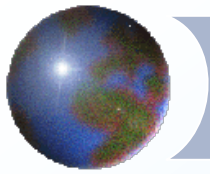


*Equitable and Reasonable
Utilization and the Obligation
Against Causing Significant Harm
Are they Reconcilable?*

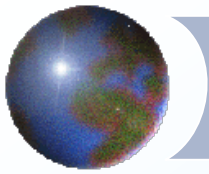
S. Salman

November 4, 2022



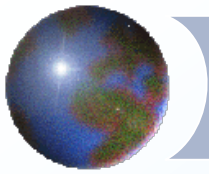
Structure of the Presentation

- ✦ The historical and legal context of the relationship between the two principles
- ✦ Work of the Institute of International Law and the International Law Association
- ✦ How the UN Watercourses Convention (UNWC) dealt with the relationship
 - ❑ Arguments for supremacy of equitable utilization
 - ❑ Endorsement by the ICJ
 - ❑ The concept of foreclosure of future uses
- ✦ Conclusion



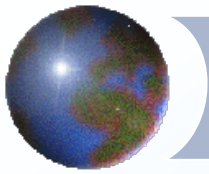
Historical and Legal Context

- ❖ International Water Law has evolved largely around relationship between two principles
 - ❖ River Oder, Trail Smelter, Lake Lannoux cases
 - ❖ Main issue for UNWC for 43 years
- ❖ Lower riparians favor the no harm rule because they believe it protects existing uses against impacts resulting from activities undertaken by upstream states: Nile, Tigris & Euphrates.
- ❖ Upper riparians prefer equitable & reasonable utilization because it provides them more scope to utilize their fair share of the watercourse for activities that may impact downstream states



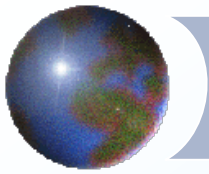
Historical and Legal Context

- ⊕ Work of the Institute of International Law (IIL) started with emphasizing the obligation against causing harm
 - ⊞ The Madrid Declaration 1911
 - ⊞ Gradual recognition of equitable utilization
 - ⊞ The Salzburg Resolution 1961
- ⊕ Work of the International Law Association (ILA) emphasized Equitable Utilization
 - ⊞ The Helsinki Rules 1966 and predecessors rules
 - ⊞ Recognition of existing uses as one of the factors for determining equitable utilization



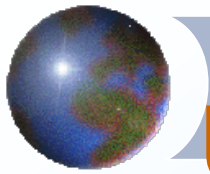
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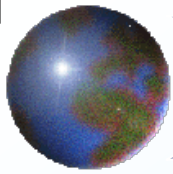
Historical and Legal Context

- ⊕ Relationship between two principles is complicated further by
 - ⊞ differences over the qualitative & quantitative assessment of the obligation not to cause significant harm
 - Not just harm but “significant” harm
 - What does “significant” mean?
 - How to measure harm? By whom??
 - Other terms: Adverse effect, appreciable harm, transboundary impact
 - ⊞ The less understood concept of “Foreclosure of Future Uses”
- ⊕ UNWC addressed relationship after a lengthy process₆



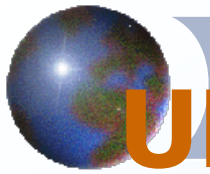
UN Watercourses Convention

- ⊕ ILC started to work on UNWC in 1971
- ⊕ Completed in 1994,
- ⊕ UNWC adopted in 1997; 26 years
- ⊕ Entered into force 2014:17 years, total 43 years
 - ⊞ 5 rapporteurs and 15 reports
- ⊕ A number of difficult issues
 - ⊞ Definitions – watercourse
 - Transboundary Grounwater
 - ⊞ Exiting agreements
 - ⊞ Dispute resolution
 - ⊞ Relationship between equitable & reasonable utilization & obligation not to cause significant harm, and which one subordinated the other



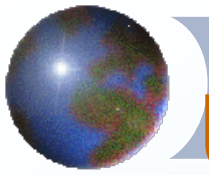
UN Watercourses Convention

- ❖ Most ILC reports subordinated obligation not to cause significant harm to principle of equitable utilization
- ❖ Others equated the two concepts
- ❖ A third approach suggested situations where equitable utilization can subordinate obligation not to cause significant harm, with the element of due diligence
- ❖ Final ILC report (1994) stated:
 - “In certain circumstances, ‘equitable and reasonable utilization’ of an international watercourse may still involve significant harm to another watercourse State. Generally, in such instances, the principle of equitable and reasonable utilization remains the guiding criterion in balancing the interests at stake.”
- ❖ UNWC codified main principles of customary IWL
- ❖ Relationship dealt with by articles 5 & 7 of UNWC after lengthy discussion & attempts to redraft article 7.



