



Benefit-Sharing and Upstream / Downstream Cooperation for Ecological Protection of Transboundary Waters:

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**A TRADITION OF
INDEPENDENT
THINKING**



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Consensus and Confusion in International Water Law: *The Illusion of Agreement*

- **Convergence:**

- 1966 Helsinki Rules; 1992 UNECE Water Convention; 1997 UN Watercourses Convention; * 2008 ILC Draft Articles on TB Aquifers; 2000 SADC Revised Protocol; Watercourse Agreements; *etc.* [equity and environmental / ecological sustainability]
 - Equitable and Reasonable Utilisation
 - Duty to Prevent Significant Transboundary Harm
 - Duty to Cooperate

- **Divergence:**

- 1997 UN Watercourses Convention: (Burundi, China, Turkey – voted against in UNGA; Bolivia, Ethiopia, Mali, Tanzania – abstained in UNGA)
- Duty to Prevent Significant Transboundary Harm: Upstream States suspicious of express inclusion of 'no harm' rule
- Equitable and Reasonable Utilisation: Downstream States suspicious of subordination of 'no harm' rule to ERU (Egypt, France, Pakistan, Peru - abstained in UNGA)

Consensus and Confusion in International Water Law: *Finding Common Interests*

- **Misunderstanding of IWL:**

- ERU flexible enough to accommodate arrangements for equitable sharing of downstream benefits
- 'no harm' rule may include harm to downstream uses / foreclosure of upstream uses
- More sophisticated understanding of key substantive / procedural rules

- **Towards Reconciliation:**

- Evolution of requirements of ecosystems protection – methodologies:
 - Ecosystems approach
 - Environmental flows
 - Ecosystem services / PES
- Benefit-sharing to secure ecosystem services basin-wide

Benefit-Sharing: *Definition & Form*

- **Definition:** 'action designed to change allocation of costs & benefits (economic, social, political, *environmental*) requiring redistribution / compensation' (Sadoff & Grey)
- **Involving:** payments for benefits / compensation for costs re upstream stewardship of TB watercourse; (inter-seasonal flows or storage, reduced flooding, sediment load, ecosystem mgt.)
- **Advantages:** allocation of quantum share inefficient; basin-wide approach to optimise benefits; framework for equitable sharing of costs & benefits; facilitate broad issue-linkage (water & non-water related)
- **Lessons:** 1961 Columbia River Treaty (sophisticated institutional & legal framework for cooperation)
- **Challenges:** (1) unequal bargaining; (2) premature 'sale' of future uses; (3) increased risk of aquatic ecosystem degradation

Benefit-Sharing: *Legal Basis – Permitted but not Required*

- **Equitable and Reasonable Utilisation:**

- Art. 5(1) UNWC – ‘attaining optimal and sustainable utilization thereof & *benefits therefrom*, taking into account the interests of the WC States’
- Art. 6 UNWC – open-ended list of factors; Art. V Helsinki Rules – ‘share in *beneficial uses*, practicality of *compensation* to one or more States’
- One of two ERU models: ‘wet water’ allocation and/or benefit-sharing - equitable apportionment of additional benefits of enhanced cooperation

- **‘No Harm’ Rule:**

- Art. 7(2) UNWC – ‘all *appropriate measures* .. question of *compensation*’
- ‘harm’ includes adverse impact on range of interests (incl. non-water)
- ‘harm’ may travel upstream – ‘foreclosure’ (Salman)
- Damage to ecosystems of a key adverse impact – Art. 20 UNWC requires States to act jointly, where necessary, to protect ecosystem

- **Duty to Cooperate**

- Art 8(1) UNWC – ‘*mutual benefit* .. *optimal utilization* .. *adequate protection*’
- Art 8(2) UNWC – ‘*joint mechanisms or commissions* .. *facilitate cooperation*’

Evolution of Ecosystem Protection in IWL

- **Legal Authority**

- Agenda 21, Chapter 18 (1992)
- 1992 UNECE Water Convention, Arts. 3 and 4
- 1997 UN Watercourses Convention, Art. 20
- 2008 ILC Draft Articles on Transboundary Aquifers, Arts. 5(1)(i) and 10

- **Means of Implementation (Technical Guidance)**

- Ecosystems Approach (e.g. UNECE Water Convention, Art. 3(1)(i))
 - 1994 UNECE Guidance
- Environmental Flows (Minute 319, Colorado Treaty; *Kishenganga Arb.*, PCA 2013; *San Juan Case*, ICJ 2011)
 - Ramsar/CBD 2012; GEFN (IUCN/WWF/UNEP) 2009; UNESCO 2013; 2007 Brisbane Declaration;
- Ecosystem Services (MEA 2005)
 - CBD 2008; ERI 2011; IEEP / Ramsar 2013; UNDP 2013; UNDP 2013; UNEP 2013; EU Commission 2013;
- Payment for Ecosystem Services (PES)
 - IUCN 2006; UNECE 2009;

PES in lieu of Ecological Benefits?

- Ecological 'benefits' long recognised in benefit-sharing.
- Issue-linkage can take place where a 'common currency' is developed re benefits.
- '**Common currency**' rapidly developing re ecological benefits:
 - Ecosystems Approach:
 - E-flows
 - Ecosystem Services
 - PES
 - (biota transfer; biodiversity; etc.)
- Can assist in crafting complex benefit-sharing arrangements focused on ecosystems protection.