International law and the sustainable governance of shared natural resources: A principled approach

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2 Community of Interests: Furthering the Ecosystems Approach and the Rights of Riparian Populations

Abstract

The legal nature of community of interests and its role in the exercise of sovereignty over shared water resources remain unclear. This chapter examines treaties that expressly recognize 'common interests' or a 'community of interests' between riparian states in order to ascertain the legal conceptualization of community of interests, determine its foundational elements, and identify trends indicating the general direction in which community of interests is evolving. Based on this analysis, the chapter argues that community of interests is a principle that, when provided for in a treaty or subsequently interpreted as such, governs riparian states' relations concerning the shared water resources. In addition, the chapter identified two trends shedding light on the general direction in which the emerging principle of community of interests is evolving: a shift from the traditional approach to environmental protection based on the no-harm rule to the ecosystems approach, and the inclusion of the basin populations as subjects of rights and duties concerning shared drainage basins. The chapter suggests that community of interests promotes a shift from protecting primarily state interests to protecting the environment – irrespective of whether harm is caused to other riparian states – and the rights of the riparian populations. Community of interests thus contributes to harmonizing the pivotal dimensions of state sovereignty, environmental protection and human rights.

1 Introduction

Ancient legal traditions show that the management of shared natural resources was based on the notion that the resource was community-owned,[1] something common to all or *res communes*,[2] and also on the notion of a shared – or common – interest, not only in the use but also in the protection of the resource.[3]

1 E. Benvenisti, 'Asian Traditions and Contemporary International Law on the Management of Natural Resources' (2008) 7 *Chinese Journal of International Law* 273, p. 275.

2 D.A. Caponera and Dominique Alheritiere, 'Principles for International Groundwater Law' (1978) 18 *Natural Resources Journal* 589, p. 596-600.

3 E. Benvenisti (n. 1) p. 276.

In the *Gabčíkovo-Nagymaros* case, Judge Weeramantry analysed principles of traditional legal systems, concluding that 'natural resources are not individually, but collectively, owned' and that 'there is a duty laying upon all members of the community to preserve the integrity and purity of the environment.'[4] Historically, the principle of community of property was considered to govern shared water resources. As Berber explains, the principle of 'community of property in water' appears in several official instruments since the end of the eighteenth century.[5]

Modern international water law has shifted the emphasis from ownership to management of shared waters, while keeping the notion of a community of interests between states sharing the resource. Until now, such a community of interests is discussed in scholarly writings primarily as an emerging theory for the governance of shared water resources.[6] Scholars have focused on elucidating what community of interests is and how it relates to the limited territorial sovereignty theory, currently the norm in international water law. According to McCaffrey, a community of interests is created by 'the natural, physical unity of a watercourse'[7] and materialised through establishing joint governance mechanisms.[8] In comparison with limited territorial sovereignty, community of interests has the advantage that it expresses more accurately both the relationship between riparian states and the normative consequences of the physical unity of shared watercourses, as well as that it implies collective or joint action.[9] In the view of McIntyre, community of interests is related to the 'common management approach' under which the drainage basin is regarded as an integrated whole and managed as an economic unit through establishing 'international machinery to formulate and implement common policies for the management and development of the basin'.[10] He agrees with the advantages of community of interests when compared to limited territorial sovereignty identified by McCaffrey.[11]

Both McCaffrey and McIntyre maintained in these writings that community of interests reinforces the doctrine of limited territorial sovereignty rather than contradicting it,[12] a view that is shared by Brown Weiss.[13] Leb in turn submits that community of interests is based on territorial interdependence high-

4 Gabcikovo-Nagymaros Project (Hungary/Slovakia) Judgment, I.C.J. Reports 1997, p. 7, separate opinion of Vice-president Weeramantry, p. 110.
5 F.J. Berber, *Rivers in International Law* (Stevens & Sons 1959), pp. 23-24.
6 Christina Leb, *Cooperation in the Law of Transboundary Water Resources* (Cambridge University Press 2013) p. 54.
7 S.C. McCaffrey, *The law of international watercourses* (Oxford University Press 2007) p. 148.
8 McCaffrey (n. 7) 155-6.
9 McCaffrey (n. 7) 165.
10 Owen McIntyre, *Environmental Protection of International Watercourses* (Ashgate 2007) p. 28.
11 Ibid. p. 37.
12 McCaffrey (n. 7) p. 164-5; McIntyre (n. 10) p. 37.
13 Edith Brown Weiss, International Law for a Water-Scarce World (Martinus Nijhoff 2013) p. 21-5.

lighting the interdependence of states and the fact they 'cannot scape their membership in the community of riparian States because it is established by the nature of their territories'.[14] According to Leb, community of interests can be considered an alternative to the theory of limited territorial sovereignty.[15] Scholars discuss community of interests as an emerging principle pointing out questions for further exploration. These relate, for instance, to the meaning and application of community of interests,[16] to the relationship between community of interests and limited territorial sovereignty,[17] to the standing of community of interests in international water law,[18] to the connection between community of interests and the ecosystems approach,[19] and to the precise legal implications of community of interests for non-navigational

14 Christina Leb, *Cooperation in the Law of Transboundary Water Resources* (Cambridge University Press 2013) p. 52.

15 Ibid.

16 Brown Weiss submits that an examination of the United States' law doctrine requiring reasonable use of water is helpful in understanding the meaning and application of community of interests, (n. 13) p. 23-5. Half a century earlier, Berber considered the principle of a community in the waters as 'a principle well known in municipal water rights, as it is the legal principle most appropriate to a fully developed legal community'. However, he questioned: 'Is the international community already developed to an extent which justifies such an analogy to municipal law?', F.J. Berber, *River in International Law* (Stevens & Sons London 1959) p. 14. Godana responds to Berber's question in 1985: 'the international community if far from being fully developed', Bonaya Adhi Godana, *Africa's Shared Water Resources: Legal and Institutional Aspects of the Nile, Niger and Senegal River Systems* (Frances Pinter 1985), p. 49. Tanzi and Arcari suggest that 'the major challenge for the contemporary law of international watercourses is exactly that of organizing the new ideas, concepts and trends referred to in the preceding pages [including community of interests] and adjusting the traditional principles of international water law accordingly', Attila Tanzi and Maurizio Arcari, *The United Nations Convention on the Law of International Watercourses* (Kluwer Law International 2001), p. 23.

17 Is community of interest a theory for shared water governance distinct from limited territorial sovereignty? See e.g. Leb (n. 14) pp. 53, 56; McIntyre (n. 10) p. 23; McCaffrey (n. 7) p. 163; Owen McIntyre, 'International Water Resources Law and the International Law Commission Draft Articles on Transboundary Aquifers: A Missed Opportunity for Cross-Fertilisation?' (2011) 13 *International Community Law Review* 237, p. 249-250; Dante A. Caponera and Dominique Alhéritiére, 'Principles for International Groundwater Law' (1978) 18 *Natural Resources Journal* 589, at 615.

18 Has community of interests become customary international law? In 1985, Godana submitted that community of interests 'has yet to develop into a principle of international law governing international water relations in the absence of treaties', (n. 16). More recent literature includes McIntyre (n. 10) pp. 33-4; Leb (n. 14) p. 55; Caponera and Nanni submit that community of interests could be considered a principle of customary international law, Dante A. Caponera and Marcella Nanni, *Principles of Water Law and Administration: National and International* (Taylor & Francis 2007) p. 197.

19 Does the ecosystems approach highlight the need for common management institutions? McIntyre (n. 10), p. 34.

uses.[20] Such topics suggest that the legal nature of community of interests remains unclear.

