Equitable Sharing of Downstream Benefits

Dr. Trilochan Upreti*

Abstract

Prerequisites of achieving or sharing broader benefits between the riparian states are cooperation, good neighbourly relations, and good faith. By the very nature of the watercourses, which spread over several states, any work on watercourses by one state may prove beneficial for another state. Hence the principle of equity should in such case serve to foster cooperation among the riparian states. Principle of equity, particularly in sharing benefits between riparian states has roots in the customary international law, thus it is the legal right of the upstream state to seek compensation for the downstream benefits enjoyed by another state.

* Secretary-Ministry of Law, Justice and Parliamentary Affairs, LLM University of Hull, PhD University of Reading
INTRODUCTION

Any intervention taken in the upper reach of a shared watercourse may have certain repercussions in the downstream. Depending upon the kind of intervention in the upstream, effects thus generated in the downstream could be either beneficial or adverse or bit of both. Even though there is not as yet, a clear-cut definition of downstream benefits, any work done in the upstream that provides benefits, in the form of flood control, regulated water for irrigation, water supply, navigation, hydropower and so forth in the lower catchments countries is said to have generated downstream benefits.

Actually the idea of downstream benefits emerged as a practice between the United States and Canada. Under Article VIII of the 1909 Boundary Waters Treaty between the two states, when one country raised the level of waters in its dams or other works, the international Joint Commission “shall require, as a condition of its approval thereof, that suitable and adequate provision, approved by it, be made for the protection and indemnity of all interests on the other side of the line which may be injured thereby”. This provision, in substance, required the state benefiting from the storage provided by the other state to compensate that state for any injury or inconvenience caused by the elevation of the water.1

Hence, the concept of downstream benefits is an integral part of the principle of equitable utilisation, which offers flexibility to accommodate the interests of all riparian states in such a manner that every party wins and no one loses.2 In this milieu, this article aims to demonstrate the concept, principle and practice of downstream benefits, its implications and emerging trend in International Water Law. It also aims to critically evaluate legal aspects of equity and its role in the dispensation of a fair justice in general and the application of the principle of equity in a complex water sharing conflict in particular. Furthermore, efforts will be made to apply this principle in south Asia, where water is in abundance in some places but scarce in other.

SIGNIFICANCE OF WATER

The significance of water is immense. Freshwater resources are essential component of the earth’s hydrosphere and are indispensable part of all terrestrial ecosystems. Freshwater resources are not only indispensable for the sustenance of life on earth but also are of vital importance to all socio-economic sectors. Like Oxygen, the importance of fresh water for the sustenance, development and maintenance of balance in the natural system is crucial. Moreover, in the words of Justice Holmes, “a river is more than an amenity; it is a treasure. If offers a necessity of life that must be rationed among those…”

Modern technology has enabled humans to divert water and convey it to distances far and wide for multifarious uses such as irrigation, drinking, industrial and recreational purposes thereby exacerbating its scarcity. With escalating competitive and conflicting uses, it has been predicted by several experts and international organisations that future wars amongst states might well be fought over water, not oil.

ASPECTS OF DOWNSTREAM BENEFITS

Often quoted in international tribunals and particularly notable in the opinion of Judge Hudson in the Diversion of Water from the River Meuse case, "what are widely known as principles of equity have long been considered to constitute a part of international law, and as such they have often been applied by international tribunals." The principle of downstream benefits needs further consideration in this regard. The principle clearly applies when the act or abstention from action is done at the request of a co-basin state. If a benefit is gained by the requesting state, it is reasonable that it should pay a fair price for it. The same is true when the action or abstention from action is a part of a cooperative scheme of development, as in the case of the Columbia River, stated below.

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6 Supra note 4, p. 16, p. 25; also see United Nations, Comprehensive Assessment of Freshwater Resources of the World, 1997.
7 55 PCIJ Series A/B No 70 p 76-77.
However, a difficult question of the applicability of this principle may arise when a state acts on its own initiative and incidentally makes it possible for a co-basin state to derive a benefit. Suppose, for instance, that Nepal decided to meet its power needs by building dams and hydroelectric installations on the Karnali River without the consent of India. Nevertheless, Nepalese work resulted into substantial benefits to India in areas flood control and power benefits. Would Nepal in this circumstance be entitled to a share of the downstream benefits? There is no clear authority to address this question. But even in this situation, both nations could negotiate the question of downstream benefits that would accrue to downstream India from the construction in upstream Nepal, so that the benefits could be shared under the principle of equity. Recourse to equity would provide a justification for the sharing of downstream benefits between two countries even in the absence of a clear provision of law to resolve the particular circumstances of a case. The principle of equity could, therefore, serve to bridge any lacuna posed by the absence of clear international legal provisions.

