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Sharing of Water Resources: Some Concepts

A. International Rivers

In the literature of international water law, rivers are usually classified into 'national', 'international' and 'internationalized' although 'boundary rivers' are treated as a category in themselves. [1] Black's Law Dictionary explains the expressions 'internal water', 'public river' and 'public waters' in the following way: "Internal waters: such as lie wholly within the body of the particular state or country". "Public river: A river capable in its natural state of some useful service to the public because of its existence as such-navigability being not the sole test".[2]

"Public waters; such as are adopted for the purposes of navigation, or those to which the general public has a right of access as distinguished from artificial lakes, ponds, and other bodies of water privately owned,or similar natural bodies of water owned exclusively by one or more persons". [3]

Taking the criterion of navigation as a basis for classification of rivers in international law, some writers have defined the international rivers accordingly. Fleischmann has, for instance, defined'international rivers' in the following words: "Rivers which flow through the territory of more than one states and are navigable right from the sea, are called international rivers". [4] Similarly, Dahm has adopted navigability as the test for international character of a river; "International rivers are those, which right from the sea or right upto the sea are navigable by nature itself and which through their navigable parts (arms) form the boundary between several states or which flow through the territories of several states. The tributaries are to be treated as international rivers only then when they themselves also fulfil these conditions". [5]

Friedrich, Hatschek, Hershey, Isay, Rivier, Saur, Ulmann and Wolgast also accept 'navigability' as the basic test for treating the rivers as international rivers,[6]

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1. Oppenheim (ed. Lauterpacht), *International Law*, Vol.I, 1955, para 176,p.464; Georg Dahm, *Vocrkerrecht*, Vol I, 631; Hans Thalman 'Internationales Wasserrecht' in Strupp's *Woerterbuch des Voelkerrechts*, Vol III, 1962,508; Karl Strupp, *Theorie und Praxis des Voclkerrechts*, 1925,39; *Grundzuege des positiven Voelkerrechts. 1932, 128ff*
2. Black's Law Dictionary, rev. edition 4,1968,953 and 1491
3. Black's Law Dictionary (Third Edition), 1933,1836
4. Fleischmann, *Das Voelkerrecht (Systematisch dargestellt von Franz v liszt, bearbeitet von Fleischmann)* ed. 12,1925,139
5. Dahm, *Voelkerrecht*, supra note 1,621
6. For references to the sources and works of these authors see Chauhan, *Rangordnung verschiedener Artenvon Wassernutzungen nach internationalem Wasserrecht*, 1963, Chapter III, International Waters.

whereas,in contradistinction to that, there are authors who assert that navigation is in no way a criterion for the international character of a river. [7]

It will be fruitful to mention some definitions of'international rivers' here. While classifying rivers, Briggs expresses himself as follows:

> "A national river is one the entire course of which is within the territory of a single state. An international river is one which flows through the territory of two or more states or forms an international boundary. An internationalised river is a river, whether originally national or international which has been subjected to special conventional regime between states... In the absence of such a regime of internationalisation accepted by a riparian state, national rivers and those portions of international rivers which are whithin the national territory are subject to the exclusive control of the territorial sovereign. No general principle of international law prevents a riparian state from excluding foreign ships from the navigation of such a river or from diverting or polluting its water."[8]

In Berber's opinion:

> "The traditional classification of the rivers into 'national' 'pluriterritorial', namely, which successively flow through two or more states (vertically divided rivers) or on whose banks different states lie opposite to each other (boundary rivers, lengthwise divided rivers) and "conventional" rivers, which lie under an international regime created through treaties, is not decisive in international law and rather can be misleading because it leads to the deduction of abstract norms for the different categories which have an existence only in logic not in positive law whereas in practical legal formulations only the concrete rules created by treaties play a role. [9]

In his classification of rivers Verdross has used the expressions 'national rivers' and 'rivers of international concern', meaning thereby the rivers which are placed under the control of some commissions. The category of the rivers of international concern is further classified by him into the rivers.

