

LAW OF THE NON-NAVIGATIONAL USES OF INTERNATIONAL WATERCOURSES: BASIC PRINCIPLES

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REGLEMENTAREA JURIDICĂ A FOLOSIRII CURSURILOR DE APĂ INTERNAȚIONALE ÎN ALTE SCOPURI DECÎT NAVIGAȚIE: PRINCIPIILE DE BAZĂ

În reglementarea folosirii cursurilor de apă internaționale în alte scopuri decât navigația în dreptul internațional s-au format două principii de bază: „principiul utilizării echitabile” și „principiul neprecinuirii daunelor”. Aceste principii, împreună cu principiile mai înaintate de durabilitate, de luarea măsurilor de prevenție, de precauție și principiul „poluatorul plătește” se întâlnesc în diferite variante pentru reglementarea regimului juridic al cursurilor de apă internaționale. Actualmente, Convenția privind protecția și utilizarea cursurilor de apă transfrontiere și a lacurilor internaționale (1992) a obținut o susținere pe larg ca un instrument important pentru cooperarea în domeniul apelor transfrontiere în regiunea Comisiei Economice a ONU pentru Europa. Cu toate că Convenția ONU cu privire la dreptul folosirii cursurilor de apă internaționale în alte scopuri decât navigația (1997) este departe de a intra în vigoare, este recunoscută ca reflecție adecvată a cutumei internaționale. Noile Reguli din Berlin ale Asociației de drept internațional demonstrează creșterea influenței principiilor și prevederilor ale dreptului internațional al mediului la reglementarea juridică a cursurilor de apă internaționale.

ПРАВОВОЕ РЕГУЛИРОВАНИЕ НЕСУДОХОДНЫХ ВИДОВ ИСПОЛЬЗОВАНИЯ МЕЖДУНАРОДНЫХ ВОДОТОКОВ: ОСНОВНЫЕ ПРИНЦИПЫ

В международно-правовом регулировании несудоходных видов использования международных водотоков сформировались два основных принципа: «принцип справедливого использования» и «принцип непричинения ущерба». Эти принципы, наряду с более поздними принципами устойчивости, принятия превентивных мер, предосторожности и принципом «загрязнитель платит», встречаются в различных вариантах для регулирования правового режима международных водотоков. К настоящему моменту, Конвенция по охране и использованию трансграничных водотоков и международных озер (1992) завоевала широкую поддержку в качестве важного инструмента трансграничного водного сотрудничества в регионе ЕЭК ООН. Хотя Конвенция ООН о праве несудоходных видов использования международных водотоков (1997) еще далеко до вступления в силу, она признана адекватным отражением международного обычного права. Новые Берлинские правила Ассоциации международного права свидетельствуют о растущем влиянии принципов и положений международного экологического права на правовое регулирование международных водотоков.

Historical Development of the International Law of Non-Navigational Uses

The international watercourses law started with the navigational uses. Non-navigational uses have long been subject to claims of national sovereignty [1]. Although water has almost never been the cause of wars, peace and boundary agreements often contained the provisions on water usage [2]. River cooperation often started for the purpose of flood control [3]. The institute of international river commissions developed in the XIXth century to regulate international navigation, commerce and later some non-navigational uses [1].

With the development of international system, codification of international law on the non-

navigational uses started within intergovernmental and sometimes non-governmental organisations. The earliest achievement is the Madrid Declaration (1911) of the Institute of International Law. Several soft-law codifications have been developed by the International Law Association [hereinafter: ILA]. The Dubrovnik Statement (1956), New York Statement (1958), Hamburg Recommendations (1960), and the Helsinki Rules (1966) are the most important ILA's products in this area. The UNEP Principles on Conservation and Harmonious Utilization of Natural Resources Shared by Two or More States (1978) were advancement in the sphere. Great work has been realised by the United Nations Economic Commission for Europe [hereinafter: UN ECE], starting from a small abstract

in the Principles of Policy on Water Pollution Control (1966) and coming to the Convention on the Protection and Use of Transboundary Watercourses and International Lakes (1992) [hereinafter: the Helsinki Convention] [4] and the Guidance on the Protection of Transboundary Waters (1996).