In connection with the relationship between community of interests and limited territorial sovereignty, following the adoption of the 2008 International Law Commission's Draft Articles on the Law of Transboundary Aquifers (Draft Articles, discussed in Chapter 1 of this dissertation)[21] commentators brought community of interests to the fore as a response to the controversial recognition of sovereignty over transboundary aquifers in Draft Article 3. As stated by McCaffrey, 'The notion of "sovereignty" over the portion of shared freshwater resources situated in a state's territory is incompatible with the principle of community of interests in those resources'[22] because 'the concept of "sovereignty" over shared groundwater cannot possibly be squared with "the exclusion of any preferential privilege of any one riparian State in relation to the others"'[23] that community of interests entails. In addition, according to McIntyre, recognising sovereignty over transboundary aquifers appears to be inconsistent with the principle of equitable and reasonable utilization, which 'requires establishment of a "community of interests" approach, normally achieved by means of cooperative institutional machinery'.[24] These scholars thus distance themselves from their previous opinion that community of interests 'reinforces the doctrine of limited territorial sovereignty rather than contradicting it'.[25] Furthermore, in the opinion of Eckstein 'the suggestion that water resources can be subject to a state's sovereignty is contrary to the community of interests approach governing transboundary surface waters.'[26] He adds 'the idea contravenes the basic tenets of international water law, including those of equitable and reasonable utilization and no significant harm, which clearly espouse a more limited conception of sovereign rights over transboundary waters'.[27] In the view of these scholars, recognising sovereignty over transboundary aquifers is 'incompatible'/'inconsistent' with, 'contrary' to community of interests. Such conflicting views, showing support for the recognition of sovereignty in the Draft Articles on the one hand and opposition

20 McCaffrey (n. 7) p. 161 stating that the 'precise legal implications [of community of interests] for non-navigational uses are less than completely clear'.

21 Draft articles on the Law of Transboundary Aquifers, Report of the International Law Commission (ILC Report), Sixtieth session (2008) in Official Records of the General Assembly, Sixty-third session, Supplement No. 10 (A/63/10).

22 Stephen C. McCaffrey, 'The International Law Commission Adopts Draft Articles on the Law of Transboundary Aquifers' (2009) 103 *American Journal of International Law* 272, p. 288.

23 Ibid. p. 289.

24 McIntyre (n. 17) p. 249.

25 (n. 12).

26 Gabriel E. Eckstein, 'Managing Hidden Treasures Across Frontiers: The International Law of Transboundary Aquifers', International Conference Transboundary Aquifers: Challenges and New Directions (ISARM 2010) <http://hispagua.cedex.es/sites/default/files/hispagua_documento/documentacion/documentos/tesoros.pdf>, p. 6.

27 Ibid.

thereto on the other, confirm that the role of community of interests in the exercise of sovereignty over shared water resources stays unsettled.

Consequently, bearing in mind that both the legal nature of community of interests and its role in the exercise of sovereignty over shared water resources remain unclear, this chapter explores community of interests for the purpose of answering the following questions: What are the basic or inherent features of community of interests according to international water law? How does community of interests relate to the exercise of sovereignty over shared water resources? In addition, considering that community of interests is regarded as an emerging principle in legal academic scholarship, the chapter seeks to identify trends that shed light on the general direction in which community of interests is developing. For this purpose, it tries to answer the following question: Does international water law show any trends indicating that community of interests is evolving in a certain direction? The answers are primarily sought in water treaties that expressly recognise 'common interests' or a 'community of interests' between the riparian states.[28] The chapter also analyses judicial decisions adopted by international courts and tribunals where relevant.[29]

The chapter begins by discussing the evolution of the principle of community of interests in chronological order based on the selected water agreements and relevant judicial decisions. It continues with an analysis of relevant provisions of the treaties selected in order to identify (1) the essential distinctive attributes of community of interests and (2) trends indicating the general direction in which the principle is developing. Based on this analysis, the chapter argues that community of interests is a principle that, when provided for in a treaty or subsequently interpreted as such, governs riparian states' relations concerning the shared water resources. Its basic legal features are: (1) the unity of the shared drainage basin; (2) riparian solidarity and cooperation; and (3) the harmonization of riparians' national laws and policies on water governance. Additionally, the chapter identified two significant trends: a shift from the traditional approach to environmental protection based on

28 The water agreements examined in this chapter are: the 1950 Treaty between Canada and the United States concerning the Diversion of the Niagara River, the 1960 Indus Waters Treaty, the 1992 Agreement between Namibia and South Africa on the Establishment of a Permanent Water Commission, the 1995 Agreement on the Cooperation for the Sustainable Development of the Mekong River Basin, the 1995 Protocol on Shared Watercourse Systems in the Southern African Development Community (SADC) Region and the 2000 Revised SADC Protocol, the 2000 Agreement between Botswana, Lesotho, Namibia and South Africa on the Establishment of the Orange-Senqu River Commission (ORASECOM), the 2002 Water Charter of the Senegal River, the 2003 Protocol for Sustainable Development of Lake Victoria Basin, the 2008 Water Charter of the River Niger and the 2012 Water Charter of the Lake Chad Basin.

29 The judicial decisions examined in this Chapter are: *River Oder* case, Lake Lanoux arbitral award, *Gabčíkovo-Nagymaros, Indus Waters Kishenganga* (2011), 2004 *Rhine Chlorides* arbitration (Netherlands/France), 2010 *Pulp Mills* case.

the no-harm rule to the ecosystems approach, and the inclusion of the basin populations as subjects of rights and duties concerning shared drainage basins. The chapter suggests that, when provided for in a treaty, community of interests is an element of sovereignty over shared water resources, which promotes a shift from protecting primarily state interests to protecting the environment as such and the rights of the riparian populations. Community of interests thus contributes to harmonizing the crucial dimensions of state sovereignty, environmental protection and human rights.

2 Evolution of the principle of community of interests

2.1 Initial conceptualization

The existence of a community of interests between riparian states was recognised for the first time in the *River Oder* case. Based on the relevant provisions of the Act of the Congress of Vienna and the Treaty of Versailles, the Permanent Court of International Justice (PCIJ) concluded in 1929 that international river law is 'undoubtedly based' on the conception of a community of interests of riparian states.[30] The ruling states:

> This community of interests in a navigable river becomes the basis of a common legal right, the essential features of which are the perfect equality of all riparian States in the user [sic] of the whole course of the river and the exclusion of any preferential privilege of any one riparian State in relation to the others.[31]

This case laid down the initial distinctive attributes of such a community of interests. Namely, a community of interests is the basis of a common legal right of navigation whose essential characteristics are the perfect equality of all riparian states in the use of the whole navigable course of the river and the exclusion of any preferential privilege of any one riparian in relation to the others. The correlative duty is to refrain from exercising sovereign rights in a way that might impede navigation.[32] The perfect equality of all riparian states indicates that they give each other the same facilities of navigation and profit from these advantages in equal proportion.[33] The *River Oder* case became the point of departure for judicial decisions addressing the principle in the period from 1997 onward.

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30 Case Relating to the Territorial Jurisdiction of the International Commission of the River Oder (UK, Czech Republic, Denmark, France Germany and Sweden v. Poland), PCIJ, Judgment of 10 September 1929, PCIJ Series A. No. 23, p. 27.

31 Ibid. p. 27.

32 Béla Vitányi, *The International Regime of River Navigation* (Sijthoff & Noordhoff 1979), p. 57.

33 Ibid. p. 33.

Almost three decades later, the 1957 Lake Lanoux arbitral award,[34] although not explicitly referring to community of interests, followed the approach of the *River Oder* case.[35] In this case, Spain argued that the 1866 Additional Act to the Treaties of Bayonne established a 'system of community' between France and Spain, which would be destroyed by the works unilaterally proposed by France for the utilisation of the waters of the lake.[36] The decision of the arbitral tribunal did not refer to such system of community; however, it held that while 'France is entitled to exercise her rights; she cannot ignore Spanish interests. Spain is entitled to demand that her rights be respected and that her interests be taken into consideration'.[37] In addition, and according to the principle of good faith, the upstream state (France) must show that 'it is genuinely concerned to reconcile the interests of the other riparian with its own'.[38]

In line with the *River Oder* case, the Lake Lanoux arbitration established that water management decisions must take into account the legitimate interests of all riparians. In other words, the interests of the other riparian states limit any one state's exercise of its sovereign rights. Despite the absence of an explicit reference to community of interests, the notion that the interests of all riparian states must be reconciled suggests that they share interests in common, i.e. that a community of interests exists between them. The Lake Lanoux arbitration thus broadened the scope of the PCIJ's dictum in the *River Oder* case to include non-navigational uses. The interests of riparian states must be reconciled concerning both navigational and non-navigational uses of transboundary watercourses, which was later confirmed in water treaties and judicial decisions.

