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## Indus Water Treaty Vis-à-vis International Transboundary Water Management Principles

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### Abstract:

*The aim of this paper is to examine the relevance of Indus basin treaty with internationally recognized transboundary water resources management principles. The Indus basin treaty known as the Indus Water Treaty (IWT) was signed between India and Pakistan in 1960. The IWT incorporates various international transboundary water resources management principles, e.g. the principle of equitable and reasonable utilization, an obligation not to cause significant harm, principles of cooperation, data exchange, notification, consultation and the peaceful settlement of disputes. The analysis of Indus water treaty with internationally recognized principles reveals that these internationally recognized principles have provided the common ground and guidelines for IWT arbitration. Meanwhile its principles have provided guidelines for various water management principles. As for as implementation of IWT is concerned, India and Pakistan have happily accepted it and able to curb water dispute.*

### KEYWORDS:

Relevance, Principles, IWT, India-Pakistan.

### INTRODUCTION:

Indus Basin is one of the largest river basins in Asia situated between 23° 59' 07" to 35° 51' 33" North latitude and 67° 24' 41" to 80 10 43 East longitude. Total catchment area of this basin is about 3, 64,700 square miles which extends over four South Asian countries i.e. India, Pakistan, Afghanistan and China. In 1947, soon after the partition of the Indian sub-continent into two independent states India and Pakistan, bulk of the irrigation canals on the Indus system became part of Pakistan. Out of 26 million acres of land irrigated annually by the Indus canals, 21 million acres lay in Pakistan and only 5 million in India. The major portion of basin lies in Pakistan which is about 2, 04300 square miles followed by India 9,5300 (Jammu & Kashmir), while 65,100 square miles collectively is shared by Afghanistan and China.

### INTERNATIONAL TRANSBOUNDARY WATER MANAGEMENT PRINCIPLES:

There are almost 263 transboundary river basins and lakes in the world, covering nearly half of the land surface, shared by two or more states. The accelerating demand and differences for water utilization over these shared river basins have made it critical issue among users and have become the source of conflicts and rivalries. To resolve some of the grave conflicts, a need for laws and principles was felt. Subsequently, some international organizations and scholarly institutions have done tremendous efforts and work to resolve the water conflicts through legal processes. The Two scholarly non-governmental organizations the-International Law Association (ILA) and the International Law Commission (ILC) have made major contributions to the law of international watercourses through adoption of a number of

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resolutions and rules. The major works of the ILA includes, the famous The Helsinki Rules" were issued in 1966, in the 1997 UN watercourses Convention" " was adopted and the Berlin Rules were issued in 2004." " " "

Apart from ILA and ILC works the basin communities and organizations, have done remarkable efforts for the development and management of internationally shared river systems. On the basis of mutual brotherhood these basin communities have documented a rich history of co-operation on their mutually signed treaties.

**INDUS WATER TREATY:**

In 1947, soon after the partition of British India into two sovereign states India and Pakistan, there was a serious canals water dispute between the two new born states. Therefore, after twelve years of hard work under the supervision of World Bank, both countries agreed to sign IWT in 1960. Although IWT was not the first treaty in the world but among all the mutually signed treaties, the IWT is one of the exceptional treaties signed by the active role of World Bank between India and Pakistan. Indeed, the World Bank is a signatory to the IWT and makes commitments of its own for tasks specified in Article V and X as well as Annexure F, G and H. Therefore, the IWT is unusual in three dimensions, its origin, the water allocation mechanism and its integration of previously established norms in customary international water law. In addition to this the IWT is involve in various legal processes and has adopted various rules and principles of water management in its mechanism. Its successful mechanism has guided the water laws, convention and treaties. In the present work an attempt has been made to analyze the relationship of IWT with other international laws, conventions and treaties. Table 1 summarizes the relevance of IWT principles with internationally recognized water management principles.