In 1997, the UN General Assembly approved the Convention on the Law of Non-Navigational Uses of International Watercourses [hereinafter: the UN Convention] [5], drafted during 20 years by the International Law Commission. In the negotiations, the delegations' positions were influenced by their perceptions of their country's geographic circumstances as upstream or downstream states [6] that gave the way to a lot of compromises.

The cases in the area of shared water resources occupy an important place in the international environmental law. These are the Lake Lanoux Case (1957), San Juan River Arbitration (1888, 1916), Oder Case (1929), Diversion of the Meuse Case (1937), and Gabčíkovo-Nagymaros case (1997) [7]. The Case Concerning Pulp Mills on the Uruguay River (Argentina v. Uruguay) [8] which is under consideration of the International Court of Justice (ICJ) since 2006 may become an important development in this area.

The Harmon Doctrine

Historically, four theories have been developed regarding the use of international watercourses to balance sovereignty and interests of states-riparians [9].

The doctrine of absolute territorial sovereignty is an extreme one, benefiting only the upstream riparians. It is often called the Harmon Doctrine, after the name of the US Attorney General [10]. In the dispute over irrigation on Rio Grande between the US and Mexico (1895), Harmon noted that the fundamental principle of international law is the absolute territorial sovereignty of every nation, as against all others, within its own territory, and self-preservation is one of the first laws of nation. He concluded that Mexico could not assert a right entirely inconsistent with the sovereignty of the United States over its national domain, and that US as upper riparian could use the waters on its territory without taking into account the effect of its activity upon Mexico [11].

The same position had been taken by the Arbitrator in the Helmand River Cases (1872, 1905). Arbitrator McMahon recognised that the general geographical position of the Helmand river naturally gives to Afghanistan as owner of Upper Helmand the rights to this river. However, the Arbitrator restricted the rights of Afghanistan to some extent in favour of Persia [12].

The other theory, absolute territorial integrity, forbids causing any harm to the other riparian. It is also considered as an extreme one, not appropriate to regulate the regimes of international watercourses today.

The theories of restricted territorial sovereignty and restricted territorial integrity that prohibit a riparian to injure a co-riparian have become a sort of compromise between the first two [10]. These two restrictive theories led to the development of the two basic concepts to define the rights and duties of states-riparians, i.e. the principle of 'equitable utilization and participation' and the principle of 'no harm'.

Principles of 'Equitable Utilization' and 'No Harm'

In one or another way, the principles of 'equitable utilization' and 'no harm' are present in the majority of international agreements, whether framework ones or the agreements covering individual watercourses.

The principle of 'equitable utilization' determines the legitimacy of the use of a watercourse based on the equity and reasonableness of this use. It allows the harm to another state-riparian to be caused, if the benefit of use overweighs the harm. The 'no harm' principle prohibits uses which result in appreciable/significant/substantial harm to the other riparian. The relative character of these two concepts is often outlined by the scholars [9]. However, one of these two principles must logically prevail in order to regulate the uses of a watercourse.

The 'equitable utilization' principle was formulated in the ILA Dubrovnik (1956) and New York (1958) Statements of Principles. The UNEP Principles stipulate the obligation of states to cooperate consistent with the concept of equitable utilization (1978). The ILA Helsinki Rules (1966) are the first attempt to combine the two principles. They state the obligation of a State to prevent any new form of water pollution which would cause a substantial injury in the territory of co-basin State, "consistent with the principle of equitable utilization". Thus, the Helsinki Rules give priority to the 'equitable utilization' rule, allowing the damage to be caused.

The principles of 'equitable utilization' and 'no harm' have been the core issue of the debate during the drafting of the UN Convention on the Law of Non-Navigational Uses of International Watercourses (1997).

Article 5 of the UN Convention describes 'equitable and reasonable utilization' principle (paragraph 1) and the principle of 'equitable and reasonable participation of states in the use of a watercourse' (paragraph 2). Some factors to determine what utilization is equitable

and reasonable are listed in Article 6. Article 7 is a 'no harm' principle. It requires states to take all appropriate measures to prevent significant harm to other watercourse states. Paragraph 2 however, shows the primacy of the principle of 'equitable utilization' [14]. If harm is caused, the State whose use causes such harm shall take all measures "having due regard for the provisions of articles 5 and 6", to eliminate or mitigate it. The reference to Articles 5 and 6 means that significant harm may be tolerated, if equity is satisfied. Some authors mention that rational thinking brought this wording life, as downstream riparians understood that upstream countries would never agree about strong 'no harm' rule [15].

