.7-8. The text of the 1997 Watercourse Convention is reproduced in 36 (1997) International Legal Material 700 (from UN Doc. A/51/869, ibid.).

for the negotiation of future agreements.[19] Although it preserves existing agreements, it recognises the necessity, in appropriate cases, of harmonising such agreements with its basic principles.[20]

The 1997 Convention consists of seven parts containing 37 Articles: Introduction; General Principles; Planned Measures; Protection Preservation and Management; Harmful Conditions and Emergency Situations; Miscellaneous Provisions and Final Clauses. An annex to the Convention sets forth the procedures which could be used in the event the parties to a dispute have agreed to submit it to arbitration.

The introduction part of the Convention explains the scope of the Convention and defines key terms. Article 1 provides that this Convention applies to non-navigational uses of international watercourses and consequently also to those navigational uses which affect non-navigational uses of international watercourses. Article 2 defines international watercourse as a watercourse parts of which are situated in different States and provides that watercourse means a system[21] of surface waters and ground waters constituting by virtue of their physical relationship a unitary whole and normally flowing into a common terminus.[22] It also provides that watercourse State means a State in whose territory part of an international watercourse is situated.[23] The introductory part also sets forth it relationship with existing and future agreements. We would analyse those provisions later in our discussion of the relevance of the Convention to the Ganges case.

This part discusses general principles of the Watercourse Convention and the relevant procedural principles of the Convention. The 'General Principles' laid down in Part II of the Convention refer to equitable

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19 UN Press Release, GA/9248, 21/5/97, 'General Assembly adopted Convention on the Law of Non-navigational Uses of International Watercourses', 1.

20 Article 3(1) and 3(2) of the 1997 Convention.

21 Hayton, "Observation on the International Law Commission's draft rules on the Non-navigational Uses of International Watercourses: Article 1-4", 3 (1992) Col. JIELP, 34-35, provides that the ILC preferred the term 'system' instead of 'basin' because the 'basin' concept may seem to involve regulation of land area and other non-water things within a hydrographic boundary.

22 Commentary to Article 2, 1994 ILC Report, supra note 15, p. 200, provides that watercourse system can be composed of a number of components including rivers, lakes, aquifers, glaciers, reservoirs and canals as long as they are interrelated with one another.

23 Watercourse State would also mean some regional economic integration organisation. See para (c) and (d) of Article 2 of the Convention.

utilisation of international watercourses, its relation with no-harm principle and the duty of co-operation.[24] Part III of the Convention sets forth the procedural principles concerning new projects as well as changes in existing uses and Article 33 of Part VI describes the dispute settlement procedures. While discussing the above principles, this section takes into account the relevant 'Statements of Understanding' of the Sixth Committee Working Group[25] and the commentaries of ILC to the draft articles it adopted in 1994.[26]

EQUITABLE UTILISATION AND OTHER GENERAL PRINCIPLES

Equitable utilisation: The principle of equitable and reasonable utilisation is evaluated in the ILC's commentary as a 'well established rule of international law' which defines 'fundamental rights and duties of states' with regard to the non-navigational uses of international watercourses.[27] Article 5(1) of the Convention requires a watercourse State to exercise her rights to utilise an international watercourse in an 'equitable and reasonable manner'. The objectives are to attain 'optimal and sustainable utilisation', to take into account the interests of other watercourse States concerned and at the same time, to ensure 'adequate protection of the watercourse'. This explanation of equitable utilisation principle reflects a more recent development of international law on 'sustainable utilisation' of natural resources, although its amalgamation with 'optimum utilisation' does not seem to make its meaning clearly.

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[24] McCaffrey and Rosenstock, "The International Law Commission's draft articles on international watercourses", 5 (1996) RECIEL 91, described the general principles as the 'cornerstone' of the Convention.

[25] During the elaboration of 1997 Convention, the Chairman of the Working Group took note of the 'Statements of Understanding pertaining to certain articles of the Convention'. These Statements were included in the Report of the Sixth Committee Working Group to the General Assembly. McCaffrey and Sinjela, supra note 5, at p. 102, described these Statements as *travaux preparatoires* of the 1997 Convention.

[26] These commentaries appear in 1994 ILC Report, supra note 15. The legitimacy of invoking ILC commentaries is established by the Sixth Committee Working Group during its elaboration of the Convention. The Sixth Committee Working Group (in 'Statements of understanding pertaining to certain articles of the Convention) noted that: "Throughout the elaboration of the draft Convention, reference had been made to the commentaries to the draft articles prepared by the International Law Commission to clarify the contents of the articles".

[27] Para 1, commentary to Article 5, 1994 ILC Report, supra note 15, p. 218.

Article 5(2) introduces a complementary principle of equitable participation of watercourse States in 'the use, development and protection' of an international watercourse. As ILC commentary to this Article explains, equitable participation is linked to Article 8, which defines the principle of co-operation in more general terms, necessitating compliance with procedural duties.[28]

Article 6(1) contains a non-exhaustive list of factors to be taken into account in determining whether a utilisation of international watercourse is equitable and reasonable. These factors include conservation, protection, development and economy of use of the water resources along with other long established factors: the natural condition of the watercourse, social and economic needs of the watercourse States, dependent population, effect of a use of the watercourse on other watercourse States, existing uses of the watercourse and available alternatives. The incorporation of conservation aspects of the watercourse and also of the 'potential uses' along with existing uses in Article 6(1) correspond with the provisions of Article 5 on sustainable use and adequate protection of watercourse. This enjoins the watercourse States with greater responsibility, which the Working Group considered to be appropriate in view of the recent development of the international environmental law.[29]

Article 6(3) denies any hierarchy among the factors, because of 'the varying importance of the factors from one watercourse to another'.[30] Article 6(2) requires watercourse States 'to enter into consultation in a spirit of co-operation' in cases where such consultation is needed for an equitable utilisation or for determining the comparative importance of the factors relevant to equitable utilisation.

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28 Para 6, ibid., p. 220.

29 The Chairman of the Drafting Committee of the Working Group (in UN, GAOR, 51st Session, Sixth Committee, Summary record of the 24th meeting, 17/10/96, p. 4, para. 14,) recalled that inclusion of the principle of sustainable development and protection of ecosystem in the Convention was proposed 'in order to bring the draft articles more fully into line with contemporary international environmental law'. For the summary records of the Sixth Committee Working Group's 15th to 20th meetings on elaboration of Article 5-10 during the 51st session of the UN General Assembly, see UN Docs. A/C.6/51/SR.15-20.

30 Commentary to Article 6, 1994 ILC Report, supra note 15, p. 232.

No- harm principle: Checking harmful effects of a use of an international river has been usually regarded as one of the factors of equity.[31] The necessity of strengthening obligations concerning harm was indicated by the ILC in its comment that: "Article 5 [concerning principle of equitable utilisation] alone did not provide sufficient guidance for States where harm was a factor".[32] The Commission found enough legal materials for formulating a principle concerning harm, although the question of its stringency and its relationship with equitable utilisation formed lengthy debate in the ILC and as well as in the Sixth Committee of the General Assembly.[33]

Till the adoption of the 1991 draft articles, the ILC tended to give primacy to the no-harm principle because of its precision and ease of application, its ability to protect the downstream States and its effectiveness in responding to environmental needs.[34] But the 1994 final draft of ILC weakened the no-harm principle by implying that a watercourse State's obligation in this regard would be limited to exercising 'due diligence' to avoid harm.