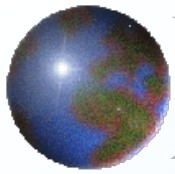
UN Watercourses Convention

- ❖ Sixth Committee convened as “Working Group of the Whole” in two lengthy meetings 1994 & 1996
 - ❖ Relationship proved the most controversial issue
 - ❖ Sixth Committee dropped due diligence clause art. 7
- ❖ Replaced it with (in article 7):
 - ❖ requirement to take all appropriate measures to prevent causing of significant harm to other watercourse States
 - ❖ Where significant harm nevertheless is caused to another watercourse State, the States whose use causes such harm shall take all appropriate measures, having due regard for the provisions of Articles 5 and 6, in consultation with the affected State, to eliminate or mitigate such harm, and
 - ❖ where appropriate, to discuss issue of compensation



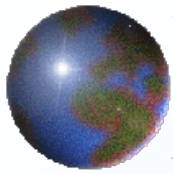
UN Watercourses Convention

- ✦ New formula accepted by both groups because
 - ✦ Lower riparians considered it neutral – equating the two principles
 - ✦ Upper riparians considered it as supporting subordination of no harm to equitable utilization
- ✦ Prevailing view under IWL is: UNWC has subordinated obligation not to cause significant harm to principle of equitable and reasonable utilization because:
 - ✦ The factors for determining Equitable utilization include existing uses & effects of the use or uses of the watercourse in one watercourse State on other watercourse States; factors not renegotiated
 - ✦ Article 7 requires taking all appropriate measures to prevent causing significant harm to other watercourse states.



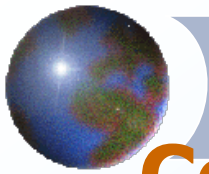
UN Watercourses Convention

- ❖ When significant harm nevertheless is caused to another watercourse state, then Article 7 requires taking all measures to eliminate or mitigate such harm giving due regard to Article 5 on the principle of equitable and reasonable utilization
- ❖ Significant harm may be tolerated in certain cases, such as when the possibility of compensation may be considered
- ❖ Duty of Conduct not Result.
- ❖ Above view is in line with the ILC Helsinki Rules which were widely accepted as representing customary IWL before the UNWC was adopted,
 - factors for determining equitable utilization
- ❖ UNWC referred to valuable contribution of other organization, both governmental and NGO



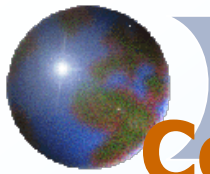
ICJ Endorsement of this View

- ⊕ A major endorsement of this view came from ICJ in September 1997 in the Gabčíkovo (Danube case)
 - ⊕ ICJ emphasized the concept of equitable utilization when it directed that “the multipurpose programme, in the form of a co-ordinated single unit, for the use, development and protection of the watercourse is implemented in an equitable and reasonable manner.”
 - ⊕ ICJ Quoted from the 1929 by the PCIJ where PCIJ stated: “[The] community of interest in a navigable river becomes the basis of a common legal right, the essential features of which are the perfect equality of all riparian States in the use of the whole course of the river and the exclusion of any preferential privilege of any one riparian State in relation to the others.”
 - ⊕ ICJ did not make any reference to the obligation not to cause significant harm
 - ⊕ Similar approach by ICJ in the Pulp Mills case



Concept of Foreclosure of Future Uses

- ⊕ There is a widely-believed, but inaccurate, notion that only upstream riparians can cause harm to downstream riparians by affecting the quantity and quality of water flows to such downstream riparians.
 - ⊠ i.e. Harm flows with the river, downstream
 - ⊠ one basic misunderstanding about international water law in general, and the UNWC in particular
- ⊕ It is obvious that downstream riparians can be harmed by the physical impacts of water quality and quantity changes caused through use by upstream riparians
 - ⊠ Dams & diversion, use over equitable share
- ⊕ Harm is both qualitative and quantitative



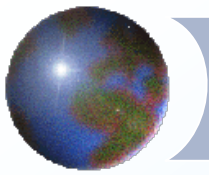
Concept of Foreclosure of Future Uses

- ❖ it is less understood, and not comprehended, that upstream riparians can be harmed by the potential foreclosure of their future uses of water, caused by the prior use & claims of rights by downstream riparians.
 - ❖ Concept of foreclosure of future uses establishes a clear Linkage between the two principles
 - ❖ Applies only to the quantitative aspects of shared watercourse
 - ❖ Concept also referred to as “the Legal Harm”
 - ❖ Misunderstanding contributed to difficulties on the relationship between the two principles
- ❖ For this reason notification under IWL is required from any riparian (lower or upper) to the other riparians both upper and lower riparians.
 - ❖ UNWC uses “watercourse state” not upper and lower riparians
 - ❖ World Bank Policy requires notification of all riparians



Conclusion

- ✦ International water law is the law of cooperation; UNWC:
 - ✦ Mentions Cooperation/Cooperate 15 times
 - ✦ Affirms in its preamble the importance of international cooperation and good-neighborliness
 - ✦ Further confirms that cooperation will ensure utilization, development, conservation, management and protection of international watercourses, and promotion of their optimal and sustainable utilization for present and future generations
- ✦ Cooperation can only be achieved through
 - ✦ An inclusive treaty of all the riparaians to the shared watercourse
 - ✦ Establishment of a Commission of water professionals
 - ✦ With meaningful authority over the watercourse, and
 - ✦ With Joint Projects and Programs



Conclusion

- ⊕ Thus, with:
 - ⊕ An inclusive treaty,
 - ⊕ a commission with meaningful authority over the shared watercourse; manned by water professionals
 - ⊕ Jointly planned, funded & managed projects/programs
- ⊕ There will be no questions or disputes over:
 - ⊕ How to measure equitable & reasonable utilization
 - ⊕ How to measure quantitative and qualitative harm
 - ⊕ Which riparian may cause harm to which riparians, and
 - ⊕ Which riparian should notify other riparians
- ⊕ And we will achieve the optimal and sustainable utilization and protection of the shared watercourses
- ⊕ Examples: Manantali and Diama Dams on Senegal River
- ⊕ Itaipu Dam on the Parana River



Thank You

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