> "as falling under the internationalisation of first grade, second grade and third grade respectively according to the test whether they are placed

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7. For such views see Charles H Stockton: *Outlines of International Law*, 1914,134 Simsarian James. The Diversion of Waters affecting the U.S.A. and Canada, AJIL,1938,488-518; Black's Law Dictionary supra note 3,1491
8. Briggs, *The Law of Nations, Cases, Documents and Notes* 1953,274
9. Berber: *Lehrbuch des Voelkerrechts*,(Vol.I) 1975,319
10. Alfred Verdross and Zemanek, *Voelkerrecht*, 1959, 509 ff. See also B.R.Chauhan, *Settlement of International Water Law Disputes in International Drainage Basins.* 1981,92

under the control of a river commission comprising firstly, only the riparian states, secondly the riparian as well as the non-riparian states and thirdly under the direct control or administration of a river commission, as the case may be.[10]

According to Lipper: "An international river is one either flowing through the territory of more than one states, sometimes referred to as a successive river, or one separating the territories of two states from one another, sometimes referred to as a boundary or contiguous river."[11]

Classifying the rivers into 'national','mixed national' and 'international rivers', Sauer states that "the practice terms those rivers as international rivers which divide and flow through the territories of several states and are navigable right from the sea".[12]

In the Convention and Statute on the Regime of Navigable Waterways of International Concern of April 20,1921, the Barcelona Convention on Transit of 1921 has made use of the expression 'waterways of international concern'.

The international Law Association (I.L.A.) at the Forty-Seventh Conference in Dubrovnik, defined the expression 'international river' as "an international river is one which flows through or between the territories of two or more states."[13]

Later, at its Forty-Eighth Conference at New York in 1958 the International Law Association made use of the expression 'drainage basin' and subsequently at its fifty-Second Conference at Helsinki in 1966, while adopting the Helsinki Rules the I.L.A. adopted the expression 'international drainage basin' to be used while dealing with the problems of international water resources law.

In Chauhan's view a river can acquire international character only when it fulfils two conditions, namely,(i) if it factually (geographically and physically) as a boundary river or as river flowing through several states, falls under the territorial jurisdiction of two or more states; and (ii) through certain measures of international law, it becomes subject-matter of rights, interests of claims of two or more than two states. It is immaterial as to which particular uses of waters say

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11. Lipper 'Equitable Utilisation' in Garreston, Hayton and Olmstead (eds.), *The Law of International Drainage Basin,* 1967,16; also cited by E.J.Manner, 'Some Legel Problems relating to the Sharing of Boundary Waters' in *Festschrift fuer Berber,* 1973,321 and fn 2. For other related concepts and definitions see also the E.C.E. Document. *Legal Aspects of Hydro,electric Development of Rivers and Lakes of Common Interest.* U.N. Economic Commission of Europe, E/ECE/136,1952,5. Also see B.R.Chauhan (1981), supra note 10,93 (fn.37)
12. Wilhelm Sauer, Das *System des Voelkerrechts* 1952, 34. See also Chauhan (1981), Supra note 10,92
13. See *Report of the Forty-Seventh Conference held at Dubrovnik (26 August to 1 September 1956),* London,1957,241, Annex 1-Resolution: Principles of Law Governing the Uses of International Rivers.

navigation or irrigation or others, are at the root of or form the basis for the said rights, interests and claims.[14]

In the light of the above analysis, it is submitted that on principle the rivers may be classified as 'national' and 'non-national'. Only those 'non-national' rivers can be termed as 'international rivers', which through some measures of international law are made subject-matter of rights, interests and claims of two or more than two states. Through such measures both national or non-national rivers can be internationalised through the consent of the concerned territorial states, although, in certain cases, just as in case of the internationalisation of Kiel Canal after the First World War, such consent may be procured through pressure. Further, the phenomenon of internationalization can place a national or a non-national river, as the case may be,under the control of a commission, consisting of the representatives of only riparian states, or a mixed commission, consisting of the representatives of riparian as well as non-riparian states or a commission comprising the representatives of only non-riparian states, which may be a rare case, but all the same, is technically possible. There is also the possibility of the concerned river being placed under the control of an international organisation.[15]