Article 7 of the Convention, as finally approved by the Working Group,[35] discards the phrase 'due diligence' which the ILC used for fixing the standard of liability. Instead, Article 7 requires a watercourse State to 'take all appropriate measures to prevent causing of significant harm'[36] to

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[31] Utton, "Which rule should prevail in international water disputes: that of reasonable use or that of no-harm", 36 (1996) *NRF* 641. See also Article 6 of Helsinki Rules on the factors relevant to equitable and reasonable sharing in chapter 4, pp. 176-77.

[32] Para 2, commentary to Article 7, 1994 ILC Report, supra note 15, p. 236.

[33] See Nussbaum, "Report of the working group to elaborate a convention on international watercourses", 6 (1997) RECIEL 49-50. McCaffrey and Sinjela, supra note 5, at p. 101. Bourne, "The International Law Commission's draft articles on the Law of International Watercourses, Principles and Planned Measures", 3 (1992) Colo. JIELP, 73-82.

[34] UN, GAOR, 51st Session, Sixth Committee, summary record of the 16th meeting, para. 33.

[35] For detail of the debate on the relation between equitable utilisation principle and no-harm principle, see ibid., summary record of the 16 and the 17th meetings.

[36] The expression 'significant harm' was preferred by the ILC in its draft articles of 1994, although in the 1991 draft articles, it was 'appreciable harm'. The Special Rapporteur of the ILC, Mr. Rosenstock, while sitting as an expert consultant during the elaboration of the Watercourse Convention by the Working Group, explained that the change from appreciable to significant was made only to avoid the possibility that in addition to substantial harm, trivial harms could also be measured by increased scientific and technological capacities and therefore may be confused

other watercourse States. If significant harm, however, is caused, Article 7 requires the State causing such harm to give due regard to Article 5 and 6 and to consult the affected State in order to eliminate or mitigate such harm and to discuss the question of compensation in appropriate cases.

The necessity of procedural duties: While addressing the obligation of no-harm and its relationship with equitable utilisation, the 1997 Convention puts significant emphasis on the relevant procedural duties.

First: As Article 7(2) provides, in cases where significant harm is caused, the obligation of the State causing such harm does not end on the ground that appropriate measures were undertaken for prevention of such harm. The post-harm obligation is an obligation of consultation with the affected State in which due regard has to be given to the provisions of Article 5 and 6. The purpose of such consultation is 'avoiding significant harm as far as possible while reaching an equitable result in each concrete case'.[37] It can be suggested, therefore, that although a harmful use of international watercourse is not prohibited, such use necessarily entails an obligation of consultation with the affected State for elimination or mitigation of harm or in appropriate cases for considering the question of compensation. While determining the remedial measure to balance the interests of both States, due regard have to be given to the relevant factors of equity.

Second: The above requirement of effectuating a balance between Article 7 and Articles 5 and 6 entails further procedural duties in cases where consultation fails. As para 21 of the ILC commentary to Article 7 provides, 'if consultations do not lead to a solution, the dispute settlement procedures contained in Article 33 will apply'.[38] Thus the question of ascertaining the extent to which a harmful use is equitable can make it essential to make resort to dispute settlement procedures.

The whole process indicates that Article 7 basically sets forth or entails obligations of conduct rather than obligations of result. A watercourse State first has to take preventive measures and thereafter, if harm is caused,

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with the term 'appreciable' meaning capable of being measured. He concluded: "As the Commission's records made abundantly clear, the change from 'appreciable' to 'significant' had not been intended to alter the thresholds, but to avoid a circumstances in which the threshold could be lowered to a clearly de minis level". See, UN, GAOR, 51st Session, Sixth Committee, summary record of the 16th meeting, para. 35.

37 Para 1 of the commentary to Article 7, 1994 ILC Report, supra note 15, at p. 236.

38 Ibid., at p. 244.

has to consult with the affected State for an equitable resolution and lastly if the consultation fails, has to enter into dispute settlement procedures for such resolution.

Other General Principles: In Article 8 to Article 10, the Convention spells out other general principles, which facilitate implementation of equitable utilisation. Under Article 8, watercourse States are required to co-operate each other on the basis of 'sovereign equality, territorial integrity, mutual benefit and good faith', which are defined as the 'most fundamental principles' in the relevant commentary of the ILC.[39] The objectives of co-operation are to 'attain optimal utilisation and adequate protection of an international watercourse'. ILC's commentary to Article 8 confirms that co-operation is required for attainment and maintenance of equitable allocation of the uses and benefits of international watercourses and 'for smooth functioning of the procedural rules' contained in part III of the Convention.[40]

Article 9 provides for regular exchange of data and information on the condition of a watercourse and this principle is viewed by ILC as a minimum requirement for ensuring equitable utilisation of an international watercourse.[41] This principle is 'pursuant to Article 8' and it thus represents a specific example of the obligation of co-operation. Under this Article, a watercourse State is required not only to exchange readily available information but also to employ her 'best efforts' to collect and supply new data and information provided that she is requested to do so by the other watercourse State who is ready to pay reasonable costs.[42] The purpose of regular exchange of data and information is to ensure that 'the watercourse States will have the facts necessary to enable them to comply with their obligations under Article 5, 6, and 7'.[43]

Article 10 sets forth a general principle that in the absence of agreement or custom to the contrary, no use of an international watercourse enjoys inherent priority over other uses. Para 2 of the Article requires watercourse States to resolve conflicts between their uses in the light of the provisions

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39 Para 2 of the commentary to Article 8, ibid. at p. 245.

40 Para 1, ibid., at pp. 244-5.

41 Para 1 of the commentary to Article 9, ibid., 250.

42 See, in this regard, UN GAOR, 51st Session, Sixth Committee, summary record of the 17th meeting, para. 50.

43 Para 2 of the commentary to Article 9, 1994 ILC Report, supra note 15, at p. 250.

of Article 5 to 7, giving special regard to 'vital human needs'.[44] It is thus well indicated here that conflict of uses may entail consultation and, in some cases, dispute settlement as without them the application of Article 5-7 may not be ensured.

PROCEDURAL PRINCIPLES CONCERNING PLANNED MEASURES

Procedural principles concerning planned measures have been laid down in the 1997 Convention in order to achieve two objectives. One is to maintain an equitable balance between various uses of an international watercourse and the other is to avoid disputes relating to new uses by watercourse States.[45] From an early stage, the ILC underscored the necessity of these principles to address issues concerning new uses as well as existing uses.[46] Accordingly, planned measures are defined as 'new projects or programmes of major or minor nature' as well as 'changes in existing uses of an international watercourse'.[47] The Convention incorporates a comprehensive set of procedural principles concerning planned measures.

Exchange of information: Article 11 defines obligations of exchange of information concerning planned measures. Under this article, watercourse States are required to exchange information, consult and, in appropriate cases, negotiate on the 'possible effects' of planned measures on the condition of an international watercourse. These obligations are unconditional, and irrespective of actual effects of planned measures.[48] These are intended to avoid problems inherent in a unilateral assessment of the effects of planned measures.

Notification: Provisions concerning notification of planned measures define more specific obligations for enabling a potentially injured State to evaluate possible effects of planned measures by other State. As Article 12

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[44] Para 4 of the commentary to Article 10, ibid., 257, defines 'vital human needs' as 'an accentuated form' of the factor contained in Article 6, para 1(b) which refers to social and economic needs of the watercourse States concerned. Vital human needs thus indicate uses of water to sustain human life, like drinking water and water required for the production of food to prevent starvation.

[45] Para 1 of the commentary to Article 12, ibid., 260

[46] McCaffrey, "Second Report", II:2 (1986) YILC, pp. 139-141, paras. 192-7.