**Table 1: IWT relationship with Internationally Recognized Water Management Principles:**

Internationally Recognized Water Management Principles	1960 IWT	1966 Helsinki Rules	1997 UN Water Convention	Treaties/Agreements
<b>Reasonable And Equitable Utilization:</b>	IWT water utilization is an "equitable" 80: 20% on the basis of population and demand of both countries.	Articles IV, V, VII, X, XXIX (4)	Articles 5, 6, 7, 15, 16, 17, 19	1995 SADC Protocol on Shared Watercourse Systems (Article 2), 2002 Sava River Basin Agreement (Articles 7-9), 1995 Mekong Agreement (Articles 4-6, 26)
<b>Not To Cause Significant Harm To Other Party:</b>	Article IV, Section 2			Consistent with Trail Smelter and Corfu Channel Cases
<b>Cooperation And Information Exchange:</b>	Articles VI- VII- VIII,	Articles XXIX (1), XXIX (2), XXXI	Articles 5(2), 8, 9, 11, 12, 24(1), 25(1), 27, 28(3), 30	Mexico-US 1946 Treaty, the ILA's 1982 Montreal rules on water pollution in an international drainage basin, the 1992 E.C.E., 1995 SADC Protocol on Shared Watercourse Systems (Articles 2-5), 2002 Sava River Basin Agreement (Articles 3-4, Articles 14-21), 1995 Mekong Agreement (Preamble, Articles 1, 2, 6, 9, 11, 15, 18, 24, 30)
<b>Notification, Consultation and Negotiation:</b>	Article IV (10),	Chapter 3 XXIX (2), XXIX (3), XXIX (4), XXX, XXXI	Articles 3(5), 6(2), 11-19, 24(1), 26(2), 28, 30	1995 SADC Protocol on Shared Watercourse Systems (Articles 2[9], 2[10]), 2002 Sava River Basin Agreement (Part Three and Four, Article 22), 1995 Mekong Agreement (Articles 5, 10, 11, 24)
<b>Peaceful Settlement of Disputes:</b>	Article IX, Annexure F, G	Articles XXVI- XXXVII	Paragraph 1, Article 33.	1995 SADC Protocol on Shared Watercourse Systems (Article 7), 1995 Mekong the 1995 Mekong River basin agreement (Articles 34 and 35), 2002 Sava River Basin Agreement (Articles 1, 22-24, Annex II), and the 2002 agreement of the Sava River basin (Articles 22-24).

Sources: Rehman 2009 and Mary Miner 2009.

It was not easy task for India and Pakistan to maintain relationship over Indus basin dispute. However, IWT has created the mechanism for development through transparency in exchange of information and simple water distribution system. Resultingly IWT has opened the ways of development between two countries. Indeed IWT is a unique one and successful instance of peace. Although India and Pakistan insisted on the IWT text "nothing contained in this treaty shall be construed by the Parties as in any way establishing a general principle of law or any precedent" IWT, Article XI, (2). The International water Law Association adopted the IWT as context for its Helsinki Rules in the use of water of International Rivers. As the IWT had been concluded six year earlier to the Helsinki Rules, the findings of the International Law Association could have little effect on the course of the negotiations leading to this treaty or on the terms of the settlement.

The Indus river basin is sprawled over four sovereign countries and includes even disputed state of J&K. Unlike the International Water Law Convention and principles, the IWT refused to take account of the

'drainage basin' or 'watercourse' concept considering the whole Indus a unit. The World Bank floated the idea of integrated management and the river basin approach during the negotiations, they were discarded. Rather the rivers were divided between two states as eastern group and western group of rivers. Hence, the distributions of water of Indus basin between the two countries as eastern and western group have opened ways for independent development of two countries. It has enabled India to harness the eastern rivers to its benefit. It helped in diverting waters to arid areas like Rajasthan and develops irrigation facilities. India could also get facility to build run-of-the-river hydroelectric plants on the western rivers and flood control storage facilities, though no storage so far. For Pakistan it assured, permanent water supply for its canal system. It helped Pakistan gain independence from India for ensuring its supplies by binding the latter to a formal international treaty. The treaty helped regulate the flows of the Indus and its tributaries. Therefore Pakistan was able to build storage projects undertaken and ensured her water availability for irrigation during critical sowing season. Pakistan was also able to build three mega dams, various canals and tube wells on western rivers

The principles of Water distribution utilization were adopted in the IWT to settle the grave dispute .i.e. "reasonable and equitable" utilization of the waters by both states. In fact this mechanism has played a significant role in the development of peace and security in the region. However, actual allocation of the water was not "equal" .i.e. an 80: 20 percentage by Pakistan and India respectively and was severely criticized in India on the ground of inequality. Nevertheless the distribution is equitable based on needs, prior use, and other considerations as spelled out in article 5 of the UNICW.