The preparatory history of the UN Convention shows the intention of the drafters to force a harming state to try first to eliminate the damage. Only if that is impossible, damage shall be mitigated [15]. The present text does not make this explicit. The only Article in the UN Convention, where a stronger 'no harm rule' is contained, is Article 21 "Prevention, reduction and control of pollution". However, its autonomous character still causes disputes.

Case Law

The supporters of the 'no harm' or 'equitable utilization' rules have been relying on several cases and treaties as authorities to prove that one or another principle dominates in the customary international law.

The Trail Smelter Arbitration (1937) [16] dealing with the pollution of the Columbia river valley by a Canadian company operating a smelter at the border of Canada with US, is usually regarded as supporting the 'no harm' rule. The Tribunal in the second Decision (1941) cites Prof. Eagleton: "a State owes at all times a duty to protect other States against injurious acts by individuals from within its jurisdiction". The Tribunal makes a remarkable statement: "no State has the right to use or permit the use of its territory in such a manner as to cause injury by fumes in or to the territory of another or the properties or persons therein, when the case is of serious consequence and the injury is established by clear and convincing evidence". It concludes that the smelter "shall be required to refrain from causing any damage through fumes in the State of Washington". The opponents of the 'no harm' rule note the weakness of Trail Smelter as precedent for the 'no harm' principle. They claim that the case refers to air pollution. They note that the relevant precedents of the US Supreme Court have not been properly dealt with by the Arbitration. It is also argued that the statement about harm is no more than *obiter dictum* [13].

Kansas v. Colorado (1906) is the US Supreme Court case supporting the equitable utilization doctrine. The

Court speaks about the equitable division of benefits by the states. It justifies the diversion of waters by Colorado which has diminished the flow of water into the state of Texas. The Court points out the significant benefits of this diversion which transformed thousands of acres into fertile fields. It underlines the 'efficiency of the overall resource use', which is one of the features of the 'equitable utilization' principle [17].

The other group of cases often invoked to support the 'no harm' rule is San Juan River Cases (Costa Rica v. Nicaragua, 1888, 1916) [7] where the Arbitrator was asked to clarify some points of the Treaty. In this case, the Arbitrator comes to 'no damage' formula via the concept of natural rights. The natural rights of Costa Rica included the rights it possessed in the San Juan River, and "these rights were to be deemed injured in any case where territory belonging to Costa Rica was occupied or flooded". The Arbitrator concluded that "Costa Rica could not prevent Nicaragua from executing improvement works at its own expense and within its own territory, provided such works did not result in occupation, flooding or damage to Costa Rica territory...".

The German Constitutional Court in 1927 viewed 'equitable utilization' as governing in the application of the general 'no harm' rule in Wurttemberg and Prussia v. Baden [18]. In this case, German länder were in dispute over a number of issues dealing with the loss of water in the Danube on the territory of Wurttemberg, appearing later in Baden and Prussia. The Court underlined that as confirmed a number of times by the Government of German Reich "no state may take measures on its own territory which have serious adverse effects on the flow of the waterway over another state's territory". To apply this rule, "the legitimate interests of riparian states must be weighed against each other in an equitable manner".

Some authority for the 'equitable utilization' may be drawn from the Diversion of Water from the Meuse case [7]. Although the Permanent Court of International Justice decided to solve the dispute of the Netherlands and Belgium based on the treaty between them, it explicitly pointed out the equality of the countries to use the Meuse. It rejected the Netherlands's claim that the treaty intended to place the Parties in a situation of legal inequality by conferring on the Netherlands a right of control to which Belgium could not lay claim.

The Lake Lanoux Case (France v. Spain, 1957) [7] has provoked a controversial discussion over its value as a precedent for the 'no harm' rule. In this case, the Spanish Government objected the decision of France to divert some waters from Lake Lanoux to another basin, and return the same amount of waters to the

Lake Lanoux basin before its waters entered Spain. Spain was relying on the Treaty and Additional Act in force between the Parties [13].