[47] Para. 4 of the commentary to Article 11, 1994 ILC Report, supra note 15, at p. 260.

[48] Para 3 of the commentary to Article 11, ibid. at pp. 259-60.

requires, before a watercourse State implements planned measures which 'may have a significant adverse effect' upon other watercourse States, she shall provide such States 'timely' notification of the planned measures. Notification shall be accompanied by 'available technical data and information including the result of any environmental impact assessment'. Under Article 13 and 14, the notifying State is also obliged to provide the notified State with any additional data and information requested for, and to restrain from implementing the planned measures during the period of reply by the notified State, which might extend from six months to one year. Under Article 18, if a watercourse State fails to serve notification, the potentially affected Watercourse State can request the former State for such notification.

Consultation and Negotiation: Article 16 and 17 deal with obligations that follow notification of planned measures. According to Article 16, if the notifying State does not receive any reply from the notified State under Article 15, she can proceed with the implementation of planned measures subject to her obligation under Article 5 and 7. On the other hand, if the notified State communicates to the notifying State that the planned measures would be inconsistent with the provisions of Article 5 or 7, then according to Article 17(1), both States have to begin consultation and, if necessary, negotiation with a view to arriving at 'an equitable resolution of the situation'. Article 17(2) provides that consultation and negotiation have to be conducted on the basis that each State 'must' in good faith pay reasonable regard to 'the rights and legitimate interests' of the other State. For that purpose, Article 17(3) requires the notifying State, if she is so requested by the notified State, to refrain from implementation of the planned measures for at least six months.

The above principles had been addressed in the ILC as 'indispensable adjunct to the general principle of equitable utilisation'.[49] Their significance lies in providing solutions *ex ante* rather than settlement of conflicting uses *ex post*. As noted by the Special Rapporteur of the ILC in its 39th session in 1987, in the absence of procedures, the principle of equitable utilisation

[49] Supra note 46, p. 139, para 188. In his next report, the Special Rapporteur observed that 'the very generality and elasticity of the equitable utilisation principle requires that it be complemented by a set of procedural rules for its implementation. Without such rules, a State would often discover the limit of its rights only by depriving another State of its equitable share- probably without intending to do so'. For detail, see McCaffrey, "Third Report", II:1 (1987) YILC, pp. 22-23, paras. 32-35.

would operate only as a *post hoc* check on a State's unilateral determination of her equitable share.[50] Consequently, 'an equitable allocation would be achieved in many cases only by means of the process of claim and counter claim - and perhaps ultimate resort to third-party resolution - that could result from a State's use of the watercourse'.[51]

Thus the principles concerning planned measures basically lay down obligations proceeding to actual dispute. These principles and Article 33 (concerning dispute resolution) appear to form an integral procedural framework for implementing equitable utilisation of international watercourses.

DISPUTE SETTLEMENT: COMPULSORY FACT-FINDING

Article 33 contains dispute settlements procedures in order to respond to the 'complexity' and 'inherent vagueness' of the criteria to be applied for equitable utilisation of international watercourses.[52]

Article 33 defines the scope of its application and provides a graduated series of dispute settlement mechanisms. In the first para, it clarifies that 'in the absence' of any specifically applicable agreement, the Parties to the 1997 Convention can seek a settlement under this Article with regard to any dispute concerning 'interpretation or application' of the Convention. This Article provides for bilateral as well as third-party dispute settlement. Inclusion of provisions for third-party settlement was considered necessary in view of the limitations of bilateral efforts for a dispute settlement.[53] Dispute settlement procedures can be invoked gradually: first bilateral methods, thereafter optional methods of third-party settlement and lastly, if optional methods are not agreed, a mandatory Fact-finding Commission.

Bilateral settlement: Article 33(2) requires the disputing States to enter into negotiation before making any effort for third party settlement. Negotiation has to be conducted in good faith and in a meaningful way for an equitable solution of the dispute.[54] If negotiation fails, the watercourse States can make use of any existing joint watercourse institution established

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50 Ibid, pp. 22-3, para. 33.

51 Id.

52 Para. 21 of the Commentary to Article 7, 1994 ILC Report, supra note 15, p. 244.

53 Rosenstock, the Special Repporteur of ILC, even proposed mandatory arbitration and judicial settlement of watercourse disputes. See I (1994) YILC, p. 40.

54 Para 2 of the commentary to Article 33, 1994 ILC Report, supra note 15, at p. 323.

by them. Article 33(2) requires such method of dispute settlement in 'appropriate' cases which appears to indicate the necessity of considering whether the institution has sufficient resources and jurisdictions to deal with the matter and if so, whether the concerned States are ready to comply with a decision of such institution. Otherwise, the disputing States can make resort to the optional procedures of third-party dispute settlement.

Optional third-party settlement: Article 33(2) provides for optional procedures of third-party dispute settlement, which are as follows: mediation or conciliation by a third party or submission of the dispute to arbitration or to the International Court of Justice (ICJ). Under ILC's draft Article 33, resort to arbitration or to the ICJ could have been made only after using all other available methods of dispute settlement. The Sixth Committee Working Group changed that provision for enabling submission of a dispute to arbitration or to the ICJ directly after failure of bilateral negotiation. Thus, Article 33(10) provides an automatic process of submission of dispute to arbitration or to the ICJ. According to this, while ratifying, accepting, approving or acceding to the Convention, a State can declare, in a written instrument submitted to the Depository, that she recognises such submission as compulsory *ipso facto*. However, this process of dispute settlement would apply in respect of only those States who would make similar declaration. With regard to the process of establishment and operation of the arbitral tribunal, the Parties may accept the provisions laid down in the Annex to the Convention or they can agree different provisions.

Mandatory Fact-finding Commission: Making resort to the methods of third-party settlement under Article 33(2) and Article 33(10) essentially depends on consent of all the States involved in the dispute. In contrast, Article 33(3) and 33(5) make provisions for submission of a dispute to a Fact-finding Commission, which can be established by any of the parties to a dispute. The purpose of such Fact-finding Commission would be to facilitate resolution of a dispute through the 'objective knowledge of the facts'. [55] Article 33 put noticeable emphasis on Fact-finding Commission by making detail provisions to explain the procedures concerning the appointment and functions of such Commission.

[55] Para 4, ibid., at p. 324.

First: Under para 3 of Article 33, Fact-finding Commission can be established in cases where within six months from the time of a request for negotiation, the Parties concerned fail to settle their dispute through negotiation or by any other means referred to in Article 33(2).

Second: Under para 4 and 5 of the said Article, the Commission would be composed of one member nominated by each Party concerned and a foreign chairman chosen by the nominated members or, on their failure, by the Secretary General of the United Nations (if he is requested to do so by any Party concerned). In cases of unwillingness or failure of any Party to nominate its member, the UN Secretary General, if requested so by the other Party concerned, shall appoint a foreign national to constitute a single member Commission.

Third: Para 6 and 7 facilitate efficient functioning of the Commission by defining its autonomy and its unfettered access to information. The Parties concerned shall be obliged to fully co-operate with the Commission by providing the required information and by permitting the Commission to inspect river condition or any structure.

Fourth: Para 8 provides for the adoption of the Commission's report by a majority vote, unless it is a single member Commission. It requires the Commission to set forth, in its report, its findings, the reasons therefor and its recommendations for equitable solution of the dispute. The Parties concerned 'shall consider' that report in 'good faith'.

