

# How international water law rules and principles can help build trust – learning from case studies

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# Purpose of the presentation

- Examine two key legal mechanisms that are contained in both the UN Watercourses Convention and the UNECE Water Convention
  - Notification and consultation procedures
  - Dispute settlement mechanisms
- Look at how these mechanisms have been implemented through river basin treaties
- Explore some of the benefits and challenges experienced in implementing the legal mechanisms
- Demonstrate the advantages of adopting such provisions in basins that lack existing arrangements

# Two case studies



# Notification and consultation procedures

# UNECE Water Convention

- Implicit requirement to notify and consult concerning planned measures
  - Parties to take all appropriate measures to prevent, control and reduce any transboundary impact (Art 2(1))
  - Essential step in determining what is equitable and reasonable (Art 2(2))
  - In taking measures party shall be guided by the precautionary principle (Art 2(2))
  - EIAs and other means of assessment constitute 'appropriate measures' (Art 3(1)(h) & Art 9(1)(j))
  - Joint bodies serve as a forum for exchanging information on planned uses and related installations (Art. 9(2)(h))
  - Provisions on monitoring and assessment (Art. 4 & 11), exchange of data and information (Art. 6 & 13) and consultations (Art. 10)
- Link to the UNECE Convention on Environmental Impact Assessment in a Transboundary Context

# UN Watercourses Convention

- Watercourse States must notify and consult over planned measures that 'may have a significant adverse effect' upon other watercourse States (Part III)
- Detailed procedure
  - When to notify, ie., timely
  - When to reply, ie., 6+6 months
  - What obligations are placed on notifying state, ie., suspension of project, and exchange of plans and any assessment
  - What to do in absence of notification
  - What happens if no agreement, ie., consultations for 6 months followed by dispute settlement

# 1995 Mekong Agreement and procedures

- Activities on the mainstream of the Mekong subject to prior consultation *with the aim of reaching agreement* (Art. 5)
- Definitions
  - 'Prior consultation' is neither a right to veto the use nor unilateral right to use water by any riparian without taking into account other riparian's rights
- Procedure and Guidelines on Notification, Prior Consultation and Agreement (PNPCA)
  - Timely notification
  - Content and form/format of notification and reply
  - Duties of notifying state during notification period
  - Duration of notification
  - Absence of notification

# Xayaburi Case

- 1<sup>st</sup> dam on the mainstream of the Mekong in Laos
- Submitted to PNPCA in September 2010
- PNPCA Working Group established
  - Roadmap development
  - Technical studies
  - Site visit
  - Public consultations
- Prior consultation review report completed March 2011



# Lessons learnt

- PNPCA process an opportunity for states to cooperate over assessing potential impacts of the dam
  - Fish migration
  - Sedimentation transfer
- Involved an element of stakeholder consultations even though not explicitly envisaged in the Mekong Agreement or PNPCA
- Opportunity for potentially affected States to raise their key concerns
- Difficulty in agreeing what 'timely' notification meant
- Question over the data gaps and need for baseline assessments
- Differing interpretations over
  - consultation period, ie., 'minimum of 6 months'
  - Meaning of 'suspension of works'
- Vague procedures for dispute settlement

# Dispute settlement mechanisms

# UNECE Water Convention

- Article 22 – Settlement of Disputes
  - Parties seek to settle disputes through negotiation or by other peaceful means
  - A party may consent to dispute settlement via
    - International Court of Justice
    - Arbitration
- Implementation Committee...

# Water Convention's new Implementation Committee



- Established in 2012 for dispute prevention and practical case-oriented assistance
- 9 members in personal capacity, outstanding lawyers and water professionals, Elected by the Meeting of the Parties among candidates nominated by the Parties, Signatories and NGO's
- Meets twice a year in open, public and transparent manner
- Procedures (advisory procedure, Committee initiative and others)
- Measures (national plan of implementation, transboundary water agreement, capacity building, facilitating technical assistance), may recommend stronger measures to Meeting of the Parties