Indeed in first of its cases, the United States government argued for downstream benefits right in 1925 in the case of the New Brunswick Electric Power Commission regarding the Grand Falls Power dam against Canada. However, later on when Canada argued the same case as a precedent supporting her claims to recompense for downstream benefits comparing it with the Libby Dam application, the United States denied its applicability. Argument was that there was a distinction between the claims that may be made when waters are backed up into boundary waters and when they are backed up across the boundary. The reason for this argument was article VIII of the 1909 treaty, which provided there must be an “an equal division” of boundary waters between the United States and Canada with “equal and similar rights in the use” of those waters; hence, the power generated from the boundary waters must be shared. But the treaty did not provide for the sharing of waters of trans-boundary rivers, thereby power produced from such rivers need not be shared.8

Truly, the idea of downstream benefits has been disputed sometimes, but there is no denying in that the nature of the right seems inherent in the customary international law9. Thus, the waters of a river must be shared

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8 Supra note 2, p. 334-338
9 The damming and storage of flood and snow fed waters in Canadian territory made it possible to augment and regulate an enormous volume of water, from which a series of hydropower stations were constructed to harness a large amount of hydropower in US territory as well as in Canadian territories. Furthermore, flood damage was controlled,
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Equitably by the states through whose territories it passes in tune with the principle of equitable division of the benefits. It should be noted that after a long and daunting exercise, the United States has started to agree in principle that simple equity requires some compensation be paid for the benefits received from upstream improvements in Canadian territory, which derive some type of benefits in the United States. It is because, within the United States, upstream states have in fact been successfully claiming a share of benefits conferred on downstream states by works in the upstream states.10

Furthermore, there may be more obvious reasons for the sharing of downstream benefits, an upstream country may be reluctant, in the first place, to go ahead with its projects, unless it can be assured of receiving compensation for the un-captured benefits it would send downstream. Similarly, if a downstream country deems that its upstream neighbour is not interested in recovering external benefits and will build its project any way, and substantial harm was thereby prevented. In addition, the regulated flow of the waters was substantially used for irrigation in the US. However, a huge chunk of Canadian territory was submerged by these reservoirs, and forests, flora and fauna were extinguished. A huge amount of money was also spent in order to construct these structures. The United States agreed to pay US $ 64 million for the downstream benefits accrued in its territory as a result of Canadian storage. The power generated by these augmented waters was shared equally with Canada, and the Canadian share was later bought by the US at the agreed price for which it paid US$ 254 million. The money was provided to Canada in advance so that she could undertake the works. The benefits accruing from these works were classified as power, flood control and irrigation each of which was shared equally. However, it took almost twenty years to convince the United States about these benefits and conclude this treaty. Moreover, it should be worthwhile to note at this point that, from the beginning to the end, the US was completely reluctant to recognise this concept and practice. In order to obtain American consent on downstream benefits, the Canadian side had to explore the very strong bargaining point of diversion of the Columbia River into the Fraser river that drained to the ocean throughout its own territory. In fact, as the US and Canada are both in the upstream and downstream positions, it would have been hard on the US to rely on a different concept, principle and practice. Because of their unique geographical specificity, any other kind of argument on the part of the US could have boomeranged against her in other watercourses. See for detail, Ralf W. Johnson, “The Columbia Basin”, in A. GARRISION, R. HAYTON AND C. OLMSTEAD, THE LAW OF INTERNATIONAL DRAINAGE BASINS, New York: Ocena Pub, 1967, C. B. Bourne, “The Columbia River Controversy”, 37 Canadian Bar Review, 1959.