The provisions concerning Fact-finding Commission were criticised in the Sixth Committee by some delegates on the ground that such Commission would only deal with factual aspects of a dispute and that its decision would not be binding on the Parties to the dispute.[56] These criticisms, however, appear to overlook that disagreement on facts is very common to watercourse disputes and that objective facts are essential for ensuring application of legal rules. As McCaffrey and Sinjela observed:

> ... [F]acts are of critical significance in realizing the core obligations of the Convention. For example, how can states determine whether their utilization is "equitable and reasonable" under Article 5 without an agreed factual basis? And how can a state establish that it has sustained significant harm if the state that allegedly caused the harm denies that it caused it or that any harm has been suffered?[57]

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[56] UN, GAOR, 51st Session, Sixth Committee, summary record of the 21st meeting, para 6 and 44.

[57] McCaffrey and Sinjela, supra note 5, p. 104.

Therefore, data and information gathered by a fact-finding commission could definitely contribute to the settlement of a dispute. Furthermore, as the ILC envisaged, 'the availability to watercourse States of fact-finding machinery will often prevent disputes from arising by eliminating any questions as to the nature of the relevant facts'.[58]

EMPHASIS ON PROCEDURAL DUTIES

The 1997 Convention, as we have seen above, embodies an integral set of principles for equitable utilisation of international watercourses. While doing so, the Convention reflects the appropriateness of putting emphasis on the procedural duties.[59] A summary of the above discussions in this regard is given below.

First: As explained above, the 1997 Convention has defined the relationship between the principles of equitable utilisation and no-harm in such a way that it necessarily involves compliance with procedural duty of consultation (inherent in that are the duties of information exchange and notification) and dispute settlement.

Second: In spite of the framework character of the 1997 Convention,[60] the principles concerning planned measures lay down stringent procedural obligations for the States willing to implement such measures. Under this Convention, such States can not avoid the obligations concerning exchange of information, notification and consultation irrespective of the actual consequence of planned measure. By requiring information on new uses as well as changes in the existing uses (planned measures) and regular

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58 Para 4 of the commentary to Article 33, 1994 ILC Report, supra note 15, at p. 324

59 In the plenary meeting of the General Assembly in which the Convention was adopted (UN, *GAOR*, 51st session, 99th plenary meeting, 21/5/97, pp. 1-12.), the delegates were granted an opportunity to record their dissent. As regards provisions concerning planned measures, it was alleged that the provisions are far beyond the scope of a framework convention (Turkey, ibid. p. 4); they place onerous burden on upper riparian States (Ethiopia, ibid. p. 9); dishonour sovereignty of States (Rwanda, ibid. p. 12). As regards provisions for dispute settlement, the criticisms were: a framework convention can not foresee any compulsory settlement of dispute (Turkey, ibid. p. 5); compulsory fact finding goes against Article 33 of UN Charter (China, ibid. p. 7); it is excessively stringent (France, ibid. p. 8); inappropriate for a framework convention (India, ibid. p. 9); sovereignty of States is not honoured (Rwanda, ibid. p. 12); dispute settlement provisions should be more obligatory, binding, third party oriented. (Pakistan, ibid. p. 5)

60 See para 5 of the Preamble of the 1997 Convention.

exchange of data on the watercourse condition, this Convention highlights the necessity of a regime of comprehensive information sharing.

Third: The provisions of dispute settlement under this Convention refer to optional as well as mandatory third-party settlement. The provisions of mandatory fact-finding ensure the efficiency of the dispute settlement machinery. The Convention also stresses on the necessity of co-operation and good faith of the States concerned for a meaningful and effective negotiation for resolving dispute on equitable utilisation of international watercourse.

Fourth: The emphasis of the Convention on procedural duties is also reflected in its provisions concerning protection, preservation and management of international watercourses as well as in the provisions relating to harmful condition and emergency situation. The Convention, while dealing with the issues in its part V (Article 20-26) and in part VI (Article 27-28) respectively, requires watercourse States to undertake joint measures [61] or to consult [62] or to co-operate with each other [63].

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[61] In appropriate cases, joint measures are required for protection and preservation of the ecosystem of the watercourse (Article 20), for prevention and control of pollution (Article 21) and of the marine environment (Article 23) and for prevention and mitigation of harmful condition (Article 27). ILC commentary to Article 20 (1994 ILC Report, supra note 15, p. 282) provides that, 'joint action would usually be appropriate in the case of contiguous watercourses or those being managed and developed as a unit'. The purpose of joint measures is to ensure optimum utilisation with adequate protection of the watercourse. Para 4 of the commentary to Article 20, ibid. pp. 282-3 and para 5 of the commentary to Article 21, ibid., p. 293.

[62] Article 24(1) requires the watercourse States to enter into consultation concerning the management of an international watercourse if request for such consultation is made by any of them. Article 26(2) provides for consultation when a watercourse State reasonably believes that it 'may suffer significant adverse effects' arising from the operation and maintenance of water works (e.g. installation, facilities) of other watercourse State.

[63] Article 25 requires co-operation in 'appropriate' cases in order to respond to the 'needs and opportunities for regulation of the flow' of the waters of an international watercourse. Co-operation is required more emphatically for prevention, mitigation and elimination of harmful effects of 'emergency situations' that result suddenly from natural causes (Article 28). Under this Article, co-operation includes immediate notification to other watercourse States and competent international organisations, co-operated measures and joint contingency plans.

APPLICABILITY OF THE 1997 CONVENTION AS A TREATY INSTRUMENT

From our above discussion, it can be said that the 1997 Watercourse Convention has minimised the problems of the vagueness of the principle of equitable utilisation by putting emphasis on complementary procedural duties and also by ascertaining its relationship with the no-harm principle. However, for the purpose of this study, the more important question is to examine the relevance of the Convention to the utilisation of water of the Ganges River which is now being governed by the 1996 Treaty. The Convention has yet to come into force and Bangladesh and India have yet to become Parties to this Convention. At present, as a treaty instrument, the Convention has no role to play in the Ganges case. If Bangladesh and India ever become Parties to this Convention, its applicability to the Ganges case would depend on its relationship with the 1996 Treaty. Article 3 of the 1997 Convention contains the provisions which would determine that relationship. Article 3 of 1997 Convention reads:

> Watercourse agreements
>
> 1. In the absence of an agreement to the contrary, nothing in the present Convention shall affect the rights or obligations of a watercourse State arising from agreements in force for it on the date on which it became a party to the present Convention.
>
> 2. Notwithstanding the provisions of paragraph 1, parties to agreements referred to in paragraph 1 may, where necessary, consider harmonizing such agreements with the basic principles of the present Convention.
>
> 3. Watercourse States may enter into one or more agreements, hereinafter referred to as "watercourse agreements", which apply and adjust the provisions of the present Convention to the characteristics and uses of a particular international watercourse or part thereof.
>
> 4. Where a watercourse agreement is concluded between two or more watercourse States, it shall define the waters to which it applies. Such an agreement may be entered into with respect to an entire international watercourse or any part thereof or a particular project, programme or use except insofar as the agreement adversely affects, to a significant extent, the use by one or more other watercourse States of the waters of the watercourse, without their express consent.

> 5. Where a watercourse State considers that adjustment and application of the provisions of the present Convention is required because of the characteristics and uses of a particular international watercourse, watercourse States shall consult with a view to negotiating in good faith for purpose of concluding a watercourse agreement or agreements.
>
> 6. Where some but not all watercourse States to a particular international Watercourse are parties to an agreement, nothing in such agreement shall affect the rights or obligations under the present Convention of watercourse States that are not parties to such an agreement.