Utilization of an international watercourse in an equitable and reasonable manner within the meaning of article 5 of the UNICW requires taking into account all relevant factors and circumstances, including:

- The population dependent on the watercourse in each watercourse state.
- The effects of the use or uses of the watercourses in one watercourse state on other watercourse States;
- Existing and potential uses of the watercourse;
- Conservation, protection, development and economy of use of the water resources of the watercourse and the costs of measures taken to that effect; and
- The availability of alternatives, of comparable value, to a particular planned or existing use.

The article II and III of the IWT stipulates the distribution of water between India and Pakistan and facilitates both countries to some sort of territorial type of division which was later adopted and defined in detailed by the 1997, UNICW. Apart from the water distribution mechanism, the utilization of water of Indus basin was another difficult task for the two countries. But it was properly managed by the division of the basin into two. The IWT has refused to take account of the 'drainage basin' or 'watercourse' concept considering the whole Indus a unit. Rather the rivers were divided between the two states with specified consumptive and non -consumptive utilization of water from two wings. Therefore the concept of consumptive and non-consumptive use of water from eastern and western rivers for India and Pakistan is consistent with the Lake Lanoux decision as:

Lake Lanoux Water Utilization Mechanism	Indus Water Treaty Water Utilization Mechanism
<p><b>"Control and Enjoyment of Waters of Common User between the Two Countries"</b></p> <p>"Article 8 elucidate that, all standing and flowing waters, whether they are in the private or public domain, are subject to the sovereignty of the State in which they are located, and therefore to that State's legislation, except for the modifications agreed upon between the two Governments.</p> <p>"Flowing waters change jurisdiction at the moment when they pass from one country to the other, and when the watercourses constitute a boundary, each State exercises its jurisdiction up to the middle of the flow.</p> <p><b>Article 9:</b> For watercourses which flow from one Country to the other, or which constitute a boundary, each Government recognizes, subject to the exercise of a right of verification when appropriate, the legality of irrigations, of works and of enjoyment for domestic use currently existing in the other State, by virtue of concession, title or prescription, with the reservation that only that volume of water necessary to satisfy actual needs will be used, that abuses must be eliminated, and that this recognition will in no way injure the respective rights of the Governments to authorize works of public utility, on condition that proper compensation is paid.</p> <p>"Article 10: If, after hearing satisfied the actual needs of users recognized on each side respectively as regular, there remains at low tide water available where the frontier is crossed, such water will be shared in advance between the two countries, in proportion to the areas of the irrigable lands belonging to the immediate respective riparian owners, <i>minus</i> land already irrigated.</p>	<p><b>Indus Water Treaty Water Utilization Mechanism</b></p> <p><b>Article II, Provisions Regarding Eastern Rivers (Sutlej, Ravi, Beas)</b> All the waters of the Eastern Rivers shall be available for the unrestricted use of India. Except for domestic and non-consumptive uses, Pakistan shall be under an obligation to let flow, and shall not permit any interference with, the waters of the Sutlej Main and the Ravi Main In the reaches where these rivers flow in Pakistan and have not yet finally crossed into Pakistan.</p> <p>All the waters, while flowing in Pakistan, of any Tributary which, in its natural course, joins the Sutlej Main or the Ravi Main after these rivers have finally crossed into Pakistan shall be available for the unrestricted use of Pakistan.</p> <p><b>Article III Provisions Regarding Western Rivers (Indus, Jhelum, Chenab)</b></p> <p>Pakistan shall receive unrestricted use of all those waters of the Western Rivers. India shall be under an obligation to let flow all the waters of the Western Rivers, and shall not permit any interference with these waters.</p> <p><b>Article IV Provisions Regarding Eastern and Western Rivers</b></p> <p>Pakistan shall make its best endeavors to construct and bring into operation a system of works that will accomplish the replacement from the Western Rivers (and other sources of) the water supplies for irrigation canals in Pakistan, which on 15th August 1947 were dependent on water supplies from the Eastern Rivers. Thus construction of a system of works, known as Indus Basin Project (IBP) was undertaken. It consisted of two gigantic dams on river Jhelum and Indus, construction of six barrages, remodeling of two existing barrages, seven inter river link canals, remodeling of two existing canals and one gated siphon to link western and eastern rivers. The use of the natural channels of the rivers for the discharge of flood or other excess waters shall be free and not subject to limitation by either party, or neither party shall have any claim against the other in respect of any damage caused by such use.</p> <p>Each party declares its intention to prevent, as far as practicable, undue pollution of the waters and agrees to ensure that, before any sewage or industrial waste is allowed to flow into the Rivers, it will be treated, where necessary, in such manner as not materially to</p>