10 Apart from attempts to provide for sharing of benefits by “Interstate Compacts” section 10 (f) of the Federal Power Act 1935, imposes on the Federal Power Commission the duty of determine the benefits to downstream plants from upstream storage of assess charges against those downstream plants.
the downstream country may not have the motivation to accept an agreement, for it will receive some benefit at no cost to itself.\(^{{11}}\)

Thus, the sharing of cost and benefit in an international watercourse largely depends on co-operation between the riparian states. By the very nature of the watercourses, which spread over several states, it is the geographical, hydrological or other issues that determine what type of cooperation is required on a particular situation. For example, to attain optimal benefits from a watercourse, dam and reservoir can be constructed in one country and hydropower, irrigation, flood control and other benefits could be accrued to another state.\(^{{12}}\) That is to say, due to the hydrological and geographical situation, a dam and reservoir could be constructed in one country, whereas hydroelectricity could be generated in another country just as flood control and irrigation benefits could be accrued to that very country. Equity provides inspiration to riparian states for such cooperation and sharing of benefits derived by their individual or mutual endeavour.

There are numerous practices in bilateral relations, which cover similar issues without necessarily using one particular practice or procedure. Professors Bourne, McCaffrey and Utton are of the opinion that:

“There is support for the existence of a principle of downstream benefits in customary international law. Under the concept of equitable utilization, watercourse states are entitled to a reasonable and equitable share of the benefits of an international watercourse. It would seem to follow, therefore, that when a watercourse state does or refrains from doing an act that confers a benefit on another state sharing the watercourse, the latter state is under an obligation to share the benefit equitably with the former. The treaty practice of states supports the existence of this principle of sharing benefit. As it is well known, the principle of downstream benefits is dealt with explicitly in the Columbia Treaty.\(^{{13}}\) And many other treaties provide for the return, either in kind or in cash, of a share of the benefits received as a result of the acts done in another state.”\(^{{14}}\)

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\(^{{13}}\) 542 United Nations Treaty Series, p. 244.

AS A CUSTOMARY INTERNATIONAL LAW

From an extensive research few instances of downstream benefits from the several treaties concluded between riparian states can be found, from which it seems that the concept was practised from the early nineteenth century, and has been widely recognised ever since. As a result of such practice, it has become the rule of customary international law.  

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15 Supra note 13: “Examples of six treaties has been referred to.

1. Article 358 of the Treaty of Versailles, 1919 gave France the exclusive right to use the waters of Rhine for power production, subject to France’s paying Germany one-half the value of the energy produced (11 Mertens, N.R.G., 3rd Ser., 323 (1922));

2. The Barcelona Convention, 1921, Article X (7 L.N.T.S 35), also contains the idea of sharing downstream benefits and even upstream benefits, providing that where a state is obliged under the convention to take steps to improve the river or is put to expense to maintain it for navigation, it is entitled to demand a reasonable contribution to the costs involved;

3. The agreement between South Africa and Portugal regulating the use of the waters of the Kunene River, 1926, (70 L.N.T.S. p. 316); this agreement gave South Africa the right to build a dam upstream in Angola and certain diversion works. Article 12 provided as follows: “No charge shall be made for the water diverted from the Kunene River for the purpose of provided means of subsistence for the Native Tribes in the Mandated Territory; but should it be desired to utilise a portion of the water referred to in Article six above (one half of the flood water of the river) for any other purposes, being for purposes of gain… South Africa. …Shall pay, for such portion of the water so utilized, to. …(Portugal) such compensation as may be mutually agreed upon”.