It is evident from the above provisions of Article 3(3) that the utility of the Convention lies mostly in the requirement that the future watercourse agreements would 'apply and adjust' the provisions of the Convention to 'the characteristics and uses of a particular international watercourse or part thereof'. But, as Article 3(1) provides, the Convention shall not alter the rights and obligations defined in an existing agreement (like the 1996 Ganges Treaty). Article 3(2) of the Convention, however, provides that if it is necessary, the contracting Parties to the Convention 'may' 'consider' harmonising existing agreements with the basic principles of the Convention. The use of the above quoted words in Article 3(2) clearly indicates that in cases where the limitations of a treaty necessitate its harmonisation with the 1997 Convention, making such harmonisation is a matter of discretion rather than obligation of the parties concerned.[64]

The necessity of such harmonisation lies in the broader spectrum the 1997 Convention has covered and in the efficiency of the procedural techniques the said Convention has established. A comparison between the two instruments would identify the areas where the 1996 Treaty should be harmonised with the 1997 Convention for establishing a more efficient legal regime.

A COMPARISON BETWEEN THE 1996 TREATY AND THE 1997 CONVENTION

The 1996 Treaty was negotiated without data and information concerning the use of Ganges water in the upper basin in Uttar Pradesh and Bihar province and also without recent data on water availability at Farakka.[65]

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[64] To quote McCaffrey and Sinjela, supra note 5, p. 98, the Convention 'mildly encourages' concerned States to consider such harmonisation.

[65] Islam, supra note 1, at pp. 261-272.

The negotiation for the Treaty was limited and that has resulted only in a vague arrangement for sharing of the Ganges water. This vagueness is impliedly acknowledged in the text of the Treaty which, unlike the previous sharing arrangements, has described its schedule of water sharing (Annexure II) as 'indicative schedule'.

Given the vagueness and flexibility of the sharing arrangement, the procedural duties laid down in the 1996 Treaty appear to be inadequate. This Treaty contains no provision like the previous agreements (guarantee clause in 1977 Agreement and 50:50 sharing of shortage in the 1982 and 1985 MOUs) which can influence India to restrict withdrawal of Ganges water above Farakka. In spite of that omission, the 1996 Treaty has only reproduced the limited procedural duties of the previous Agreements concerning sharing information on the available flow *at and below* Farakka, and consultation and dispute settlement on the basis of such information. That means this Treaty has virtually exempted India from any obligation relating to the use of Ganges water above Farakka.

The limitations of the 1996 Treaty were exposed during in the very next dry season in 1997. During that season, both Bangladesh and India (in practice West Bengal) received less water[66] due to significant decrease of the Ganges flow at Farakka. As reported in a leading Indian weekly:

> ...the Treaty talked about water that just isn't there. The agreement was arrived at on the basis of the average availability of water between 1949 and 1988. But the water flow has declined drastically since 1988 [the year on which the 1985 MOU expired], especially after Uttar Pradesh and Bihar began drawing 25,000-45,000 cusecs through lift irrigation projects before the waters reached Farakka Barrage. Predictably the Treaty began to falter with the onset of the dry season.[67]

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[66] As India Today, 30/4/97, 'Indo-Bangla Accord, holding no water', at p. 66, reported: "Between March 11-21 this year, India was to get 33,931 cusecs under the treaty but ended up getting only 19,000 cusecs on an average. And on March 17, it got only 18,000 cusecs, an all-time low. Bangladesh too is losing out. During the same period, it is stated to have received only 21,000 cusecs against the agreed share of 35,000 cusecs. And during the 10 days cycle of March 21-30 its share further dipped". Indian Express, 6/4/97 accused India Government for 'making a mockery of the terms of the accord which was hailed as historic and trend setting'. See also, Miah, "Panibibin pani chukti [No water for water agreement]' in daily *Khoborer Kagaz*, 24/6/97; Khan, "Ganges Water Treaty- An analysis of first year Implementation", in The Daily Star, 26/5/97.

[67] India Today, 30/4/97, 'Indo-Bangla Accord, holding no water', p. 66.

The above report may be said to be somewhat presumptive on the amount of water flow withdrawn in the upper parts of the Ganges basin. But the fundamental problem, to which the above report referred, has not been addressed in the 1996 Treaty. The Treaty contains no provisions for notification, information exchange, consultation or dispute settlement concerning the withdrawal of Ganges water in the upper basin.

The limitations of the Treaty could be further exposed through its brief comparison with the provisions of the 1997 Convention. expects the contracting Parties to consider harmonisation of existing agreements with its 'basic principles'. It does not specify what those basic principles are. But as its entire framework centres around the 'General Principles' enshrined in its part II, it is apparent that those principles represent the said 'basic principles'. At the same time, as the 'General Principles' are laid down in the Convention in such a manner which necessarily involves procedural duties, the principles concerning those duties can also be regarded as equally important principles. A brief comparison of the contents of those principles with the provision of 1996 Treaty is outlined below for indicating the areas in which the 1996 Treaty needs to be reviewed.

First: The 1997 Convention provides for taking all appropriate measures to prevent the causing of significant harm to other watercourse State (Article 7). In comparison, the 1996 Ganges Treaty does not oblige its Parties to take any preventive measures. The Treaty also fails to spell out that causing significant harm to a watercourse State may not constitute an equitable utilisation. Article II of the 1996 Treaty only provides for applying the principles of equity and no-harm if the available Ganges flow falls below 50,000 cusecs at the agreed point of apportionment. For many years, Bangladesh and India agreed that the 'historic' flow at Farakka was inadequate to meet the requirement of Bangladesh and that of India as far as the question of operation of the Farakka Barrage was concerned.[68] In that context, it is difficult to see that the very notion of sharing an unlimited lower flow (below 50,000 cusecs), without investigating its uses in the upstream areas and without co-ordinating those uses, could properly reflect equity or no-harm principle.

Second: The Convention requires exchange of all relevant information on watercourse condition (Article 9) and on planned measures (Article 11) and adequate consultation between the watercourse States for determining and maintaining equitable utilisation. But the 1996 Treaty provides for

[68] See, in this regard, the discussion of the 1974 Joint Declaration and the 1977 Ganges Agreement in Islam, supra note 1, at pp. 154-57, 213-219.

exchange of limited information and for consultation apparently on the basis of such information.[69] Consequently it has failed to properly define and ensure equitable sharing. Under Article I, II, and IV of this Treaty, the operation of the sharing system is dependent on information on water flows *at and below* Farakka point. The necessity of exchanging information on river condition and on the uses of the Ganges water *above* Farakka, and holding consultation about the effects of those uses on the water availability at Farakka has not been reflected in any provision of the 1996 Ganges Treaty.

Third: The Convention requires the watercourse States to settle their dispute by bilateral negotiation and, if it fails, by third-party procedures which may include a mandatory Fact-finding Commission. But Bangladesh and India have failed to make any provision of third-party dispute settlement in the 1996 Treaty. Consequently, in regard to issues like adjustment of the sharing arrangement during review meetings, sharing of below 50,000 cusecs water or interpretation of the Treaty, conflicts between the two States can lead to a long lasting deadlock and can also affect the prospect of future negotiation on sharing of other common rivers.[70]

Thus, the 1996 Treaty quite obviously falls short of reflecting the contemporary conventional principles and rules on non-navigational use of international watercourses. The Treaty also lacks environmental and conservational provisions which are laid down in detail in the 1997 Watercourse Convention.[71] Therefore, it can be suggested that there are scopes for harmonisation of the 1996 Treaty with the 1997 Convention and thus establishing a more efficient legal regime concerning the use of the Ganges water.