This case was relied upon in the Second, Fourth and Fifth Reports on the UN Draft Articles by Prof. McCaffrey to support the 'no harm' formula. However, as some authors mention, the statements of McCaffrey have not been accurate as he had been using the text with minor inconsistency [13]. The result of the case concerned the necessity to take interests of other riparians into account. The Arbitral Tribunal only made an allegation that Spain could have claimed that her rights had been impaired in violation of the Act, if it would have argued that that the works would bring about an eventual pollution of waters, or that the waters returned could injure Spanish interests. That is why, the authority of Lake Lanoux as a precedent for 'no harm' rule raises doubts.

The international watercourse law has been tested by the *Gabcikovo-Nagymaros case* in the ICJ [19]. In this case, Hungary stopped the implementation of the joint project with Slovakia provided for by the Treaty on the construction of several dams, while Slovakia drafted and implemented the unilateral re-route of the Danube into Gabcikovo dam (so-called 'Variant C'). The case was treated differently by environmentalists. From one side, the Court's emphasis on the environment pleased many [20]. From the other side, the majority has been disappointed as the Court showed a lot of conservatism in its decision and have not applied several principles recently developed by the international environmental law [21].

Among other claims, Hungary was appealing to the principle of equitable and reasonable utilization, claiming that the Variant C violates this principle, depriving Hungary "of its due share of water quantity, water quality" [22]. The Court, when deciding Slovakia's diversion of the Danube under Variant C, finds the diversion to be an international wrong, saying that all riparians enjoy equality in the use of the waters of shared rivers. It calls for the Parties to re-establish the joint regime, so that it would "reflect in an optimal way the concept of common utilization of shared water resources".

The ICJ has been blamed for not addressing in *Gabcikovo-Nagymaros case* the issue of the obligation of states not to cause significant harm and not providing the clarification of the relationship between the principles of 'equitable utilization' and 'no harm' [21].

The Helsinki Convention Approach: Precautionary Principle, the Polluter Pays Principle, and the Principle of Sustainability

Another approach to the regulation of the relations of riparians, which is present in a number of agreements, does not clearly fall under the categories of strict 'equitable utilization' or 'no harm'. The UN ECE Convention on the Protection and Use of Transboundary Watercourses and International Lakes (1992) [4], the Helsinki Convention, is one of such documents.

The Helsinki Convention does not use the concept of 'harm'. Instead, it uses the notion of 'impact' meaning "any significant adverse effect on the environment resulting from a change in the conditions of transboundary waters, caused by human activity". The very purpose of the Convention is to prevent and reduce transboundary impact. The Helsinki Convention obliges the Parties to take all appropriate measures "to prevent, control and reduce pollution of waters causing or likely to cause transboundary impact", "to ensure that transboundary waters are used with the aim of ecologically sound and rational water management", and "to ensure that transboundary waters are used in a reasonable and equitable way, taking into particular account their transboundary character, in the case of activities which cause or are likely to cause the transboundary impact".

The Helsinki Convention establishes several guiding principles for the Parties. The first guiding rule is the Precautionary Principle. This principle is present in the Rio Declaration on Environment and Development (1992). Although not being relied on by the ICJ's majorities neither in the *Gabcikovo-Nagymaros Case*, nor in the request to the Court concerning the French Nuclear Tests Case, the Precautionary Principle is contended to have already crystallized into a norm of customary international law [23]. Different national and international instruments contain a variety of stronger or weaker versions of this principle [24]. The wording of the Helsinki Convention states that if there is an action that might lead to the avoidance of the transboundary impact of the release of hazardous substances, this action must be undertaken even if the causal link between the release of substances and the transboundary impact has not been fully proved by scientists.

The other guiding rule is the Polluter Pays Principle. The definitions of this principle vary. The most common is that "the polluter shall bear the cost of pollution prevention and control measures required so that the environment is in an acceptable state" [25]. The Helsinki Convention contains a weaker version: the polluter has to pay for the costs associated with pollution prevention, control and reduction measures.

The third guidance is the principle of sustainable development. The first appearance of this principle

was the Stockholm Declaration on the Human Environment (1972) saying that nature conservation must be guaranteed a priority in economic planning. Later, this principle becomes the cornerstone of the Rio Declaration (1992). It is broadly formulated in the Helsinki Convention saying that “water resources shall be managed so that the needs of the present generation are met without compromising the ability of future generations to meet their own needs”.