# UN Watercourses Convention

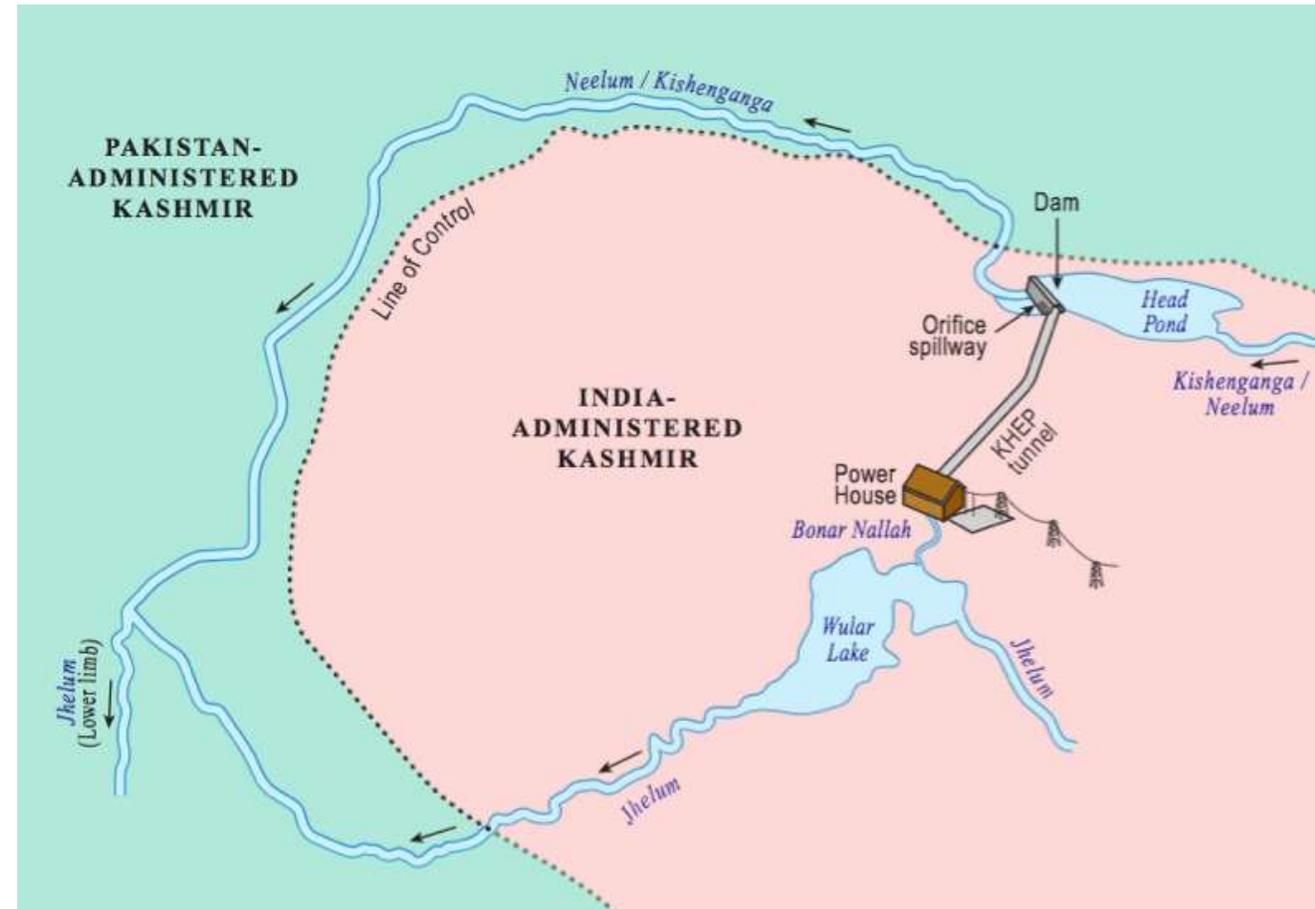
- Article 33 – Settlement of Disputes
  - Settle disputes in a peaceful manner through negotiation, good offices, mediation, conciliation, joint watercourse institutions, arbitration or international court of justice
  - If after 6 months parties unable to settle their dispute then one party may request that the dispute be submitted to 3<sup>rd</sup> party fact-finding
  - 3<sup>rd</sup> party fact-finding examining the disputes and develop a recommendation that the States must consider in good faith
  - Party may also consent to dispute settlement via
    - International Court of Justice
    - Arbitral Tribunal

# Indus Water Treaty

- Adopted in 1960 between India and Pakistan
- Objectives
  - Attain the most complete and satisfactory utilization of the waters of the Indus
  - Set out rights and obligations of each state concerning use of the Indus
- Disputes first considered by Indus Commission (Art IX)
- If unresolved the aggrieved party has the possibility to submit the dispute to to a neutral expert or permanent court of arbitration

# Kishenganga Dispute

- India plan to develop Hydropower scheme
- Breach of Pakistan's rights to utilise waters of the river
- Request for Arbitration by Pakistan, 17 May 2010
- Partial award 18 February 2013 and final award 20 December



# Permanent Court of Arbitration Case

- India has a right to utilize the river for hydropower
- Must be run-of-river and India must therefore maintain a minimum flow



# Lessons learnt

- Providing clear dispute settlement steps avoids lengthy delays and deadlock
- Treaty set out strict requirements in terms of permissible hydropower developments
- Even where there is low trust amongst the parties clear commitments *coupled with* strong dispute settlement process can make a treaty effective
- The opposite is true, ie., where commitments are not clear, or no arrangement is in place, cooperation will be difficult
- Disputes are inevitable and do not impede wider cooperation between parties where effective arrangements are in place

# Conclusions

- Only two examples of provisions that can be found in the two Conventions
- Many other examples relating to, for example:
  - Definitions and scope
  - Equitable and reasonable utilisation, protection of ecosystems and the duty to take all appropriate measures to prevent significant harm
  - Data and information exchange
  - Joint institutional arrangements
  - ...
- Two examples illustrate common message that having such arrangements in place helps to foster cooperation
- Where no arrangements are in place, the two Convention can help address gaps, and support the development of basin-specific arrangements