APPLICABILITY OF THE 1997 CONVENTION: BANGLADESH AND INDIA'S POSITION

Bangladesh and India responded differently to the 1997 Watercourse Convention. While Bangladesh voted in favour of the adoption of the 1997 Convention, India abstained from the voting.[72]

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69 Ibid., 262-271.

70 For detail, see, Ibid., 279-83.

71 Article 20-26 of the 1997 Convention.

72 UN, GAOR, 51st session, 99th plenary meeting, 21/5/97, pp. 7-8.

Bangladesh's views about some specific provisions of the Convention appeared in the records of negotiations on the draft of 1997 Convention. During these negotiations in the Sixth Committee Working Group of the Whole, Bangladesh's delegate expressed the view that 'any utilisation that causes harm could not be equitable or reasonable' and that 'the duty of co-operation is a principle of general international law'.[73] He also supported the text of Article 33 although with a comment that 'it would be better to have compulsory and binding procedures incorporated in Article 33'.[74] In the Working Group, Bangladesh's delegate also acted as a co-ordinator of informal consultations on Articles 20 and 22 (as regards the term "ecosystems").[75] In spite of such active involvement, Bangladesh is yet to sign and ratify the Convention. However, even after completion of these requirements, Bangladesh could not demand harmonisation of the Ganges Treaty with 1997 Convention unless India also becomes a Party to the Convention.[76]

India's approach to the Convention is apparent in her abstention from the voting on the Convention. In the General Assembly meeting, in which the Convention was adopted, India's delegate explained the reasons for India's abstention:

> .....this is a framework Convention that should not be prescriptive in nature. It should leave the watercourse States to evolve and implement mutually agreeable terms in respect of the particular international watercourse concerned. Unfortunately, in some of its provision the present Convention has deviated from this agreed approach, and consequently it is not balanced enough to accommodate differing interests and promote wider acceptability of the Convention.[77]

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73 UN, GAOR, 51st session, Sixth Committee, summary record of the 15th meeting, p.8, para. 47.

74 Ibid., summary record of the 21st meeting, p. 10, Para. 47.

75 Para 5 of the introduction, Report of the Sixth Committee convening as the Working Group of the Whole at its second session, UN Doc. A/51/869, 11 April 1997.

76 According to Article 30(4) of the 1969 Vienna Convention on the Law of Treaties, in cases where only one of the parties to an earlier treaty becomes party to a later treaty, the earlier treaty governs the rights and obligations of the parties to the earlier treaty.

77 UN, GAOR, 51st Session, 99th plenary meeting, 21/5/97, p. 9.

India's delegate then expressed India's specific reservation in regard to the provision of Article 3, 5, 32[78] and 33 of the Convention. He recalled that India abstained in the Working Group from the voting on the 'package of Article 5, 6 and 7'. He also stated that India voted against the provision of third-party settlement of Article 33 when it was put to the vote in the Working Group and would again have voted against the same Article had it been put to a separate vote on the day of adoption of the Convention.[79] The reasons, the Indian delegate showed in the General Assembly, for objecting Articles 3, 5 and 33 of the Convention are as follows.[80]

As regards Article 3: India observed that Article 3 'fails adequately to reflect the principle of freedom, autonomy and the right of the States to conclude international agreements on international watercourses without being fettered by the present Convention'. Thus, India does not seem to accept that her autonomy and right already exercised in the conclusion of existing agreements (like the 1996 Ganges Treaty) should be reviewed in the light of the provisions of 1997 Convention.[81] India's observation on Article 3 also indicates that India expected the Convention to be more liberal in allowing the watercourse States to adjust its provisions in the negotiation of future agreements.

As regards Article 5: India objected the 'superimposition of the concept of sustainable development' on the principle of optimum utilisation. As her

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78 Article 32 deals with non-discrimination in the domestic judicial and other procedures. India (ibid.) expressed the view that Article 32 'presupposes political and economic integration among the States of a region' which 'are not so integrated'.

79 UN, GAOR, 51st Session, 99th plenary meeting, 21/5/97, p. 9.

80 Ibid.

81 Tanzi, "Codifying the Minimum Standards of the Law of International Watercourses", 21 (1997) NRF 111, noted that during the Sixth Committee Working Group meetings, India was one of the States (others were Argentina, Egypt, France, Pakistan, Switzerland and USA) who proposed that a specific provision should be inserted that the rights and obligations arising from existing agreements should not be affected by the Convention. According to Nussbaum, "'Report of the Working Group to elaborate a convention on international watercourses", 6 (1997) RECIEL 52, such proposal was also made by Italy, Turkey, Canada and Romania. As he provided, (ibid. 52) India's proposal was contained in the UN Doc. A/C.6/51/NUW/WG/CRP.7.

delegate explained the reasons: "international environmental regimes contain certain elements such as transfer of technology, resources and technical expertise to promote capacity-buildings among developing countries. None of these elements is elaborated in the present Convention". In his opinion, Article 5 has not been defined 'in a clear and unambiguous manner' stating the right of a State to utilise an international watercourse 'in an equitable and reasonable manner'. Previously, during the elaboration of the Convention by the Working Group, India expressed a view that Article 5, 6 and 7 should have been retained as proposed in the ILC draft articles in which equitable utilisation had primacy and the obligation of no-harm was limited to the principle of 'due diligence'.[82] It explains why India abstained from the Working Group's voting on the package of Article 5, 6, and 7.

As regards Article 33: Article 33 was the only Article which India voted *against* in the Working Group. In the General Assembly, Indian delegate explained that: "Article 33 dealing with settlement of disputes, contained an element of compulsion insofar as it envisages the creation of a Fact-finding Commission. In our view, any procedure for peaceful settlement of disputes should leave the parties to the dispute to choose freely, and by mutual consent, a procedure acceptable to them. My delegation is opposed to the imposition of any mandatory third-party dispute settlement procedure upon a State without its consent."

India's above position indicates that the 1997 Convention would hardly have any relevance to the Ganges case, unless India reconsiders its position in this regard. Even if both Bangladesh and India, by any chance, decide to become parties to the 1997 Convention, the Convention would not automatically affect the rights and obligations defined in the 1996 Ganges Treaty. Rather, any of the above States could invoke the provisions of Article 3(1) and 3(2) of the Convention to claim that there is no 'obligation' to harmonise the 1996 Treaty with the 1997 Convention.[83] As discussed above, while abstaining from the Convention, India had clearly expressed her objection to some specific articles of the Convention. Any attempt to

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82 UN, GAOR, 51st Session, Sixth Committee, summary record of the 62nd meeting, UN Doc. A/C.6/51/SR.62/Add.1, p. 2-3, paras. 5-6.

83 Safeguarding of existing agreements by the 1997 Convention conforms to Article 30(2) of the 1969 Vienna Convention on the Law of Treaties according to which if a treaty specifies that it be subject to an earlier treaty, the provisions of the earlier treaty would prevail.

review the Ganges treaty in line with the 1997 Convention would require mostly India's willingness to discuss more comprehensive obligations concerning equitable utilisation, no-harm, information exchange and fact finding commission. It may be suggested that such attempt should be based on recognising the status of the provisions of the 1997 Convention as reflective of customary international law.