2.2 Subsequent evolution

In the second half of the last century, international agreements at the basin level began incorporating the notion that riparian states had common interests in the shared rivers. In the 1950 treaty between Canada and the United States concerning the diversion of the Niagara River, the parties recognised 'their

34 Lake Lanoux Arbitration (France v. Spain) 24 ILR 101 (1957) (http://www.ecolex.org/server2.php/libcat/docs/COU/Full/En/COU-143747E.pdf)

35 See, e.g., Philippe Sands and Jacqueline Peel, *Principles of International Environmental Law* (Cambridge University Press 2012), p. 307; Patricia Birnie, Alan Boyle and Catherine Redgwell, *International Law & the Environment* (Oxford University Press 2009), p. 542; Awn S. Al-Khasawneh, 'Do judicial decisions settle water-related disputes?' in Laurance Boisson de Chazournes, Christina Leb and Mara Tignino (eds), *International Law and Freshwater: The Multiple Challenges* (Edward Elgar 2013), p. 347.

36 Lake Lanoux (n. 34) p. 10.

37 Ibid. p. 33.

38 Ibid. p. 32.

common interest in providing for the most beneficial use of the waters of that River'.[39] Ten years later, in the 1960 Indus Waters Treaty, India and Pakistan 'recognize that they have a common interest in the optimum development of the Rivers'.[40] As stated by the tribunal in the *Indus Waters Kishenganga* arbitration (2011), the terms of the Indus Waters Treaty and the fact that India and Pakistan had applied it for more than 50 years despite difficulties in their relations 'attest to the essential mutuality of their interests'.[41] In 1992, the Agreement between Namibia and South Africa on the Establishment of a Permanent Water Commission referred to the shared waters as 'water resources of common interest to the Parties'.[42] In 1995, the Agreement on the Cooperation for the Sustainable Development of the Mekong River Basin acknowledged the existence of a 'community of Mekong nations'.[43] This agreement created the Mekong River Commission for the joint management of the shared waters and related resources.[44] It has been submitted that riparian states in the Mekong River have effectively implemented a community of interests through this commission.[45] Also in 1995, the Protocol on shared watercourse systems in the Southern African development community (SADC) region listed community of interests as one of the general principles that shall apply to shared rivers,[46] stating that the parties 'undertake … to respect and abide by the principles of community of interests in the equitable utilisation of [shared watercourse] systems and related resources'.[47] However, the 2000 SADC Revised Protocol on shared watercourses, which repealed and replaced the 1995 Protocol,[48] no longer refers to community of interests.

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39 Treaty between Canada and the United States of America concerning the Diversion of the Niagara River, signed at Washington 27 February 1950, came into force on 10 October 1950 (http://www.treaty-accord.gc.ca/text-texte.aspx?id=100418) see Preamble.

40 The Indus Waters Treaty 1960 between the Government of India, the Government of Pakistan and the International Bank for Reconstruction and Development, 419 UNTS 124, Article VII(1).

41 Order on the Interim Measures Application of Pakistan dated 6 June 2011 in the Indus Waters Kishenganga Arbitration, Secretariat: Permanent Court of Arbitration, para. 121.

42 (http://www.internationalwaterlaw.org/documents/regionaldocs/nambia-southafrica.html) Art. 1(2).

43 Agreement on the Cooperation for the Sustainable Development of the Mekong River Basin, signed in Chiang Rai, Thailand (5 April 1995) (www.mrcmekong.org/assets/Publications/agreements/agreement-Apr95.pdf), see Preamble.

44 Ibid. Ch. IV.

45 Beatriz Garcia, 'Exercising a Community of Interests: A Comparison between the Mekong and the Amazon Legal Regimes' (2009) 39 *Hong Kong Law Journal* 421, p. 431, comparing state practice in the Mekong and Amazon rivers.

46 Protocol on Shared Watercourse Systems in the Southern African Development Community (SADC) Region signed at Johannesburg (28 August 1995) (http://www.fao.org/docrep/w7414b/w7414b0n.htm)

47 Art 2(2).

48 Revised Protocol on Shared Watercourses in the Southern African Development Community (SADC) (http://www.internationalwaterlaw.org/documents/regionaldocs/Revised-SADC-SharedWatercourse-Protocol-2000.pdf) Art. 16 (1).

Community of interests reappeared in international judicial decisions in 1997 with the judgement of the International Court of Justice (ICJ) on the *Gabčíkovo-Nagymaros* case. As mentioned above, the scope of community of interests in the *River Oder* case was limited to the interests that riparians had in exercising the right of navigation. Afterwards, the Lake Lanoux arbitration and the treaties referred to in the previous paragraph gradually extended its scope to non-navigational uses. The *Gabčíkovo-Nagymaros* case confirmed that the community of interests between riparian states also covered non-navigational issues. After quoting the principle of community of interests as stated in the *River Oder* case, the ICJ affirmed: 'Modern development of international law has strengthened this principle for non-navigational uses of international watercourses as well, as evidenced by the adoption of the Convention of 21 May 1997 on the Law of Non-navigational Uses of International Watercourses by the United Nations General Assembly'.[49] Although the Convention on the Law of Non-navigational Uses of International Watercourses (UNWC)[50] – adopted only four months earlier – does not expressly mention community of interests, the ICJ interprets it as containing the principle.

Water agreements signed after the *Gabčíkovo-Nagymaros* case either explicitly recognise the principle of community of interests or use terminology that implies the existence of a community of interests between riparian states. The 2002 Water Charter of the Senegal River acknowledges a community of interests between riparians in its preamble.[51] Mbengue argues that the community of interests in the Senegal River crystallised with the 1963 Bamako Convention[52] because it established a unique joint management organisation, whose unanimous approval was necessary for any project on the river, 'leaving almost no room for unilateral actions'.[53] This facilitated the creation of a 'community of law' between riparians in which no project would be implemented without the prior approval of all of them.[54] As elaborated further below, the common rights and duties of the riparian states create a community of law between

49 Gabcikovo-Nagymaros Project (Hungary/Slovakia) Judgment, I.C.J. Reports 1997, p. 7, para. 85.

50 Convention on the Law of the Non-navigational Uses of International Watercourses (New York, 21 May 1997; in force 17 August 2014).

51 It reads: '*Desireux de donner un cadre a la fois durable et evolutif a la communaute des interest entre les Etats riverains du fleuve Senegal*', Charte des Eaux du Fleuve Sénégal (28 May 2002) (http://www.portail-omvs.org/sites/default/files/fichierspdf/charte_des_eaux_du_fleuve_senegal.pdf).

52 Convention Relative a l'Amenagement General du Bassin du Fleuve Senegal (Bamako, 26 July 1963) (http://iea.uoregon.edu/pages/view_treaty.php?t=1963-BamakoSenegalRiverBasin.FR.txt&par=view_treaty_html).

53 Makane M. Mbengue, 'The Senegal River legal regime and its contribution to the development of the law of international watercourses in Africa' in Laurance Boisson de Chazournes, Christina Leb and Mara Tignino (eds), *International Law and Freshwater: The Multiple Challenges* (Edward Elgar 2013), 218-221.

54 Ibid. p. 223.

them mainly through the harmonisation of their laws and policies on water management.[55] In addition, as stated in the 2003 Protocol for Sustainable Development of Lake Victoria Basin, one of the principles that shall guide the management of the resources of the basin is 'the principle of community of interests in an international watercourse whereby all States sharing an international watercourse system have an interest in the unitary whole of the system'.[56]

Although not explicitly recognising the principle of community of interests, the following water agreements nevertheless imply the existence of a community of interests between riparian states. The 2000 Agreement between Botswana, Lesotho, Namibia and South Africa on the establishment of the Orange-Senqu River Commission (ORASECOM) considers the Orange-Senqu river system as a 'water source of common interest'[57] and affirms that collaboration between the parties with regard to its development 'could significantly contribute towards the mutual benefit, peace, security, welfare and prosperity of their people'.[58] In addition, the 2008 Water Charter of the Niger Basin regulates 'facilities of common interest', namely those 'in which two or several Niger Basin Authority [NBA] Member States have an interest and which [sic] coordinated management has been decided by mutual agreement between the NBA Member States'.[59] It also defines 'project or program of common interest' as 'a transboundary project or programme carried out in the Niger Basin and of interest to two or several Member States'.[60] Finally, the 2012 Water Charter of the Lake Chad Basin acknowledges the 'common interests of the Member States' in the management of the Lake Chad Basin[61] and sets 'the recognition of common facilities and facilities of common interest' as one of its specific objectives.[62]

International judicial decisions continued advancing the development of the principle of community of interests. In the 2004 *Rhine Chlorides* arbitration (Netherlands/France), concerning the parties' financial obligations under the 1991 Additional Protocol to the 1976 Convention on the Protection of the Rhine

55 See section 3.3. below.

56 Protocol for Sustainable Development of Lake Victoria Basin (29 November 2003) (http://www.internationalwaterlaw.org/documents/regionaldocs/Lake_Victoria_Basin_2003.pdf), Art. 4(2)(k).