It is a legal, political, moral responsibility of every riparian state in an internationally shared basin to inform about the development of basin which may cause serious harm to its rights or other states' interest. These principles are generally accepted by all basin communities as legal document. But generally these principles are opposed by upper riparian states. However in the IWT, these principles are happily accepted and applied to ensure the right of two countries. The IWT Article IV, Section 2 admonition to avoid material damage to the other party is consistent with the Trail Smelter and Corfu Channel Cases. As Trail Smelter

arbitration depicts "Under the principles of international law, none of state has the right to use or permit the use of its terrain in such a way as to cause injury by fumes in or to the territory or another or the properties or persons therein, when the case is of serious consequence and the damage is recognized by clear and convincing evidence. Trail Smelter arbitration was appreciated and applied in various international water laws, environment laws and agreements to protect the basin states from material injury and significant harm, including human health. It is now considered as the part of customary international laws. Therefore, on the basis of its successful result it led India-Pakistan and World Bank to apply the IWT.

The IWT article IV (2) depicts as; "Each Party agrees that any Non-consumptive Use made by it shall be so made as not to materially change, on account of such use, the flow in any channel to the prejudice of the uses on that channel by the other party under the provision of this Treaty. In executing any scheme of flood protection or flood control each party will avoid, as far as practicable, any material damage to the other Party, and any such scheme carried out by India on the western Rivers shall not involve any use of water or any storage in addition to that provided under article III" (see article III of IWT)

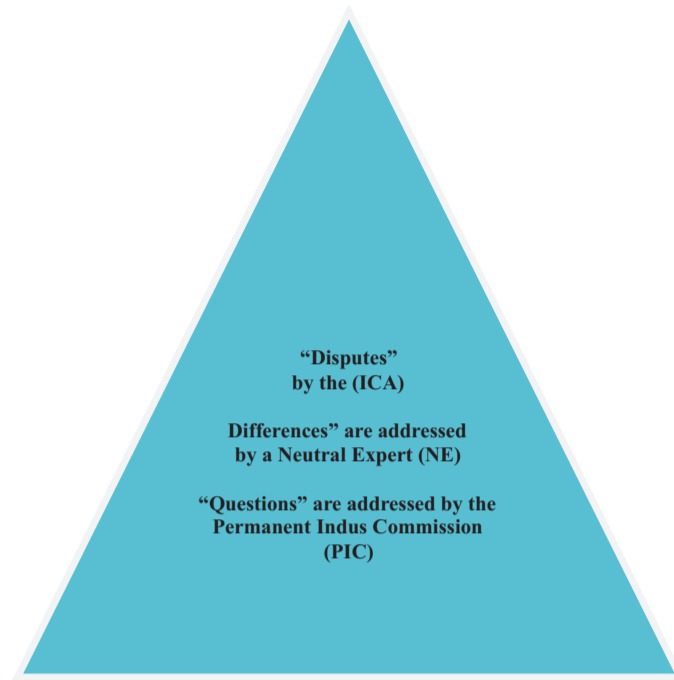
Both India and Pakistan have happily accepted the principle of "no significant harms" to protect their rights as the cause of material damage from any party. Also the IWT depicts in article IV (10), that "Each party declares its intention to prevent, as far as practicable, undue pollution of the rivers which might affect adversely uses similar in nature to those to which the waters were put on the effective Date, and agrees to take all reasonable measure to ensure that, before any sewage or industrial waste is allowed to flow into the rivers, it will be treated, where necessary, in such manner as not materially to affect those uses: provided that criterion of reasonableness shall be customary practice in similar situations on the rivers". After-wards the ILA has applied this article in the Helsinki rules of Chapter 3 on pollution prevention draw upon IWT.

The IWT article IV (11) "the Parties agrees to adopt, as far as feasible, appropriate measures for the recovery, and restoration to owners, timbers and other property floated of floating down the Rivers, subject to appropriate charges being paid by owners" allowance for all parties on an international river to be allowed non-consumptive use provides a precedent for the Helsinki navigation and timber-floating proviso of chapter 5 (International Law Association 1967).