B. International Drainange Basin

There was time when in the field of international water law, the terms 'international rivers' and 'international lakes' were used. Later, some other concepts such as 'systems of waters' as "consisting of the interconnecting flowing surface waters, lakes and swamps areas within any drainage basin of which lower outlet leads to any sea or to some body of inland water from which there is no outlet to sea" found a place in this field of literature or in the deliberations of organisations handling the co-related problems. The international Law Association was one such organization, which along with the just mentioned concepts also made use of the expressions 'international system of waters' "as consisting of the interconnecting flowing surface waters, lakes and swamp areas within a drainage basin, any area (land area) of which lies within the territory of two or more states" and 'drainage basin' as "an area within the territory of two or more states in which all the streams of flowing surface water, both natural and artificial, drain a common watershed, terminating in a common outlet or common outlets either to the sea or to a lake or to some inland place from which there is no apparent outlet to a sea."[16]

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14. Chauhan (1981), Supra note 10,94. (also fn.41) See also Thomas T.F.Hung in Some International and Legal Aspects of the Suez Canal Question, AJIL, No. 12,1957,278, The term 'international' has been employed at least in two senses:
    1. In the general descriptive sense signifying a transaction cutting across the boundaries of at least two states, which is devoid of legal consequences; and
    2. In the technical sense in which certain legal consequences flow, such as an international obligation arising out of a treaty.
15. For this analysis see Chauhan (1981), *Supra* note 10,95-96
16. See International Law Association, *Report of the 48th Conference, New York*, 1958-86,99. See also Chauhan (1981), Supra note 10,88-89

As the quantum of water contributed by a contestant state to a drainage basin is also a relevant factor for distribution of water of water resources within a drainage basin, the concept of 'drainage basin' gained significance in th domain of international water resources law. Article II of the Helsinki Rules, framed and adopted by the International Law Association at Helsinki in 1966, has defined the concept of 'international drainage basin' as "an International drainage basin is a geographical area extending over two or more states determined by the watershed limits of the system of waters including surface and underground waters, flowing into a common terminus."[17]

According to Chauhan.

> "the requirement of water contributing connection works both ways. It allows to include such a water-contributing resource within the basin and exclude those surface-water or groundwater resources from the said basin, which though within the geographical area of the concerned basin, are not connected with the drainage system of the basin and as such do not contribute any water to the said basin. Thus sinks ,ponds,swamps and groundwater aquifers occurring entirely within the territory of a state but without surface or groundwater links, in the form of water contributing connection, natural or man-made, to the drainage of the said basin, will not form a part of that basin."[18]

The utility of the drainage basin approach has been fully realized in the field of international water law. This is evident from the fact that the concept has been already adopted even by bodies other than international Law Association. As an illustration thereof it may be pointed out that the Asian-African Legal Consultative Committee in "The Law of International Rivers", in 1973, under Proposition II(1) has incorporated verbatim the definition of 'international drainage basin' as enunciated in Helsinki Rules.[19]

C. International Water Resources System

At some stage it was realized in the field of international water resources law that the expression 'international drainage basin', as commonly understood, depicted only the surface-water and groundwater resources within the concerned two or more states forming a part of the respective drainage basin. It was felt that the water resources should include the entire range of natural waters available in whatsoever form, namely, vapour, liquid or solid in which they occur, and through

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17. See *I.L.A. Report of Fifty Second Conference, Helsinki 1966,* 484-485; Helsinki Rules, 1967,6-7. For comments on the concept of international derainage basin see also Helsinki Rules, 1967,8
18. See B.R.Chauhan (1981), supra note 10,90
19. See Dente A. Carponera, *The Law of International Resources*, Background Paper No. 1/Rev.1, FAO, 1978,45

which they build up the entire hydrological circle. Therefore some more comprehensive expression depicting a more complete transnational, non-maritime hydrosystem was considered necessary. Thus emerged the expression 'international water resources system', which appears to be quite comprehensive and has been inducted in the literature of international water law.[20]

> This concept of "international water-resources system" may be defined as "all surface water, ground water, atmospheric water or frozen water that in any of the vapour, liquid or solid form,flows in,stands on, is present within or passes over the territory of more than one state."[21] In Chauhan's view: "The international status of such a water resources system is a matter of hydrologic fact, namely, the hydro-interconnection and interdependence within or between bodies, aquifers or aggregation of waters in any form. Those states will have international protection of their interests in such an international water resources system, which possess territory, including air space, within which water occurs or flows as a part of this interconnected water resources system."[22]