THE 1997 CONVENTION AS CODIFICATION OF CUSTOMARY LAW

The 1997 Convention is based on the draft articles the International Law Commission adopted in 1994.[84] As a product of ILC's study, these articles represent the 'codification and progressive development' of international law of the non-navigational uses of international watercourses.[85] This has been confirmed in para 2 and 3 of the preamble of the 1997 Convention. If we take into account the meanings of 'codification' and 'progressive development', as they are explained in the Statute of the ILC, the 1997 Convention can be said to have incorporated both existing or emerging rules (codification) and developing principles of international law (progressive development).[86] The ICJ in a number of cases[87] recognised this dual utility of multilateral Conventions. This recognition provides authenticity to a suggestion that the rules codified in the 1997 Convention can be applicable, as customary international law, to the water sharing disputes between Bangladesh and India. Other principles which represent

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84 McCaffrey and Sinjela, supra note 5.

85 The ILC was established in 1946, under Article 13, Para. 1(a) of the UN Charter, to promote 'progressive development' and 'codification' of international law. On International Law Commission, see Sinclair, The International Law Commission, 1987.

86 As Article 15 of the ILC Statute (quoted in Harris, Cases and Materials on International Law, 1998, at p. 66) provides, 'progressive development' of international law means 'the preparation of draft conventions on subjects which have not yet been regulated by international law or in regard to which the law has not yet been sufficiently developed in the practice of States', and 'codification' means 'the more precise formulation and systemisation of rules of international law in fields where there already has been extensive State practice, precedent and doctrine'.

87 For example, *North Sea Continental Self* cases, 1969 ICJ Reports, 37-41; *Military and Paramilitary Activities* case, 1986 ICJ Reports, I94. On multilateral treaties declaratory or constitutive of customary law, see, Baxter, "Treaties and Custom", 129:1 (1970) Recueil Des Cours, 37-74.

progressive development of law, may, over time through uniform and constant state practice, enter into the realm of customary international law.

The ILC, as its usual practice, did not specify which of the provisions of the 1994 draft articles are 'codification' of law and which provisions are 'progressive development of law'. However, the commentaries, which the ILC made to the draft articles of 1994 and which the Sixth Committee Working Group invoked during negotiation of the 1997 Convention, made some valuable indications as to the status of the principles enshrined in the articles. In the light of those commentaries, we would here identify the provisions of the 1997 Conventions which may be considered as existing or emergent customary rules. We would then examine whether those customary rules have developed in such a manner which indicates that they are binding on Bangladesh and India.

CUSTOMARY RULES IN THE 1997 CONVENTION

While making commentaries to the draft articles, the ILC used various phrases like 'established rule of international law', 'basic rule', 'well established rule', 'general obligations' which are indicative of their status as rules of customary law. In the context of Ganges case, we would here focus only on the principles of equitable utilisation, no-harm and the procedural principles.

As regards Article 5 on equitable utilisation and participation, the ILC commentary provides that this article sets out 'the fundamental rights and duties of States' and that one of the 'most basics' of these is the 'well-established rule' of equitable utilisation which is 'complemented' by the 'principle' of equitable participation.[88] The ILC observed that 'all available evidences of the general practice of States, accepted as law, in respect of the non-navigational uses of international watercourse ... reveal an overwhelming support for the doctrine of equitable utilisation as a general rule of law'.[89] It is thus obvious that equitable and reasonable utilisation of international watercourses is existing rule of customary law. As a complementary 'principle', equitable participation perhaps enjoys the status of a developing principle.

According to the ILC commentary, the no-harm principle enshrined in Article 7 sets forth the 'general obligation' for watercourse States and such

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88 Para 1 of the commentary to Article 5, 1994 ILC Report, supra note 15, p. 218.

89 Para 10, ibid., p. 222.

obligation is reflected in various international conventions and treaties.[90] The relationship of this obligation with the equitable utilisation principle raised controversy in the Working Group meetings and consequently, a vote was conducted there on the package of Article 5, 6 and 7. These Articles were adopted by 36 votes in favour, 4 against and 22 abstention.[91] But as it was reflected in the statements of objecting and abstaining States at the day of adoption of the 1997 Convention, the reservations about the package of the above three articles were mostly concerning the extent to which equitable utilisation should allow harm.[92]

The 1997 Convention does not provide any rigid formula for implementation of equitable utilisation or for assessing the extent to which infliction of harm would be equitable in each particular case. It requires the watercourse States to comply with procedural principles for determination of those question. In this respect, as the ILC commentaries provide, regular exchange of data and information on the watercourse condition is 'the general minimum requirement',[93] data and information supply on new uses or on changes in existing uses amounts to 'general obligation',[94] notification of new project is 'embodied' in various sources of state practice,[95] consultation is 'required in similar circumstances' in international instruments and decisions.[96] Among dispute settlement provisions, negotiation in good faith and in a meaningful way is 'a well-established rule of international law',[97] fact-finding has received 'considerable attention by States' whereas other methods of third-party settlement are optional in the text of Article 33.[98]

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90 Paras 3-7 of the commentary to Article 7, ibid., pp. 236- 9.

91 UN, GAOR, 51st Session, 99th plenary meeting, 21/5/97, p. 4.

92 See, UN, GAOR, 51st Session, 99th plenary meeting, 21/5/97, pp. 1-12. Article 7 was criticised due to its failure to explicate an appropriate relationship with Article 5 (Czech, ibid., p. 6); for undermining equitable utilisation, (Slovakia, ibid., p. 7); for putting onerous burden on upper riparian States (Ethiopia, ibid., p. 9). On the hand, Pakistan and Egypt (ibid., pp. 5, 11) observed that the obligation of no harm should have been more stringent.

93 Para 1 of the commentary to Article 9, 1994 ILC Report, supra note 15, p. 250

94 Para 2 of the commentary to Article 11, ibid., p. 259.

95 Para 6 of the commentary to Article 12, ibid., p. 262.

96 Para 2 of the commentary to Article 17, ibid., pp. 274-5.

97 Para 1 of the commentary to Article 33, ibid., p. 323.

98 Para 4, ibid., p. 324

The ILC commentaries thus reflect that: 1) equitable utilisation and no-harm principles are established rules of international law. However, the major changes made by the ILC as well as by the Sixth Committee in the definition of the relationship between these principles indicate that the customary nature of this relationship has not been well established; 2) The principle of negotiation for dispute settlement is an established rule. ILC commentaries are not that much specific about the customary status of principles of notification, information exchange and consultation. These obligations are, however, inseparable from the obligation of negotiation in the sense that a negotiation without notification and information exchange can serve the objective purposes for which the negotiation is required. These principles thus cannot be taken anything less than establishes rule of customary law. The status of the provision concerning Fact-finding Commission is merely in a formative stage.