These principles are not unique for the Helsinki Convention only. They appear in numerous watercourse agreements as well. For example, the Polluter Pays Principle, Precautionary Principle and Sustainability are listed in the Convention on Cooperation for the Protection and Sustainable Use of the Danube River [26]. The reference to “sustainable development, utilization, conservation and management” is made in the Preamble to the Mekong Agreement [27].

The approach taken in the Helsinki Convention differs from that one in the UN Convention, which subordinates ‘no harm’ to ‘equitable utilization’. Several reasons can be outlined to explain this difference. The UN Convention was supposed to be of “universal applicability” [28], while the Helsinki Convention was negotiated by the countries belonging to the UN ECE. The UN ECE comprises states with the more developed environmental conscience in comparison with the wide range of countries-negotiators to the UN Convention. During the drafting of the Helsinki Convention, the division on upstream-downstream states was not that evident, as most of the states have been upstream and downstream at the same time. That is why, the equitable utilization could never become a dominant principle for the Helsinki Convention. When the approach of the Helsinki Convention has been advocated for in the negotiations over the UN Convention, downstream states and the particular environmentally-minded states were in favor of the combination of ‘no harm’ rule with the principle of sustainable development and the precautionary principle [29], as it has been done in the Helsinki Convention. However, their attempt failed.

Serious objections may be raised against the guiding role of “equitable utilization”. There is a lot of truth in words of those who consider that principle of equitable utilization is a “utilitarian concept, employing a cost-benefit analysis” [19], which shall not be governing in the international environmental law. As Birnie and Boyle conclude, “equitable utilization is useful as a means of introducing environmental factors into the allocation of shared watercourse resources, but as a basis for comprehensive environmental protection of those watercourses it is a principle only of modest utility” [30].

The concept of the Integrated Water Resource Management (IWRM) has recently become central to the water policy debate worldwide and received support in the Johannesburg Plan of Implementation (2002) and many regional instruments, in particular the EU Water Framework Directive (2000). The effective implementation of the IWRM presumes decisions and actions to be taken at all levels (basin wide, national and international). The application of IWRM to the management of international watercourses shall be central to transboundary water cooperation.

Berlin Rules

In 2004, the ILA approved the Berlin Rules on Water Resources [31], a revision of its Helsinki Rules (1966). As outlined by Rapporteur Dellapenna, “the Berlin Rules speak in terms of a new paradigm of international water law that focuses on ecological integrity, sustainability, public participation, and minimization of environmental harm” [32]. The Berlin Rules present a new attempt to define the relationship between the ‘equitable utilization’ and ‘no harm’. However they rather bring more controversy to the debate. The Berlin Rules provide for the obligation of basin states to “manage the waters of an international drainage basin in an equitable and reasonable manner having due regard for the obligation not to cause significant harm”. They also describe their obligation to “refrain from and prevent acts or omissions within their territory that cause significant harm to another basin State having due regard for the right of each basin State to make equitable and reasonable use of the waters.” Several members of the ILA Water Resources Committee signed a dissenting opinion in relation to the Berlin Rules. They express their disagreement, among other things, with making the principle of equitable utilization subordinate to the ‘no harm’ rule [33]. Among other things, the Berlin Rules make a strong emphasis on the protection of the environment, by including the obligation to protect the ecological integrity of the aquatic environment, the obligation to apply the precautionary approach, and the duty to prevent, eliminate, reduce, or control pollution.

Conclusions

None of the two major principles, the principle of ‘equitable utilization’ and the principle of ‘no harm’, can be considered as clearly dominating in the international law of non-navigational uses of international watercourses. The ‘no harm’/‘no impact’ rule and ‘equitable utilization’ principle, along with the more recent principles of sustainability, preventive action, precaution, and the polluter pays

principle, appear in different variations to govern the regimes of international watercourses. By now, the UN ECE Convention on the Protection and Use of Transboundary Watercourses and International Lakes received clear support as an important instrument for transboundary water cooperation in the UN ECE region. While the UN Convention on the Law of Non-Navigational Uses of International Watercourses is still far from entering into force, it is well recognized as an adequate reflection of customary international law. The new ILA Berlin Rules prove that the provisions and principles of the growing body of international environmental law increase their impact on the legal regulation of international watercourses.