4. The Kunene River, under the name of the Cunene River, was the subject of a more recent treaty between Portugal and South Africa, namely the agreement in regard to the first phase of development of the water resources of the Kunene River Basin, 29 January 1969, to be found in Treaties concerning the Utilization of International Water Courses for Other purpose then Navigation.: Africa, Natural Resources/Water Series No.13 (1984), (UN Publication ST/ESA/141;Sales No. E/F.84.II.A7) (it is not known if this treaty came into force). This treaty provides another example of one watercourse state paying another of benefits received by it as a result of developments of the watercourse in the another state. Under it, Portugal was to construct the Gove dam and South Africa agree “to participate in the financing of the dam in respect of components forming part of storage function, but exclusive costs incurred for hydro-power generation purely in the interest of the Portuguese government”; in return, Portugal agreed not to extract more than fifty per cent of the resulting regulated flow of the river, and to operate the dam so as to provide a regulated flow (Articles 4.1.3. 4.1.11 and 12). The treaty also provided for the construction and operation of works for the diversion by means of pumping water form the Cunene River for human and animal requirements in S.W.Africa and for irrigation there. South Africa agreed to pay for the construction of the works, and for their operation which would be done by the Portuguese authorities; South Africa was also to pay a fixed amount for the ground occupied and for the flooding caused by these works (Article 4).
“While treaty practice can be invoked in support of the principle of downstream benefits where the act or the omission to act that confers the benefits, was done or not done at the request of the downstream state, treaty practice does not exist to support the wider proposition that a downstream state is obliged to share benefits that it receives from the acts or omissions of an upstream state that it has not asked for or otherwise agreed to. The obligation to share downstream benefits, however, may exist under customary international law even when these benefits have not been solicited or agreed to. Logically, the obligation would seem to be implicit in the principle of equitable utilization; for, if benefits are to be shared equitably, it should not matter whether or not the beneficiary sought them. Furthermore, a failure to share windfall benefits would seem to be a case of unjust enrichment. This is not to say, however, that there may not be a difference between a case in which a downstream state has asked for a benefit and one in which it has not so asked; in the latter case, equity might dictate that the downstream state not pay as much as it would have to in the former case.”

Principle of sharing downstream benefits also stems from the principle of unjust enrichment. Expropriation of foreign property without giving sufficient compensation reflects one such example of unjust enrichment under international law, against which an analogy could be drawn in respect to downstream benefits. In factory at Chorzow case the then Permanent Court of International Justice upheld that under general international law, damages in case of expropriation would have been based on the book value

5. The Rhine Chlorides agreement (16 I.L.M. 265 (1977)) is another example of states sharing downstream benefits. This agreement provides that the Netherlands is to pay a substantial share of the cost to France of disposing of waste salts form the Mines d’Postas d’Alsace in ways other than discharging them into the Rhine; thus the downstream state pays the upstream state for the conferral of a benefit (freedom from pollution harm). While not an upstream “development” case per se, this is a particularly striking example since it could be argued that France had a duty to avoid significant pollution harm to the Netherlands apart from the treaty.

6. Another example is the Lesotho Highlands Project treaty under which South Africa paid a substantial share of the cost of constructing the projects in Lesotho in return of the downstream benefits it would receive from it.

7. The 1977 treaty between Czechoslovakia (now Slovak) and Hungary involved in the Gavcikovo-Nagymaros case may provide another example. The dam and hydro plant that was to produce the bulk of the electricity under the treaty is located on a bypass canal wholly within Slovakia. The lion’s share of Danube water is diverted into that canal then rejoins the bed of the Danube, which forms the boundary between two states. Under the Treaty, Hungary was to receive power from that plant, as well as flood control benefits, both arguable downstream benefits.”

Supra note 14 at p. 4, see also N. KLIO'T, WATER RESOURCES AND CONFLICT IN THE MIDDLE EASt, London: Roulledge, 1994, p. 50
of the property at the time of its disposition plus interest. Hence, the court continued that reparation should reflect not merely the value of property at the time of disposition, but the loss sustained because of the expropriation. The PCIJ in the Norwegian Claim (*Norway v. USA*) also dealt with the issue where America was told to pay appropriate reparation to Norway refuting that unjust enrichment is not tolerable under the principle of international law.

Apart from the above cases, there are several arbitral tribunals’ decisions in cases of appropriation of the property of a foreigner without paying sufficient compensation, in which the principle of unjust enrichment has been invoked. Thus, principle of unjust enrichment is regarded as a rule of customary international law that could not be compromised under any circumstances. And as principle of unjust enrichment forms the sufficient basis for equitable sharing of downstream benefits, refusal to recognise the application of the principle of downstream benefits by any riparian state is against the principle of unjust enrichment, thus against customary international law.