D. Dispute

While explaining the term 'dispute' it is pointed out in Bouvier's Law Dictionary that "a fact is properly said to be in dispute when it is alleged by one party and denied by the other, and by both with some show of reason."[23] Black's Law Dictionary defines a 'dispute' as "a conflict or controversey; a conflict of claims or rights; an assertion of a right, claim or demand on one side, met by contrary claims or allegations on the other."[24]

Further, it is stated that the 'matter in dispute' comprises "the subject of litigation; the matter for which a suit is brought and upon which issue is joined, and in relation to which jurors are called and witnesses examined.[25]

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20. See *Management of International Water Resources: International and Legal Aspects*, Natural Resources/Water Series No. 1,United Nations, New York, 1975, 12.
21. See B.R.Chauhan (1981),*supra* note 10,97-98; and 'Management of International Water Resources through International Water Resources Commissions,' International Law Association (Indian Branch) Proceedings of the Annual Seminar, March 10, and 11,1973,84.
22. See B.R.Chauhan (1981),*supra* note 10,98. For more detailed treatement and analysis of various categories of water,namely,surface water,ground water,atmospheric water and frozen water, see ibid., 98-104
23. Appeal of Knight, 19 p a 494. *Black's Law Dictionary* (12th Reprint 1975-Vol I.A-K),888
24. Slaven v. Wheeler,'58 Tex. 25; Black's Law Dictionary (3rd edition 1933), 593; Revised, Fourth Edition, 1968,558.
25. Lee v. Watson 1 Wall. 339,17 L.Ed. 557, Black's Law Dictionary ibid., 593

E. International disputes

Some observations made by the international judicial organs are significant in this regard. The Permanent Court of International Justice, while giving its findings on 30th August, 1924 in the Mavrommatis Case defined a dispute as "a disagreement on a point of law or fact, a conflict of legal views, or of interests between two persons."[26]

The International Court of Justice, while facing the problem of "interpretation of treaties", with reference to controversy, arisen between some Allied and Associated powers on the one hand and Bulgaria, Hungary and Romania on the other, pertaining to the alleged violation of those treaties, remarked that "whether there exists an international dispute is a matter for objective determination. The mere denial of the existence of a dispute does not prove its non-existence." [27]

While dealing with the South-West Africa case the International Court of Justice observed in this regard as follows:

> "It is not sufficient for one party to a contentious case to assert that a dispute exists with the other party. A mere assertion is not sufficient to prove the existence of a dispute any more than a mere denial of the existence of the dispute proves its non-existence. Nor is it adequate to show that the interests of the two parties to such a case are in conflict. It must be shown that the claim of one party is positively opposed by the other." [28]

Thus, an international dispute must indicate positive steps in the form of assertion of claim and opposition thereof, as the case may be, by the respective parties, as mere assertion or denial of such claims etc, unaccompanied by any positive steps by the respective parties, would not be sufficient for proving the existence or non-existence of a dispute as such. [29]

As observed by Chauhan, in case of an 'international dispute' the following four requirements must be fulfilled:

(i) The dispute should reflect a disagreement on a point of law or fact, a conflict of legal views or of interests or claims;
(ii) The dispute must be between states as entities of international competence. Regarding this aspect it should be clearly understood that it is quite possible that an element in a dispute may be wrong done to a national of one state or the aggrieved party may be a corporation or other agency or legal entity falling with the jurisdiction of one

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26. Permanent Court of Internaional Justice (P.C.I.J) Ser.A.No. 2,P.11.
27. International Court of Justice (I.C.J.) Reports 1950, P. 74.
28. I.C.J. Reports, 1962, 328.
29. See B.R.Chauhan (1981) *supra* note 10,88-89. See also Berber; Lehrbuch des Voelkerrechts, Vol III,1977,29ff.

state; but until it is taken up by the government of the state of the injured national or affected agency or legal entity, as the case may be, the dispute can hardly be considered as international dispute.

(iii) The dispute must lead to some action by the aggrieved state or party in the form of diplomatic protest, propaganda compaigns, application to an international organization or any of the whole gamut of actions and such an action should not remain uncontested by the other party.