57 Agreement on the Establishment of the Orange-Senqu River Commission (3 November 2000) (https://iea.uoregon.edu/treaty-text/2000-orangesenqucommissionentxt) Preamble.

58 Ibid.

59 La Charte de l'eau du Bassin du Niger (http://www.abn.ne/attachments/article/39/Charte%20du%20Bassin%20du%20Niger%20version%20finale%20francais_30-04-2008.pdf) English version <http://www.abn.ne/images/documents/textes/water_charter.pdf>, Art 1(19) and Arts 28 and 29.

60 Art 1(24).

61 Water Charter of the Lake Chad Basin (http://www.africanwaterfacility.org/fileadmin/uploads/awf/Projects/MULTIN-LAKECHAD-Water-Charter.pdf) Art. 3.

62 Art. 4(g). See also chapter 11 of the Charter.

against Pollution by Chlorides (Additional Protocol), the tribunal found that: 'When the States bordering an international waterway decide to create a joint regime for the use of its waters, they are acknowledging a 'community of interests' which leads to a 'community of law' (to quote the notions used … in the [*River Oder* case]).'[63] The establishment of a joint management mechanism for the shared river thus admits the existence of a community of interests, which in turn creates a community of law between riparian states. In addition, the tribunal deemed solidarity an element of said community of interests and law, stating that 'Solidarity between the bordering States is undoubtedly a factor in their community of interests'.[64] In this regard, France had argued that the object and purpose of the Additional Protocol was to 'promote solidarity among the States bordering the Rhine, each of which has an equal interest in the quality of its waters, and the activities of which contribute in their different ways to the pollution of the river'.[65] In concrete terms, this solidarity 'takes the form of actions taken by each of the States bordering the river on its own behalf, and also of collective financing of necessary measures.'[66] Therefore, forcing France to bear a heavier burden than it had accepted would undermine the solidarity established under the Protocol and disregard its object and purpose.[67] The tribunal found that the Netherlands too recognised that solidarity was relevant based on a proposal for the subsequent implementation of the 1976 Convention formulated by Germany and the Netherlands setting out measures to be taken 'respecting the principle of solidarity'.[68] Another document considered by the tribunal reads in relevant part: 'After studying all the possible ways of reducing chloride discharges over the entire length of the Rhine, the principle decided on was that of reducing levels at the French Potassium Mines alone, on behalf of all the polluters, because of its better cost-effectiveness ration'.[69] According to the tribunal, it appears from this document that 'the parties decided to opt for a system that established a solidarity between them'.[70]

Finally, the ICJ links further the principle of community of interests with the duty to cooperate in the 2010 *Pulp Mills* case.[71] This case concerned the breach allegedly committed by Uruguay of obligations under the 1975 Statute

63 Case concerning the auditing of accounts between the Kingdom of the Netherlands and the French Republic pursuant to the Additional Protocol of 25 September 1991 to the Convention on the Protection of the Rhine against Pollution by Chlorides of 3 December 1976 (Netherlands/France), Arbitral Award of 12 March 2004, para. 97.

64 Ibid.

65 Ibid. para. 44.

66 Ibid.

67 Ibid. See also para. 96.

68 Ibid. para. 96.

69 Ibid.

70 Ibid.

71 The link between community of interests and the duty to cooperate is also discussed in Chapter 1, Section 3.3.2, of this dissertation.

of the River Uruguay (1975 Statute); as stated by Argentina, said breach arose out of 'the authorization, construction and future commissioning of two pulp mills on the River Uruguay',[72] regarding in particular 'the effects of such activities on the quality of the waters of the River Uruguay and on the areas affected by the river'.[73] Although the 1975 Statute does not expressly refer to a community of interests, Argentina nevertheless argued that the Statute created a community of interests and law between Uruguay and Argentina,[74] whose purpose and aim is to compel the states to cooperate.[75] Argentina requested provisional measures 'to safeguard the community of interests and rights created by the Statute of the River Uruguay',[76] arguing that the legal regime of the shared river was based on '"mutual trust" between the two States and a "community of interests" organized around respect for the rights and duties strictly prescribed by the 1975 Statute'.[77] Such community of interests and mutual trust 'requires Uruguay to co-operate in good faith with Argentina' in complying with the Statute.[78] In Argentina's view, this is 'an objectively established "community of interests"'.[79] In addition, referring to the *River Oder* and *Gabčíkovo-Nagymaros* cases, Argentina argued that Uruguay's refusal to comply with its obligations under the Statute 'runs counter to the requirement of "exclusion of any preferential privilege of any one riparian State in relation to the others"'.[80] In its order on the request for provisional measures, the ICJ did not refer to community of interests. However, in its final judgment the Court confirmed the existence of a community of interests based on the 1975 Statute linking it with the duty to cooperate. As the Court noted, 'the parties have a long-standing and effective tradition of co-operation and co-ordination through CARU [Comisión Administradora del Río Uruguay, the joint management mechanism set up by the parties]'.[81] According to the Court 'By acting jointly through CARU, the Parties have established a real community

72 Pulp Mills on the River Uruguay (Argentina v. Uruguay) Judgment, I.C.J. Reports 2010, para. 1.
73 Ibid.
74 Pulp Mills on the River Uruguay (Argentina v. Uruguay), Provisional Measures, Order of 13 July 2006, I.C.J. Reports 2006, p. 113, paras. 39 and 64.
75 (n. 74) Pleadings by L. Boisson de Chazournes, Transcript of Public Sitting, 8 June 2006, CR 2006/46, p. 45, para. 13.
76 (n. 75) p. 47, para. 18.
77 (n. 74) para. 39.
78 Ibid. para 64.
79 (n. 75) p. 45, para. 12.
80 Ibid.
81 Pulp Mills on the River Uruguay (Argentina v. Uruguay) Judgment, I.C.J. Reports 2010, para. 281.

of interests and rights in the management of the River Uruguay and in the protection of its environment.'[82]

As it stands today, community of interests is not part of customary international water law. All judicial decisions that have contributed to the evolution of the principle are based on the interpretation of one particular treaty or another and not on a rule of customary law. Therefore, community of interests is an element of sovereignty over shared waters only when included in treaty law or when the treaty is silent on the issue but has nevertheless been subsequently interpreted as including a community of interests.[83]

To summarize, the initial conceptualization of the principle of community of interests provided the following foundational attributes: (1) the community of interests of riparian states is the basis of a common legal right of navigation; and (2) the essential features of the common legal right are the perfect equality of all riparian states in the use of the whole navigable course of the river and the exclusion of any preferential privilege of any one riparian in relation to the others. Community of interests evolved from encompassing only riparian states' common interests in navigation to include their common interests in non-navigational uses as well (e.g., consumption, irrigation and hydropower generation). Throughout its evolution, the principle has added to its initial conceptualization the elements of community of law, solidarity and cooperation. As explained in the introduction, the legal nature of community of interests and its role in the exercise of sovereignty over shared water resources continue to be unclear. For this reason, the next section examines water treaties that refer to the 'common interests' or 'community of interests' between riparian states in order to identify the basic features of community of interests according to said treaties and thus establish its legal nature.

3 Elements of community of interests

3.1 The foundation: unity of the basin

The natural physical unity of international rivers has as a result that the community of interests extends to the whole course of the river including its watershed. The Helsinki Rules on the Uses of the Waters of International Rivers adopted by the International Law Association in 1966 introduced the concept of 'international drainage basin' defined as "a geographical area extending

82 Ibid. See also Owen McIntyre, 'The contribution of procedural rules to the environmental protection of transboundary rivers in light of recent ICJ case law' in Laurance Boisson de Chazournes, Christina Leb and Mara Tignino (eds), *International law and freshwater: The multiple challenges* (Edward Elgar 2013), pp. 247-8.