Restoration of peace and brotherhood is important and to achieve this there is need to develop some institutions which can keep societies closer and eager for development. Therefore to realize the importance of development, peace and cooperation, the IWT provides for some institutional mechanism also. Both countries have established posts of Permanent Indus Basin Commissioners (PIC) under the article VIII, article VI and Article VII of the IWT. The PIC should ordinarily be a high ranking engineer especially competent in the field of hydrology and water use. The responsibilities of PIC are to maintain difference cooperative management and information-sharing and regularly data exchange on Indus Basin. The PIC has to meet regularly once a year in India or Pakistan and submit reports to respective governments before 1st June every year. The post of PIC was inspired by the International Court of Joint Commission (IJC) under the boundary waters treaty between US and Canada. The future co-operation and data exchange system on Indus basin was developed as the pattern of various earlier agreements and treaties like the Mexico-US 1946, treaty over border waters. The IWT Article VI on data exchange, Article VIII (PIC) and Article IX (dispute settlement) provide precedents for Helsinki Chapter 6 (International Law Association 1967). In addition to obligation of data exchange and future cooperation has been recognised in a variety of instruments like UNCIW 1997, the 1992 E.C.E, the 1995 Mekong agreement and the 1996 Ganges water Treaty, has established joint bodies for the collection of data and exchange of notes.

There is a hierarchy of jury which settles the "question", "differences" and "disputes" if any over water between two countries. The process has been addresses in the IWT which is quite complex and time consuming. Firstly, the case is tried in the institution of PIC, if the commissioners fail to settle, the case will be extradited to the neutral expert and if the case remains unresolved again. Finally it will be solved in international court of arbitration.

#### **Process of Arbitration specified in the IWT**



The principle of cooperation advocates that all states in an international watercourse should seek a settlement of the disputes by peaceful means in case states concerned cannot reach agreement by negotiation. The 1960 Indus Waters Treaty (Article IX, Annexure F and Annexure G), articulate the mechanism for disputes. The “questions” to be decided by the PIC, “differences” to be settled by Neutral Experts (NE) and “disputes” to be settled by International Court of Arbitration (ICA). It is important to note applicable law for the ICA to be followed within the frame work of IWT itself. Therefore, the principle of dispute settlements of IWT has been recognised by most of modern international conventions, agreements and treaties, e.g. the 1966 Helsinki Rules (Article XXVII) and 1997 UN Watercourses Convention (Paragraph 1, Article 33). It has also been incorporated in major treaties in recent years, for instance the 1995 Shared Watercourse Systems in the South African Community (SADC) protocol (Article 7), the 1995 Mekong River basin agreement (Articles 34 and 35), and the 2002 framework agreement of the Sava River basin (Articles 22–24).

The above contemplation of IWT vis-à-vis other laws, convention and treaties of water reveals that IWT is a quintessential water conflict resolution agreement and has created exemplary water conflict management mechanism. It is involved in various laws, agreements and treaties, as some of its principles have been taken from previous agreements and some of IWT principles have guided various forthcoming laws, convention treaties and i.e. Helsinki Rules 1966 and UNIWC 1997 and some others. In the case of implementation, the IWT survived many ups and downs even though bitter relations of India-Pakistan as three major wars 1965, 1971 and 1999. Therefore, in this sense it can claim that it is a successful instance of peace and conflict resolution. Moreover, its guiding principles, friendly cooperation between two PIC and maintaining the rules and regulations are also the result of two countries' implementation on IWT. It has faithfully served both the countries as a means of prevention of water-related disputes. But contrary to this some water experts have reflected both benefits and disadvantages in IWT. For instance it allows both countries to pursue their individual interests, without much need for cooperation in the field of water. On the other hand, it restricts cooperation on integrated water basin management, information sharing and disaster management measures.

Despite the fact, the IWT is a successful instance of water conflict resolution; there are some ambiguities still in the treaty. E.g. first its mechanism has failed to cater the meal to other states. Indus basin is flowing through four sovereign countries (China, India, Pakistan and Afghanistan) including disputed state of J&K. The IWT does not include other riparian states but has only protected the rights and considerations of two giant rivals India and Pakistan, neglecting other stakeholders of the Indus basin. Therefore, it draws attention to the lack of water sharing agreements between these countries, which are also claiming their legitimate rights to a “reasonable and equitable” share of the Indus tributaries flowing through their territories. Apart from this, the arbitration of IWT does not create mechanism to address the



issue such as, ground water use for two countries, changes in flow of due to climatic changes, changing domestic demand due to population increases or rainfall variability and future developments. Although article XII of the IWT does allow for modification of the treaty by the willingness and choice of both parties, but both parties are not willing to renegotiate or modify for fear of losing ground. However, the current situation underlies that the IWT cannot remain fixed; it must adapt to emerging norms of international laws and will have to take the due considerations of other stakeholders, especially disputed state of J&K which has been affected by IWT largely. Apart from this, some contemporary issues including; riparian states objections, water development within India and Pakistan and differences over utilization it is difficult for IWT to survive the next decade. Therefore, it is important for two countries to set up new mechanism for Indus basin management.