(iv) The dispute must relate to a "reasonably well defined subject matter." Thus, merely, a general political, ideological, moral or religious view or stand expressed or taken by a state will not amount to an international dispute, even if this view is adverse to the views expressed or stand taken by another state, unless the subject-matter of this conflict of views is well defined, and the above mentioned conditions are fulfilled. [30] Of course, the respective assertions and denials should be justifiable on sound juridical grounds.

F. International Water Disputes

Taking the concept of 'international dispute' as its basis, the 'international water dispute' may be treated as to comprise a dispute between two or more than two international drainage basin states or between one international drainage basin state, on one hand and some entity of international competence pertaining to the field of water resources within another international drainage basin State on the other or between two or more than two such aforesaid entities of international competence within two distinct international drainage basin states,with respect to:

(i) The conservation, use, sharing (including sharing of benefits), control, development or management of the water resources of an international drainage basin, and

(ii) The interpretation of the terms of any treaty, agreement etc, relating to the conservation, use, sharing (including sharing of benefits), control, development and management of such water resources or the implementation of such an agreement including all matters arising out of the implementation of such a treaty, agreement or arrangement. [31]

The expression 'entity of international competence, pertaining to the field of water resources, within an international drainage basin state', has been included

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30. See B.R.Chauhan (1981) supra note 10,89; for these aspects of the elements of 'international disputes', see also H.C. Darwin on International Disputes: The Legal Aspects (*Report of a Study Group of the David Davies Memorial Institute of International Studies,*) 1972,57-58

31. For the definition see B.R.Chauhan (1981), *supra* note 10,96-97.

within the definition of 'international water disputes' in order to cover the cases of the units of federations, which in terms of the provisions of their respective constitutions, have been given the competence to conclude water resources law treaties with other foreign states or similar entities in other foreign states, and as such are a party to an international water law transaction although such units or entities do not possess full fledged statehood or status of a full fledged international person. [32]

G. Inter-State Water Disputes

With reference to the inter-state water disputes amongs the states (units) within the Indian federal set-up, Section 2 (c) of the Inter-State Water Disputes Act, 1956 (33 of 1956), defines a "water dispute" in the following words:

> "Water dispute means any dispute or difference between two or more State Governments with respect to:-
> (i) the use, distribution or control of the water of or in, any inter-state river or river valley; or
> (ii) the interpretation of the terms of any agreement relating to the use, distribution or control of such waters or the implementation of such agreement; or
> (iii) the levy of any water rate in contravention of the prohibition contained in section 7 (1)

Section 7 of the said Act prohibits the levy of seigniorage and runs as follows:-

> "7 prohibition of levy of seigniorage, etc.-
> (1) No State Government shall, by reason only of the fact that any works for the conservation, regulation ;or utilization of water resources ;of an inter-state river have been constructed within the limits of the State, impose, or authorise the imposition of, any seigniorage or additional rate or fee (by whatever name called) in respect of the use of such water by any other state or the inhabitants thereof.
> (2) Any dispute or difference between two or more State Governments with respect to the prohibition contained in sub-section (1) shall be deemed to be a water dispute."

It is noteworthy here that in terms of the above mentioned provisions of section 2 (c) of the Inter-State Water Disputes Act, 1956, an inter-state water dispute can arise in India with respect to the above mentioned matters affecting

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32. See ibid., 97. See also fn 45. (p.97) where for illustrations of such units he has cited Berber: *Die Rechtsquellen des internationalen Wassernutzungsrechts*, 1955,41,52,56, wherein Bayern (Bavaria) and Baden, two units of Federal Republic of Germany are mentioned as parties to international water law treaties.

any inter-state river or river valley and such a river of which the water is in dispute need not necessarily flow through all the states (units) of India which are involved in that specific dispute. Further, following the same line of interpretation an inter-state river or river valley whose water can form a subject matter of dispute for the purpose of its use, distribution or control amongst the contestant states, need not necessarily flow through or spread over all the contestant states for the purpose ;of being designated as an inter-state river or river valley, as the case may be. In order to be designated or treated as an inter-state river or river valley for the purpose of any particular water dispute it is sufficient if it flows through or spreads over the territory of any two or more than two states which need not necessarily be all the contestant states in the given specific dispute.