83 Such is the case of the 1975 Statute of the River Uruguay as interpreted by the ICJ in the Pulp Mills case.

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".[84] However, states resisted the drainage basin concept because it would limit the exercise of sovereignty not only over the water resources but also over the surrounding land areas.[85] Therefore, the UNWC adopted the term 'international watercourse system', a concept that is 'less explicitly ecosystem-oriented'.[86] The treaties examined show nonetheless a trend towards accepting that what needs to be regulated is the whole drainage basin, particularly with regard to environmental protection.

The Indus Waters Treaty had already in 1960 taken the drainage basin as the basic unit for water management, e.g. when regulating the use of the waters and the installation of hydrologic observation stations.[87] More recently, the 1995 SADC Protocol adopted the notion of drainage basin, defining it as a "geographical area determined by the watershed limits of a system of waters including underground waters flowing into a common terminus",[88] while the 1995 Mekong Agreement applies to the waters and related resources in the basin.[89] The 2000 Revised SADC Protocol defines watercourse as "a system of surface and ground waters consisting [sic] by virtue of their physical relationship a unitary whole normally flowing into a common terminus"[90] and provides that one of the guiding principles is "the unity and coherence of each shared watercourse".[91] The Lake Victoria Protocol defines the Lake Victoria Basin as the "geographical areas extending within the territories of the Partner States determined by the watershed limits of the system of waters, including surface and underground waters flowing into Lake Victoria,"[92] stating that by virtue of the principle of community of interests "all States sharing an international watercourse system have an interest in the unitary whole of the

84 Helsinki Rules on the Uses of the Waters of International Rivers, International Law Association, 1966, Art. II.

85 J Brunnée and SJ Toope, 'Environmental Security and Freshwater Resources: A Case for International Ecosystem Law' (1994) 5 *Yearbook of International Environmental Law* 41, p. 59. See also Alejandro Iza, 'Aspectos Jurídicos de los Caudales Ecológicos en Cuencas Compartidas' [2005] *Lecciones y Ensayos* 219, p. 222; Jean-Marc Thouvenin, 'Droit International General des Utilisations des Fleuves Internationaux' in Bogdan Aurescu and Alain Pellet (eds), *Actualiteì du droit des fleuves internationaux : acte des journeìes d'eìtude des 24 et 25 octobre 2008* (Pedone 2010), pp. 117-8.

86 Brunnée and Toope (n. 85) p. 58. See also Jutta Brunnée and Stephen J. Toope, 'Environmental Security and Freshwater Resources: Ecosystem Regime Building' (1997) 91 *American Journal of International Law* 26, p. 49.

87 Arts. III (2) and VII(1)(a); on agricultural use see Annexure C. See also Annexure F on the determination of the boundary of the drainage basin.

88 Art. 1

89 n. 43, Preamble, Arts. 1 and 3.

90 Art. 1(1)

91 Art. 3(1)

92 Art. 1(2)

system".[93] The agreement on the establishment of ORASECOM provides that the parties shall protect the river system "from its sources and headwaters to its common terminus".[94] The Charter of the Senegal River defines the '*bassin hydrographique du Fleuve*' as "*le fleuve Sénégal, ses affluents, ses défluents et les depressions associées*".[95] The Charter of the Niger River Basin defines 'hydrographic catchment area' as a "geographic area extending over two or several States and determined by the limits of the area supplying the hydrographic network, including groundwater and surface waters flowing to a common terminus".[96] Finally, the Lake Chad Water Charter defines the hydrographic basin of the lake as an "area in which all the runoff converges towards Lake Chad being channelled through a network of rivers and lakes flowing into Lake Chad'.[97] The 1950 Treaty concerning the Diversion of the Niagara River and the 1992 Agreement between Namibia and South Africa on the Establishment of a Permanent Water Commission, although not expressly referring to the drainage basin, nevertheless imply that the parties intended to regulate and protect not only the shared waters but also the related land as a whole.[98]

Repeatedly, we find in the treaties examined the notion that the shared waters and the watershed form a whole indivisible unit and that such a unit is the basis for water management. The realization that an international watercourse constitutes a single unit detached from political boundaries allows the recognition of common interests among riparians.[99] The unity of the basin is thus the first foundational element identified in the treaties examined.

93 Art. 4(2)(k)
94 Art. 7(12)
95 Art. 1(17); see also Art. 3 on the scope of application of the Charter.
96 Art. 1(2); see also arts. 2 and 3.
97 Art. 2; see also art. 5 on the scope of application of the Charter.
98 In the 1950 Treaty concerning the Diversion of the Niagara River, Canada and the United States recognize 'their primary obligation to preserve and enhance the scenic beauty of the Niagara Falls and River'; while the 1992 Agreement between Namibia and South Africa on the Establishment of a Permanent Water Commission provides that the Commission shall advise the parties on the prevention and control of soil erosion affecting the common water resources. The references to 'scenic beauty' and 'soil erosion' suggest an intention to regulate more than just the shared waters.
99 Jutta Brunnée, '"Common Interest" – Echoes from an Empty Shell?: Some Thoughts on Common Interest and International Environmental Law' (1989) 49 *Heidelberg Journal of International Law* 791, pp. 794-5.

3.2 Common rights and duties

3.2.1 Right to an equitable and reasonable share

The treaties examined show that equitable use is one of the common rights and duties that form an integral part of the community of interests. In the Mekong Agreement, the parties agreed to utilize the waters in a reasonable and equitable manner.[100] The 1995 SADC Protocol provides for equitable use, indicating relevant factors to determine it,[101] which are also provided for and broadened by the Revised SADC Protocol.[102] Similar provisions are found in the agreement establishing ORASECOM[103] and the Lake Victoria Protocol.[104] The Charter of the Senegal River directly relates the community of interests between riparians to reasonable and equitable use,[105] including factors to be considered for the distribution of the waters.[106] The Water Charter of the Niger River Basin[107] and the Lake Chad Water Charter contain similar provisions.[108]

The cases studied support equitable and reasonable utilization as being part of the essential rights and duties of the community of interests. It has been submitted that the *River Oder* case implies equitable use,[109] which was confirmed by the Gabcikovo-Nagymaros case.[110] In addition, the ICJ stated in the Pulp Mills case that the utilization of the river Uruguay "could not be considered to be equitable and reasonable if the interests of the other riparian State in the shared resource […] were not taken into account," thus linking equitable use with the common interests of riparian states.[111]

3.2.2 Duty to cooperate

The water treaties examined bind riparian states to comply with the common rights and duties through cooperation, usually through the establishment of

100 In accordance with Articles 26 and 5, which regulate water utilization and inter-basin diversion based on wet and dry season.
101 Art. 2(6)(7)
102 Arts. 3(7) and (8)
103 Art. 7(2). See also Art. 5(2.2) and the Preamble.
104 Arts. 4(2)(a) and 5.
105 Preamble; Art. 4.
106 Arts. 5 to 8.
107 Art. 4
108 Arts. 10 and 13.
109 E. Brown Weiss, 'The Evolution of International Water Law', 331 *Recueil de Cours* (2007) p. 198.
110 Jochen Sohnle, 'Irruption du droit de l'environnement dans la jurisprudence de la C.I.J.: l'Affaire Gabcikovo-Nagymaros ' (1998) 102 *Revue geìneìrale de droit international public* 85, pp. 113-114.
111 Para. 177.

joint management mechanisms. The treaty on the diversion of the Niagara River provides for joint action of the States Party,[112] while the Indus Waters Treaty provides for cooperation in the optimum development of the Rivers and establishes the Permanent Indus Commission.[113] In the Mekong River agreement the parties agreed to cooperate in all fields of sustainable development, utilization, management and conservation of the water and related resources and established the Mekong River Commission.[114] Similarly, in the 1995 SADC Protocol the parties agreed to pursue close cooperation and establish River Basin Management Institutions.[115]

The 2000 Revised SADC Protocol strengthens such close cooperation, providing for equitable participation and an institutional framework for implementing the Protocol.[116] The Lake Victoria Protocol recognizes cooperation as one of the fundamental principles of water management and established the Lake Victoria Basin Commission.[117] Notably, the parties to this protocol agreed to negotiate as a bloc (i.e., as a community) on issues related to the basin.[118] The agreements on the establishment of permanent water commissions also show that cooperation is a fundamental common right and duty.[119] The Water Charter of the Senegal River recognizes the fundamental character of cooperation and established the *Commission Permanente des Eaux*.[120] In addition, one of the purposes of the Water Charter of the Niger River Basin is to encourage cooperation, dialogue and consultation between riparians. As such, an advisory committee to the Niger Basin Authority (1980) was added.[121] Finally, in the Lake Chad Water Charter cooperation not only includes the relations between riparian states but also between basin and regional organizations.[122] Accordingly, States Party shall harmonize their positions within the Lake Chad Basin Commission (1964) to ensure coordinated participation in multilateral negotiation.[123]