APPLICABILITY OF CUSTOMARY RULES TO THE GANGES CASE

Although the 1997 Convention may be said to have crystallised most of the procedural rules of customary international law, it does not reflect that the obligations under those rules have strictly uniform and unalterable components. The Convention does not oblige its Parties to harmonise their pre-existing agreements and, at the same time, it authorises them to 'adjust' its provisions in their subsequent practice. These suggest that the general obligations, which the Convention have reflected, could be performed to the extent those obligations are suitable to and agreeable by the concerned watercourse States. This is because - to quote McCaffrey, the longest serving Rapporteur of ILC on this subject and his co-author - 'After all, the Convention [1997 Watercourse Convention] does not purport to contain provisions rising to the level of *jus cogens*'.[99] The authors rather observed that the use of the words "apply and adjust" in Article 3 of the Convention and the Working Group's 'Statement of Understanding'

[99] McCaffrey and Sinjela, supra ntoe 5, at p. 98; As defined in Article 53 of the 1969 Vienna Convention on the Law of Treaties, rules of *jus cogens* or peremptory norms of general international law are norms 'accepted and recognised by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of international law having the same character'. The ILC (Draft articles on the Law of Treaties, 1966, Commentary to Article 5, II:2 YILC, p. 121, para. 67 regarded the provision in UN Charter concerning prohibition of the use of force as a conspicuous example of peremptory norm of international law.

concerning Article 3[100] 'encourage parties to follow the general principles of the Convention in their specific agreements without preventing them from departing from it'.[101]

As a provision of 1997 Convention, Article 3 is, in a good deal, the sum-total of the legal opinion of international community. That opinion was not expressed in a manner which indicates that the codified or crystallised rules in the 1997 Convention do not permit their limited application in the particularised regulation of the same subject in a watercourse agreement. Thus, Article 9 on exchange of relevant information can be customary rule. But the obligations under that rule, as understood in the ILC commentary to that article[102] are residual in nature and they do not apply when the watercourse States have any applicable agreement, even if that agreement deviates in standard and quality. This is confirmed by the legal opinion of the international community to the extent that opinion is reflected in Article 3 of the 1997 Convention.

In this respect, the 1997 Convention can be compared to the provisions of 1992 UN ECE Convention on the Protection and Use of Transboundary Watercourses and International Lakes. The Convention has set forth detailed provisions for pollution control, ecologically sound use, rational water management, environmental impact assessment, information sharing, etc. The member States of the UN Economic Commission for Europe adopted this Convention according to which they 'shall adapt' existing agreements and 'shall embrace relevant issues covered by the Convention' in their subsequent agreements (Article 9.1).[103] By obliging adaptation of existing agreements with its principles and by requiring harmony in subsequent practice, this Convention thus reflects fairly invariable components of regional rules. The 1997 Convention does not do it that way at global level.

Therefore, the applicability of customary rules of the 1997 Convention to the Ganges case may not be said to be clearly mandatory. The 1996

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[100] The Statement of Understanding provides: 'The present Convention will serve as a guideline for future watercourse agreements and, once such agreements are concluded, it will not alter the rights and obligations provided therein, unless such agreements provide otherwise'.

[101] McCaffrey and Sinjela, supra note 5, at p. 98.

[102] Para 1 of the commentary to Article 9, 1994 ILC Report, supra note 15, at p. 250 and para. 1 of the commentary to Article 33, ibid., at p. 323.

[103] See, Sands, et al., (eds), Documents in International Environmental Law, 1994, 679-80.

Ganges Treaty does not exclude principles of information sharing, consultation and dispute settlement. But the obligations assumed under these principles are limited in the 1996 Treaty. Although Bangladesh occasionally demanded information and consultation about the use of the Ganges water in the upper basin, in her actual practice, as evidenced in the five agreements (1975, 1977, 1982, 1985, 1996) Bangladesh has consistently agreed with India about limited data and information sharing and about limited measures of consultation and dispute settlement. This repetitive treaty practice confirms the components of *lex specialis* between them. The 1997 Convention does not appear to reflect that such practice is not permitted by *legi generali*.[104]

CONCLUSION

The 1997 Convention has at least confirmed the necessity of observing the procedural rules it has crystallised. As has been analysed above, the ILC commentaries to the relevant articles of the Convention indicate that save third-party settlement of disputes, procedural principles of the Convention can be regarded as emerging rules of customary international law. But the ILC commentaries pointed to the residual character of those articles and clarified that they would not apply in the presence of an existing treaty regime. More significantly, the Convention itself preserves existing agreements irrespective of whether or not they have inadequately applied its principles. It also allows the contracting Parties to 'adjust' its provisions in their subsequent treaty practice. These provisions, including the implicit acceptability of derogation from the principles of the Convention in the existing treaty instruments, are contained in Article 3, which like any other article of the Convention reflects the legal opinions of the international community who participated in the negotiation and adoption of the 1997 Convention.

Article 3 thus suggests that the customary rules on procedural duties, to the extent they are crystallised in 1997 Convention, have not developed to a level of peremptory norms of international law from which deviation in standard and quality in the existing treaty instruments is not allowed. It is

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[104] In this regard, the ICJ (in *North Sea Continental Shelf* cases, 1969 ICJ Reports, at p. 42) observed that ' ... it is well understood that, in practice, rules of international law can, by agreement, be derogated from in particular cases, or as between particular parties, ...' The priority of *lex specialis* was recognised in *Tunisia/Libya Continental Shelf* case, 1982 ICJ Reports, p. 38, *Nicaragua* case, 1986 ICJ Reports, , p. 137. See, in this regard, Shaw, International Law, 4th edition, 1997, at p. 96.

thus apparent that the extent to which general legal norms (concerning the use of international watercourse) can be applied in the relationship of two States depends mostly on the agreement of those States. Such legal norms were more definitive after the formulation in 1994 of the draft articles on watercourse law by the ILC, a universal international organisation. But instead of reflecting those norms comprehensively, the subsequent Ganges Treaty of 1996 has only reproduced the limited procedural duties of the previous agreements.

It can be inferred that the scarcity of the Ganges dry season flows, in one way or another, has influenced both Bangladesh and India to establish such a limited or loose legal relationship. This loose relationship has exempted India from considering measures to control the expansion of upstream uses of the Ganges. At the same time, it has shielded Bangladesh from the possibility that reconciliation with upstream uses as well as with the needs of Farakka Barrage Project may require her to accept a lower flow than what she can at least claim now as her equitable share. But their own experience proves that this limited legal relationship has scarcely resolved the problems which could have existed in the total absence of legal regulations.

It is, therefore, suggested that the problems of sharing the scarcity of Ganges flow can be mitigated by utilising comprehensive procedural techniques rather than by delimiting their role. In the international domain, the benefits of enhancing the role of procedural principles are being increasingly recognised even in some dearth water areas.[105] This is done by concluding treaty instrument for establishing competent joint institution for integrated river basin development and management.[106] In the 1996

[105] For example, see, the Zambesi River Systems Agreement of 1987, 31 International Legal Material 814; The Kagera River Basin Agreement of 1977, 1089 UNTS 165; The Conventions on Senegal River of 1972, in UN Natural Resources/Water Series no 13, (sales no, E/F. 84.II. A.7, 16 and 21). International donor agencies' and countries' preference for such integrated development plan has already become noticeable. It can be assumed that after the adoption of the 1997 Convention, whatever would be its legal force, this preference would become more dominant in the coming years. See, in this regard, Sergent, "Comparison of the Helsinki Rules to the 1994 UN draft articles", 8 (1994) Villanova Environmental Law Journal, 477.

[106] As it is observed in the Report of the ILC on the work of its 46th session (in UN, GAOR, 49th session, supplement no. 10, p. 224, para. 12), these 'modern agreements' rather than 'specifying the respective rights of the parties', have gone 'beyond the principle of equitable utilisation by providing for integrated river basin management'.

Treaty, Bangladesh and India have apparently abandoned such a possibility by excluding the programmes of studying the previous development proposals including the proposal Bangladesh made for an integrated river basin development. The minimum legal relationship this Treaty has established for the sharing of the Ganges flow at Farakka is also unlikely to be effectively secured unless the role and scope of the applicability of the procedural principles are enhanced in line with the 1997 Convention.

The inadequacy of the Ganges agreement also demonstrates the desirability of relying on the 1997 Convention in conducting negotiations for sharing the waters of other common rivers of Bangladesh and India. Instead of disassociating themselves from the common practice, these two states should rather contribute to the strengthening of the emerging customary principles in the 1997 Watercourse Convention.