Notes:

¹ James L. Wescoat, *Main Currents in Early Multilateral Water Treaties: a Historical Geographic Perspective*, 1648-1948, (1996) 7 Colo. J. Int'l Envtl. L. & Pol'y 39.

² Jesse H. Hamner, Aaron T. Wolf, *Patterns in International Water Resource Treaties: the Transboundary Freshwater Dispute Database*, (1997) 157 Colo. J. Int'l Envtl. L. & Pol'cy.

³ Ludwik A. Teclaff, *Treaty Practice Relating to Transboundary Flooding*, (1991) 31 Nat. Resources J. 109.

⁴ Convention on the Protection and Use of Transboundary Watercourses and International Lakes (Helsinki Convention), 17 Mar. 1992, (1992) 31 I.L.M. 1312. The Convention entered into force in 1996. At present, there are 36 Parties.

⁵ Convention on the Law of Non-Navigational Uses of International Watercourses (UN Convention), 21 May 1997, (1997) 36 I.L.M. 700. Only 16 nations have ratified the Convention. For the Convention to enter into force, 35 are needed.

⁶ John R. Crook, Stephen C. McCaffrey, *The United Nations Starts Work on a Watercourses Convention*, (1997) 91 AJIL 374.

⁷ Lake Lanoux Arbitration (Fr. v. Spain, 1957) 24 I.L.R. 101. San Juan River Cases (Costa Rica v. Nicar., 1888, 1916), reproduced in Cairo A.R. Robb (ed.), *INTERNATIONAL ENVIRONMENTAL LAW REPORTS*, Cambridge University Press (1999) 15. Case Relating to the Territorial Jurisdiction of the International Commission of the Oder, Judgment of 10 Sept. 1929, PCIJ Series A No.23 (1929). Diversion of Waters from the Meuse (Neth.-Belg.), Judgment of 28 June 1937, PCIJ Series A/B No.70 (1937). Case Concerning the Gabčíkovo-Nagymaros Project (Hung. v. Slov.), Judgment of 25 Sept. 1997, (1998) 37 I.L.M. 162.

⁸ Case Concerning Pulp Mills on the Uruguay River (Argentina v. Uruguay) (visited 1 March 2008) <<http://www.icj-cij.org/docket/index.php?p1=3&p2=3&code=au&case=135&k=88>>.

⁹ Xue Hanqin, *Relativity in International Water Law*, (1992) 3 Colo. J. Int'l Envtl. L. & Pol'y 45.

¹⁰ Kevin P. Scanlan, *The International Law Commission's First Ten Draft Articles on the Law of the Non-Navigational Uses of International Watercourses: Do They Adequately Address All the Major Issues of Water Usage in the Middle East?* (1996) 19 *Fordham Int'l L. J.* 2180, 2207.

¹¹ Harmon Opinion, reproduced in Cairo A.R. Robb (ed.), *INTERNATIONAL ENVIRONMENTAL LAW REPORTS*, Cambridge University Press (1999) 548.

¹² Award of Arbitrator McMahon, 10 Apr. 1905, reproduced in Cairo A.R. Robb (ed.), *INTERNATIONAL ENVIRONMENTAL LAW REPORTS*, Cambridge University Press (1999) 10.

¹³ Charles B. Bourne, *The International Law Commission's Draft Articles on the Law of International Watercourses: Principles and Planned Measures*, (1992) 3 Colo. J. Int'l Envtl. L. & Pol'y 65.

¹⁴ Ellen Hey, *The Watercourses Convention: To What Extent Does it Provide a Basis for Regulating Uses of International Watercourses?* (1998) *RECIEL* Vol.7 Issue 3, 291.

¹⁵ Stephen C. McCaffrey, Mpazi Sinjela, *The 1997 United Nations Convention on International Watercourses*, (1998) 92 *AJIL* 97.

¹⁶ Trail Smelter Arbitration (US v. Canada, 1937 and 1941), 3 *RIAA* 1905.

¹⁷ Gunther Handl, *The Principle of "Equitable Use" as Applied to Internationally Shared Natural Resources: Its Role in Resolving Potential International Disputes Over Transfrontier Pollution*, (1978) 14 *RBDI* 40.