The notions of working together, agreement of action and mutual support are highlighted through the inclusion of solidarity as an element of community of interests. Some water treaties do this explicitly. For instance, the purpose

112 Art. VII
113 Arts. VII and VIII.
114 Art. 1; Chapter IV.
115 Arts. 2(4) and 3-6.
116 Arts. 2, 3(5), 3(7)(b), 6(6) and 5.
117 Preamble, Arts. 3 and 33-45.
118 Preamble. Indeed, one of the functions of the Lake Victoria Basin Commission is to 'prepare and harmonize negotiating positions for the Partner States against any other State on matters concerning the Lake Victoria Basin', Art. 33(3)(h).
119 The agreement between Namibia and South Africa and the Agreement on the establishment of ORASECOM.
120 Chapter 5.
121 Art. 2; Chapter VI.
122 Art. 7(j).
123 Art. 8.

of the Charter of the Niger River Basin is to encourage cooperation between riparians based on solidarity.[124] Similarly, the Lake Chad Water Charter states that the sustainable development of the Lake Chad Basin advocates "solidarity based on the common interests of the Member States,"[125] featuring the 'principle of solidarity' as one of the fundamental principles that shall guide the actions of the parties.[126] The Charter of the Senegal River includes solidarity by reference in its Preamble to the 1978 Common Works Convention, which sees the rational development of the Senegal *Comité Inter-Eta*River as a way to strengthen solidarity between riparian States.[127]

In other treaties, solidarity is reflected in the form of sharing the costs of water development works. For instance, the Treaty on the Niagara River provides that the total cost of the necessary works shall be divided equally between the parties.[128] In the Indus Waters Treaty, the parties agree on sharing the costs of installing hydrologic and meteorological observation stations.[129] Likewise, the Lake Victoria Protocol provides that the parties shall share the costs of collecting and processing data and information.[130] The 2000 SADC Protocol provides that the parties agree on the way in which they will participate in the payment of the costs of works necessary for regulating the flow of the shared waters.[131] Finally, the agreement between Namibia and South Africa on the establishment of a permanent Water Commission and the agreement on the establishment of ORASECOM provide that the Commission's report may propose the apportionment between the parties of the costs of implementing its advised measures.[132]

3.2.3 Duty of environmental protection

Riparian states then have a common right to use the shared resource as well as a common duty to protect it. Limited territorial sovereignty bases environmental protection of international rivers on the no-harm rule, which presents limitations.[133] Essentially, it allows States to use (and abuse) the resource

124 Art. 2.
125 Water Charter of the Lake Chad Basin (http://www.africanwaterfacility.org/fileadmin/uploads/awf/Projects/MULTIN-LAKECHAD-Water-Charter.pdf) Art. 3.
126 Art. 7(i).
127 Convention conclue entre le Mali, la Mauritanie et le Sénégal relative au statut juridique des ouvrages communs signée a Bamako, le 21 décembre 1978 (http://www.fao.org/docrep/w7414b/w7414b0d.htm). Its Preamble reads 'Désireux de renforcer toujours davantage les liens d'amitié, de fraternité et de solidarité qui unissent leurs peuples respectifs par une mise en valeur rationnelle du bassin du fleuve Sénégal'.
128 Art. II
129 Art. VII(1)(a)
130 Art. 24(2)
131 Art. 4(3)(b)(ii)
132 Arts. 3(4) and 6(4) respectively.
133 Chapter 1, section 2 of this dissertation discusses the limitations of the no-harm rule.

until the required threshold of significant harm to any of the other riparian States is reached *and* a resulting complaint is made by the affected State/s.[134] However, water scarcity (e.g. caused by pollution) and environmental degradation of watercourse systems are contemporary challenges that require a proactive attitude from riparian states, one that centres on the protection of the environment regardless of whether harm is caused to other states.[135] Such challenges highlight the need for an approach that moves "beyond the barriers of state sovereignty to a collective community of interests-based approach."[136] Although the protection of the environment *per se* is still emerging,[137] some of the treaties recognizing a community of interests between riparian states examined in this chapter embrace the ecosystems approach to water management. The most recent treaties have begun shifting the focus from the protection of the environment based on the no-harm rule to the protection of ecosystems regardless of harm caused to any of the riparian states. This will be discussed in section 4 below on emerging trends.

3.3 Community of law

The common rights and duties of the riparian states constitute a community of law between them. This community of law has been recognized in international jurisprudence,[138] but the question remains as to how this community of law actually forms and develops. The treaties examined show that this can be achieved through the harmonization of the laws and policies of the riparian

134 McCaffrey points out that the no-harm rule is not 'an *absolute* obligation, but rather one of due diligence, or best efforts under the circumstances' [emphasis in the original], Stephen C. McCaffrey, 'The contribution of the UN Convention on the law of the non-navigational uses of international watercourses' (2001) 1 *International Journal of Global Environmental Issues* 250, p. 254.

135 J Brunnée and SJ Toope, 'Environmental Security and Freshwater Resources: Ecosystem Regime Building' (1997) 91 *Am. J. Int'l L.* 26, 37. See also J Brunnée and SJ Toope (1994) (n. 85) 53-4, arguing that the no-harm rule seeks to balance conflicting sovereign rights and therefore focuses on the protection of State's territorial interests rather than on the protection of the environment as such.

136 Patricia Wouters and Ruby Moynihan, 'Benefit sharing in the UN Watercourses Convention and under international water law' in Flavia Rocha Loures and Alistair Rieu-Clarke (eds), *The UN Watercourses Convention in Force: Strengthening international law for transboundary water management* (Routledge 2013), p. 326.

137 On the status of ecosystems in international law see Dan Tarlock, 'Ecosystems ' in Daniel Bodansky, Jutta Brunnée and Ellen Hey (eds), *The Oxford Handbook of International Environmental Law* (Oxford University Press 2007), pp. 574-596. In relation to international water law specifically see Owen McIntyre, 'The Protection of Freshwater Ecosystems Revisited: Towards a Common Understanding of the 'Ecosystems Approach' to the Protection of Transboundary Water Resources' (2014) 23 *Review of European Community & International Environmental Law (RECIEL)* 88.

138 Rhine Chlorides Arbitration (n XX) para. 97 and Pulp Mills case para. 281.

states. It could also be strengthened by requesting prior unanimous approval of projects of a certain size on the shared river, like in the case of the legal regime of the Senegal River.

As stated in the Revised SADC Protocol, states shall observe the objective of harmonization of their socio-economic policies and plans in accordance with the principle of unity and coherence of each shared watercourse.[139] In addition, states shall take steps to harmonize their policies and legislation regarding the prevention, reduction and control of pollution and may harmonize existing water agreements with the Revised Protocol.[140] The Lake Victoria Protocol provides that riparian states shall harmonize their laws and policies on the protection and conservation of the basin and its ecosystems, waste management and water quality standards.[141] States shall also conform their laws and regulations to the guidelines formulated by the East African Community regarding environmental audits.[142] In addition, the Lake Victoria Basin Commission shall harmonize policies, laws, regulations and standards, while the management plans it develops for the conservation and sustainable utilization of the resources of the basin shall be harmonized with national plans.[143] Similarly, the agreement establishing ORASECOM provides that the Council shall make recommendations for the harmonization of policies on public participation.[144] It also provides that the term 'equitable and reasonable' shall be interpreted in line with the 2000 Revised SADC Protocol,[145] thus contributing to the development of a community of law of in the SADC region. In addition, ane of the objectives of the Water Charter of the Niger River Basin is to promote the harmonization and monitoring of national policies for the preservation and protection of the basin.[146] The Lake Chad Water Charter in turn provides that the Commission shall harmonize national legislation for the enforcement of environment, water, fishing and navigation rights to support compliance with the Charter.[147]