#### CONCLUSION AND FINDINGS:

The above contemplation shows that the 1960 IWT incorporate various international transboundary water resources management principles. The analysis of IWT with internationally recognized water management principles depicts that these principles have paved the way for successful mechanism of IWT. The IWT has become a quintessential water conflict resolution agreement. It has faithfully served both the countries as a means of prevention of water-related disputes. As some of its principles have been taken from previous agreements and some of IWT principles have guided various forthcoming laws, convention treaties and i.e. Helsinki Rules 1966 and UNIWC 1997 and some others. , e.g. the principle of equitable and reasonable utilization, an obligation not to cause significant harm, principles of cooperation, data exchange, notification, consultation and the peaceful settlement of disputes. The study shows that there are some ambiguities still in the treaty. E.g. first its mechanism has failed to cater the meal to other states. Indus basin is flowing through four sovereign countries (China, India, Pakistan and Afghanistan) including the disputed state of J&K. The IWT does not include other riparian states but has only protected the rights and considerations of two giant rivals India and Pakistan, neglecting other stakeholders of the Indus basin. Therefore, it draws attention to the lack of water sharing agreements between these countries, which are also claiming their legitimate rights to a “reasonable and equitable” share of the Indus tributaries flowing through their territories. Therefore, the IWT must adapt to emerging norms of internationally recognized water sharing principles and will have addressed the water rights of other riparian states.

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<sup>1</sup>International Law Association (ILA) is a body of voluntary body of scholars which has prepared principles on shared waters.

<sup>2</sup>International Law Committee (ILC) is an official United Nations Organization whose job is to codify and development of international law and draft new treaties.

\*The 1966 Helsinki Rules define an “international drainage basin” as “a geographic area extending over two or more States determined by the watershed limits of the water systems, including surface and underground waters, flowing into a common terminus”. Moreover the each Basin State is entitled to utilize the water within its territory, to a reasonable and equitable share the waters of an international drainage basin.

\*\*The United Nations Convention UNICW on non navigational uses of international watercourses was adopted by UN General Assembly on 21 May 1997. The convention is based largely on the ILA work, particularly the Helsinki Rules. It aims at ensuring the utilization, development, conservation, management and protection of international water courses (surface and ground waters). A total 103 countries voted in favor of the convention with 3 against (China, Burundi, and Turkey). In South Asia Nepal, Bangladesh voted in favor of the convention while India and Pakistan abstained.

\*\*\*The Berlin Rules are quite comprehensive and detailed, consisting of 73 articles and 14 chapters. The rules cover more issue than the Helsinki Rules and the UN Water Courses Convention. The Berlin Rules are applicable to the management of both national and international waters. Therefore addresses various issues related to the management of all waters in unified, comprehensive and integrated manners. The major distinction between Helsinki rules, UN Water Courses Convention and the Berlin rules is that: the former two explain the right of each basin state to a reasonable and equitable share while the later obliges each basin state to manage the waters of national and international basin in an equitable and reasonable manner.

<sup>3</sup>Helsinki Rules on the Uses of the Waters of International Rivers, in Report of the Fifty-Second Conference of the International Law Association Held at Helsinki, 14-20 August 1966, 486 (1967)

<sup>4</sup>Article II, of Helsinki Rules describes A "basin State" is a State the territory of which includes a portion of an international drainage basin

<sup>5</sup>Article 2(C), of the 1997 water convention, articulates that "Watercourse State" means a State Party to the present Convention in whose territory part of an international watercourse is situated, or a Party that is a regional economic integration organization, in the territory of one or more of whose Member States part of an international watercourse is situated.

<sup>6</sup>The arbitration is concerned the use of the waters of Lake Lanoux between the French Government and the Spanish Government. (Lake Lanoux case (France - Spain), Award of 16 November 1957, 12 U.N. Rep. International Arbitration. Awards 218 (1957)

<sup>7</sup>As used in this chapter, the term "water pollution" refers to any detrimental change resulting from human conduct in the natural composition, content, or quality of the waters of an international drainage basin.

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