¹⁸ Donauversinkung Case (Wurttemberg and Prussia v. Baden) E. Staatsgerichtshof vom 17./18. Juni 1927, in 116 *E Reichsgericht Zivilsachen*, Anhang 8.

¹⁹ Gabriel Eckstein, *Groundwater Resource, and the Slovak-Hungarian Dispute Over Gabčíkovo-Nagymaros*, (1995) 19 *Suffolk Transnat'l L. R.* 67.

²⁰ *Update: Hungary-Slovakia and the Gabčíkovo-Nagymaros Project*, (1998) Colo. J. Int'l Envtl. L. & Pol'y 260.

²¹ S. Stec, G.E. Eckstein, *Of Solemn Oath and Obligations: The Environmental Impact of the ICJ's Decision in the Case Concerning the Gabčíkovo-Nagymaros Project*, (1998) 8 *Yrbk. of International Law Envt'l L.* 41.

²² Paul R. Williams, *International Environmental Dispute Resolution: the Dispute Between Slovakia and Hungary Concerning Construction of the Gabčíkovo and Nagymaros Dams*, (1994) 19 *Colum. J. Envtl. L.* 1.

²³ Owen McIntyre, Thomas Mosedale, *The Precautionary Principle as a Norm of Customary International Law*, (1997) 9 *Journal of Environmental Law* 221.

²⁴ Alexandre Kiss, Dinah Shelton, *MANUAL OF EUROPEAN ENVIRONMENTAL LAW*, Cambridge University Press, 2nd ed. (1997).

²⁵ Henri Smets, *The Polluter Pays Principle in the Early 1990s*, reproduced in L.Campiglio, L.Pineschi, P.Siniscalco, T.Treves (eds.), *THE ENVIRONMENT AFTER RIO. INTERNATIONAL LAW AND ECONOMICS*, Graham and Trotman Ltd (1994).

²⁶ Convention on Cooperation for the Protection and Sustainable Use of the Danube River, 29 June 1994, Aus.-Bulg.-Croatia-Czech.-F.R.G.-Hung.-Mold.-Rom.-Slovk.-Sloven.-Ukr., I.E.L. 994:49.

²⁷ Agreement on the Cooperation for the Sustainable Development of the Mekong River Basin (Mekong Agreement), 4 May 1995, Cambodia-Laos-Thail.-Vietnam, (1995) 34 *I.L.M.* 864.

²⁸ Laurence Boisson de Chazournes, *The UN Convention on International Watercourses: Prospects for an Unfinished Agenda for Co-Management*, reproduced in Conference-Water: Dispute Prevention and Development (visited 1 March 2008) <<http://gurukul.ucc.american.edu/maksoud/water98/present7.htm>>.

²⁹ Malgosia Fitzmaurice, *Convention on the Law of the Non-Navigational Uses of International Watercourses*, (1997) 10 *Leiden Journal of International Law* 501.

³⁰ Patricia W. Birnie, Alan E. Boyle, *INTERNATIONAL LAW AND ENVIRONMENT*, Clarendon Press, Oxford (1992).

³¹ Berlin Rules on Water Resources, in *Report of the Seventy-First Conference (Berlin)*. International Law Association, London, UK (2004). The Preface to the Berlin Rules acknowledges that "These Rules both express rules of law as they presently stand and, to a small extent, rules not yet binding legal obligations but which, in the judgement of the Association, are emerging as

rules of customary international law.” It is not clear yet whether governments and courts will accept the Berlin Rules as an adequate formulation of the customary international law.

³² Joseph W. Dellapenna, *The Berlin Rules on Water Resources: the New Paradigm for International Water Law*, reproduced in Randall Graham, P.E. (ed.), *WORLD ENVIRONMENTAL AND WATER RESOURCE CONGRESS 2006: EXAMINING*

THE CONFLUENCE OF ENVIRONMENTAL AND WATER CONCERNS, ASCE (2006).

³³ Dissenting Opinion, ILA Berlin Conference 2004 - Water Resources Committee Report (*visited 1 March 2008*) <http://www.internationalwaterlaw.org/intldocs/ila_berlin_rules_dissent.html>.

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