In this context, the Charter of the Senegal River is unique. It provides that its rules apply to all that is not regulated by national legislations and that national authorities shall enforce them.[148] However, it goes beyond the harmonization of rules and policies strengthening the community of law among riparians by requiring unanimous approval prior to the development of any

139 Art. 3(1).
140 Arts. 4(2)(b)(ii) and 6(2).
141 Arts. 6(2), 32 and 25.
142 Art. 14(3).
143 Arts. 33(3)(a) and 27(2).
144 Art. 5(2)(4).
145 Art. 7(2).
146 Art. 2.
147 Art. 62.
148 Art. 12.

planned project on the River.[149] According to the Charter, all projects above a certain size can be executed only after prior approval of the contracting states.[150] As mentioned above, the Bamako Convention introduced this unanimous approval in 1963, which was reinforced by the 1972 Statute on the Senegal River.[151] The Charter repeats almost to the letter Article 4 of the 1972 Statute, stating that no project likely to significantly change the characteristics of the regime of the river, its navigability, the industrial exploitation of the River, the sanitary condition of the waters, the biological characteristics of fauna or flora or its water level can be executed without having been previously approved by the contracting States.[152] It has been submitted that the community of law in the Senegal River acquires in this way the form of a community of management.[153]

According to the treaties examined, riparian states have agreed on harmonizing domestic rules and policies on water management between them as well as between the community of law so created and regional water regimes (e.g., harmonization with SADC Revised Protocol). This is mostly how a community of law comes into existence. Exceptionally, the legal regime of the Senegal River not only fills legal gaps at the domestic level but also requires unanimous approval of certain planned projects, engaging all riparians through acting as a bloc, and as such deciding the rules under which water projects are to be develop.

To sum up, the unity of the shared drainage basin is the foundational legal element of the community of interests between riparian states. In addition, such a community of interests is the basis of riparian states' common rights and duties, which include the right to an equitable and reasonable share, the duty to cooperate and the duty of environmental protection. The treaties examined include riparian solidarity as a factor in the community of interests related to the duty to cooperate. Furthermore, the common rights and duties constitute a community of law among riparian states. Such a community of

149 On the development of the community of law on the Senegal River see Makane M. Mbengue, 'A Model for African Shared Water Resources: The Senegal River Legal System' (2014) 23 *Review of European Community & International Environmental Law (RECIEL)* 59.

150 Art. 24 in relevant part reads 'Conformément aux dispositions de l'article 4 de la Convention du 11 mars 1972 relative au statut du fleuve Sénégal et a l'article 10 de la présente Charte, tout projet d'une certaine ampleur ne peut etre exécuté qu'apres approbation préalable des Etats contractants'.

151 See Mbengue (n. 149) p. 64, stating that by the end of the 1970s, a joint legal regime based on a 'community of law' and solidarity was perfected within the Senegal River basin.

152 Art. 24 in relevant part reads 'En tout état de cause, aucun projet susceptible de modifier d'une maniere sensible les caractéristiques du régime du Fleuve, ses conditions de navigabilité, d'exploitation industrielle, l'état sanitaire des eaux, les caractéristiques biologiques de sa faune ou de sa flore, son plan d'eau, ne peut etre exécuté sans avoir été au préalable approuvé par les Etats contractants'. This provision repeats almost exactly Article 4 of the 1972 Convention on the Statute of the Senegal River.

153 Mbengue (n. 149) p. 62.

law is established mainly through the harmonization of riparians' national laws and policies on water governance. Requiring unanimous approval of projects of a certain size, like in the legal regime of the River Senegal, has also contributed to the formation of a community of law.

4 Community of interests furthers the ecosystems approach and the rights of riparian populations

4.1 From the no-harm rule to the ecosystems approach

The ecosystems approach began appearing in treaty law during the last decade of the 20th century. The 1995 Mekong Agreement extends environmental protection of the river to its related resources and environment, aquatic ecosystem conditions and ecological balance, and includes regulations for the maintenance of flows on the mainstream.[154] In addition, the 1995 SADC Protocol provided that States shall prevent the introduction of alien aquatic species into a shared watercourse system that may have detrimental effects on the ecosystem,[155] while the revised SADC Protocol defines 'environmental use' as the use of water for the preservation and maintenance of ecosystems, binding states to protecting and preserving such ecosystems.[156] Moreover, the 2003 Lake Victoria Protocol provides for the "principle of the protection and preservation of the ecosystems of international watercourses whereby ecosystems are treated as units, all of whose components are necessary to their functioning"[157] and the 'principle of prevention' in order "to minimize adverse effects on fresh water resources and their ecosystems".[158]

The agreement establishing the ORASECOM binds the parties to including the effects of a planned project on the ecosystems of the watercourse, as shown by the respective EIA, in the information presented to the relevant party and to preventing, reducing and controlling pollution that may significantly harm the ecosystem of the river.[159] The Charter of the Senegal River provides that the parties have the obligation to protect and preserve the ecosystem of the

154 Preamble; Arts. 3, 6 and 7. McIntyre holds that the Partial Award of the Permanent Court of Arbitration (PCA) in the Kishenganga Arbitration supports the ecosystems approach because it ruled that an environmental flow of water down the river needs to be maintained (n. 137) p. 88. On the maintenance of minimum environmental flows in the context of Mexico-US transboundary rivers and its relation to ecosystem protection see Dan Tarlock, 'Mexico and the United States Assume a Legal Duty to Provide Colorado River Delta Restoration Flows: An Important International Environmental and Water Law Precedent' (2014) 23 *Review of European Community & International Environmental Law (RECIEL)* 76.

155 Art. 2(11).

156 Arts. 1(1) and 4(2).

157 Art. 4(2)(j). See also Art. 6.

158 Art. 4(2)(i).

159 Art. 7(9) and (13).

river in accordance with its natural balance, particularly fragile areas such as floodplains and wetlands.[160] Likewise, the shared vision of the signatories of the Charter of the Niger River includes the "integrated management of the water resources and associated ecosystems," aiming at maintaining the integrity of ecosystems, their preservation and protection.[161] The Lake Chad Charter also aims at the conservation of ecosystems, including regulations for environmental flows and the obligation to consider ecosystem requirements as one of the relevant factors for the equitable and reasonable allocation of water.[162]

As previously discussed, the treaties surveyed take the drainage basin as the starting point for water governance, i.e. as the unit to be regulated. Consistent with this approach, the treaties adopt the notion of the interconnectedness of the elements of the environment and embrace the ecosystems approach. The treaties show a shift from the traditional approach to environmental protection based on the no-harm rule to the protection of the environment *per se*, i.e., irrespective of whether harm is caused to other riparian states. In comparison, water law of global application shows a rather timid adherence to the ecosystems approach. The UNWC, for instance, provides for the protection and preservation of ecosystems of international watercourses;[163] however, the governing approach to environmental protection continues to be the no-harm rule. [164]Water treaties acknowledging a community of interests or common interests between states adhere more decisively to the ecosystems approach thus furthering its application.

4.2 Rights and duties of the basin populations

Traditionally, the subjects of the common rights and duties in a community of interests are the riparian states. However, because of the growing inclusion of non-state actors in international environmental governance[165] and the emergence of the human right to water, the subject of the rights and duties is evolving to include the riparian populations.

The treaties show a trend towards recognizing the interests of the basin populations in addition to the interests of the riparian states. For instance, the 2000 SADC Revised Protocol recognizes the interests of persons, natural or juridical, in the context of a non-discrimination clause regarding the access of victims of environmental harm to judicial procedures.[166] In addition, the

160 Arts. 16 and 2.
161 Arts. 1(32), 1(14), 2, and 13.
162 Arts. 4(d), 12 and 13. See also arts. 28-30.
163 UNWC (n. 50) Art. 20.
164 Arts. 20 and 7.
165 The participation of non-state actors in international environmental governance is discussed in Chapters 4 and 5 of this dissertation.
166 Art. 3(10)(c).

Lake Victoria Protocol provides that riparian states shall cooperate to promote public participation in planning and decision-making.[167] Public participation is recognized as one of the guiding principles in managing the shared waters, according to which "decisions about a project or policy take into account the views of the stakeholders".[168] It also provides that riparians shall encourage public education and awareness regarding the sustainable development of the basin,[169] thus including the populations in the use and protection of the shared resource. Furthermore, the agreement on the establishment of ORASECOM provides that the Council shall make recommendations on the extent of public participation regarding the planning, development, utilization, protection and conservation of the shared waters.[170]

The Charters of the Senegal and Niger Rivers and of Lake Chad have a clear focus on environmental protection based on the ecosystems approach and on the satisfaction of the vital needs of the population based on the human right to water. The Charter of the Senegal River states that the use of the waters is open to each riparian state as well as the individuals within its territory and that water allocation shall ensure the populations their fundamental right to water,[171] placing the needs of the populations, particularly the most vulnerable, as primary criteria.[172] It also provides that the public shall have access to information relating to the river and to education encouraging a rational use of the waters.[173] In addition, the Water Charter of the Niger River Basin considers access to water to be a fundamental human right, defining it as "the right to a sufficient and physically accessible supply at an affordable cost of safe water of a quality that is acceptable for personal and domestic use by everyone".[174] It also provides for access to information on the condition of the river, the allocation of waters and the measures to prevent, control and reduce transboundary impacts,[175] as well as for public participation in decision-making and implementation procedures.[176] The Water Charter of the Lake Chad also recognizes the right to water,[177] provides that the legitimate concerns of the populations shall be taken into account in water management,[178] and sets forth access to information, public participation in decision-making procedures and public consultation.[179] Satisfying the needs of the

167 Art. 3(l).
168 Art. 4(h). See also Arts. 22 and 33(3)(b).
169 Art. 21.
170 Art. 5(2)(4).
171 Art. 4.
172 Arts. 6 and 8.
173 Art. 13.
174 Preamble; Art. 1(10).
175 Art. 26.
176 Arts. 27 and 5.
177 Art. 2.
178 Art. 7(p).
179 Arts. 7(g), 2 and 73.

population is one of the goals of the Lake Chad Charter.[180] It expressly recognizes the "rights of the basin populations" as including the right to water and sanitation, information and participation and to the acknowledgement and protection of local and traditional knowledge and know-how.[181] It also includes rules to support community organizations, develop and implement capacity-building activities and promote environmental education and awareness in local communities.[182] Consequently, the community of interests of the Senegal and Niger Rivers and of Lake Chad grants the basin populations a prominent legal status furthering in this way the protection of their rights. These communities of interests include therefore both state and non-state actors.

4.3 The interests of non-riparian states

Finally, another dimension that could be considered to be at an early stage of emergence is the acknowledgement of the interests of non-riparian states. The *River Oder* case addressed this in relation to the principle of freedom of navigation, stating that the interests of non-riparians in navigating the river should be recognized.[183] Concerning non-navigational uses, two of the treaties examined include these interests: the Water Charter of Lake Chad and the agreement between Namibia and South Africa. The Charter of Lake Chad considers different kinds of non-member states, namely associated states, observer states, and partial participation states,[184] which have different degrees of participation as authorized by the Commission.[185] It further provides for the protection of the legitimate interests of aquifer states that are not members of the Commission.[186] The agreement between Namibia and South Africa provides that the Commission shall have regard "for the interests any other State may have in any water resource of common interest to the Parties and that State".[187] Non-riparian states are not subject of the rights and duties recognized by the community of interests; however, these provisions indicate a certain awareness that the interests of non-riparians deserve to be taken into account.

In sum, two significant trends are identified in the treaties surveyed: a shift of environmental protection from the no-harm rule to the ecosystems approach, and a shift of the subjects of the common rights and duties from states to

180 Art. 4(k).
181 Ch. 12, Arts. 72, 73 and 75.
182 Arts. 78, 79 and 81.
183 (n. 30) p. 28.
184 Art. 2.
185 Art. 92.
186 Art. 20.
187 Art. 3(5).

include the basin populations. Based on these trends, the chapter argues that the principle of community of interests furthers the ecosystems approach and the rights of riparian populations. From the perspective of the exercise of sovereignty over shared water resources, community of interests promotes a change from protecting primarily state interests to protecting the environment as such – i.e. irrespective of whether harm is caused to other riparian states- and human rights. In addition, two of the treaties examined also indicate a nascent trend: the consideration of the interests of non-riparian states in the shared resource. This trend is just coming into existence; whether other communities of interests in shared drainage basins will adopt such an approach remains to be seen.

5 Conclusion

International water law recognizes the existence of a community of interests between states sharing freshwater resources. However, the legal nature of community of interests and its role in the exercise of sovereignty over the shared water resources remain unclear. For this reason, this chapter examined treaties expressly recognizing a community of interests or common interests between riparian states in order to identify the basic legal features of community of interests and thus establish its legal nature. The chapter also sought to establish the relationship between community of interests and the exercise of sovereignty over shared water resources. In addition, bearing in mind that community of interests is considered an emerging principle for transboundary water governance, the chapter tried to identify trends indicating the general direction in which the emerging principle of community of interests is evolving.

Based on an exhaustive analysis of the selected treaties, the chapter found that the common interests of the riparian states originate in the unity of the shared drainage basin. Nine of the eleven treaties examined clearly adopt the drainage basin as the basic unit for water governance.[188] The remaining two treaties, although not expressly referring to the drainage basin, nevertheless imply that the parties intended to regulate and protect not only the shared

188 The 1960 Indus Waters Treaty, the 1995 Agreement on the Cooperation for the Sustainable Development of the Mekong River Basin, the 1995 Protocol on Shared Watercourse Systems in the Southern African Development Community (SADC) Region and the 2000 Revised SADC Protocol, the 2000 Agreement between Botswana, Lesotho, Namibia and South Africa on the Establishment of the Orange-Senqu River Commission (ORASECOM), the 2002 Water Charter of the Senegal River, the 2003 Protocol for Sustainable Development of Lake Victoria Basin, the 2008 Water Charter of the River Niger and the 2012 Water Charter of the Lake Chad Basin.

waters but also the related land as a whole.[189] The unity of the drainage basin is thus identified as the foundational legal element of the community of interests. Such a community of interests is in turn the basis of riparian states' common rights and duties. According to the treaties examined, said rights and duties include the right to an equitable and reasonable share, the duty of environmental protection and the duty to cooperate. The treaties examined include riparian solidarity as a factor in the community of interests related to the duty to cooperate. Riparians' common rights and duties constitute a community of law among riparian states established mainly through the harmonization of national laws and policies on water governance. Requiring unanimous approval of projects of a certain size, like in the legal regime of the River Senegal, has also contributed to the formation of a community of law. Based on the findings in this chapter, the legal nature of community of interest could be articulated as follows:

> Community of interests is a principle that, when provided for in a treaty or subsequently interpreted as such, governs riparian states' relations concerning the shared water resources. Its basic legal features are (1) the unity of the shared drainage basin; (2) riparian solidarity and cooperation; and (3) the harmonization of riparians' national laws and policies on water governance.

Community of interests is not yet part of customary international water law. Until now, all judicial decisions that have contributed to the evolution of the principle are based on the interpretation of one particular treaty or another and not on a rule of customary law. For this reason, community of interests is an element of the exercise of sovereignty over shared water resources only when included in treaty law or when the treaty is silent on the issue but has nevertheless been subsequently interpreted as establishing a community of interests. As such, the principle of community of interests influences and qualifies the way sovereignty is exercised. It does so mainly through emphasizing the unity of the shared resource and the consequent duty to cooperate and community of law. It also influences a change in the exercise of sovereignty towards implementing the ecosystems approach and recognizing the rights and duties of the riparian populations.

In essence, the principle of community of interests is based on the legal recognition of the unity of the shared drainage basin. It promotes riparian solidarity and cooperation as well as the formation of a community of law.

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189 In the 1950 Treaty concerning the Diversion of the Niagara River, Canada and the United States recognize 'their primary obligation to preserve and enhance the scenic beauty of the Niagara Falls and River'; while the 1992 Agreement between Namibia and South Africa on the Establishment of a Permanent Water Commission provides that the Commission shall advise the parties on the prevention and control of soil erosion affecting the common water resources. The references to 'scenic beauty' and 'soil erosion' suggest an intention to regulate more than just the shared waters.

It also promotes a shift from protecting primarily state interests to protecting the environment irrespective of whether harm is caused to other riparian states (from the no-harm rule to the ecosystems approach) and the rights of the riparian populations (including the rights to water and to public participation). Community of interests thus promotes the harmonization of the pivotal dimensions of state sovereignty, environmental protection and human rights.