**STATE PRACTICES**

In the sphere of inter-state relations, the states of Uttar Pradesh and Bihar in India agreed to share both costs and benefits in proportion in a jointly developed Muskhand Dam Project. The interesting fact about this project is that central government intervention was required in order to conclude the agreement. Later, the states of Gujarat and Rajasthan also concluded another agreement on cost sharing in the Bajaj Sagar Dam Project in 1966, where Rajasthan agreed to pay an amount to Gujarat for work undertaken by the latter and the benefit shared by the former. In 1975, the construction of the Kadana dam submerged territory in Rajasthan, for which the state of Gujarat paid compensation. In another dispute between the Indian states of Gujarat and Madhya Pradesh on Narmada waters in the Narmada Sagar dam, the Narmada Tribunal applied this principle, and as a result Madhya

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19 Abu Dhabi Arbitration and Iran v. USA Arbitration cases in Digest of International Tribunal.
21 Id. p. 314-315
Pradesh obtained downstream benefits from Gujarat. All these applications were made to ensure justice, fill up the lacuna and remove the rigidity of law that prevented a just solution.

Thus principle of equity in sharing downstream benefits has been recognised in India. And with Indian River Boards Act of 1956, Section 15 (4), which provides, in the preparation and execution of schemes by the Board, it shall take into account the costs likely to be incurred in constructing and maintaining such works. The costs shall then be allocated among the interested governments in such proportion as may be agreed or, in default of agreement, as may be determined by the Board having regard to the benefits which will be received from the scheme by them. In addition, a committee constituted by the Government of India has recommended that such benefits must be shared between the states concerned. Furthermore, it seems that the Indian government has practised the idea of sharing the benefits proportionately in the inter-state sphere of India. The Ministry of Irrigation and Power had written to all state Governments on April 17, 1967, stating that the cost of multipurpose river valley projects should normally be allocated only to three functions: irrigation, power and flood control. The letter recommended the “facilities used” method of allocation of joint costs in preference to the “alternative justifiable expenditure” or “separable costs, remaining benefits” methods. Hence equity played significant role in each circumstance for a fair solution of each problem.

Moreover, there is another interesting example of sharing downstream benefits with another sovereign state. India is planning to construct the Dihang Dam in its far east, which, she claims, would bring down the flood level by one metre in Bangladesh substantially benefiting Bangladesh by

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22 Id. p. 323-324.
23 Id.
24 Id. p. 323: The Yadav Mohan committee appointed by the Government of India in 1961 to examine the levy of charges for utilisation of water on a downstream project. The committee recommend as follows: “when an upstream project is constructed later than an existing downstream project, the latter shall be liable to pay for the benefit obtained from an upstream project irrespective of the period that has elapsed after its construction; but when the downstream project is constructed after the upstream project, the downstream project need pay for the benefits received only if it is conceived within 20 years of completion of upper project. In either case the charge will be borne only if it is clearly established that the downstream project has been benefited by the changes in flows or otherwise by the construction or operation of the upstream project. The lower project will bear the cost to the extent the actual additional benefits are made available to it and as and when these benefits accrue”.  
25 Id. p. 324.
from the mitigating of the flood damages. Mr Muchkund Dubey, a former foreign secretary of the Government of India, has questioned how India can deny Nepal payment for downstream benefits resulting from Nepalese work whilst India is simultaneously bargaining with Bangladesh over this project.\textsuperscript{26} Indeed this could, in fact, form the basis for negotiations on resolving one of the outstanding issues between India and Nepal.

In the United States of America, the principles of downstream benefits have also been practiced in the inter-state sphere. For example, Section 10 (f) of the Federal Power Act, 1935, imposes on the Federal Power Commission the duty to determine the benefits to downstream plants from upstream storage, and assess charges against those downstream plants.\textsuperscript{27} In fact, the United States has proved to be the fertile land for the enunciation of the principle of equitable apportionment, which is considered the foundation of the principle of equitable utilisation. Furthermore, being an indispensable part of equitable utilisation, the issue of sharing the costs and benefits in a shared river, lake or stream, has been dealt with in several resolutions of conflicts between states.\textsuperscript{28}

Another example is provided by the Owen Falls Dam in Uganda, where Egypt has developed and supplied hydropower to Uganda at her own cost. However, the water augmented in the reservoir was exclusively for her own use. In order to supervise the water and power arrangements, a resident Egyptian Engineer was provided for in the agreement between the two states. In addition, electricity was produced for Uganda at Egypt’s expense, as a downstream benefit.\textsuperscript{29}

\textbf{APPLICATION OF EQUITY}

Apart from the arid and semi-arid areas of South Asia, freshwater is quite abundant in the region. However, due to poor management, preservation and a dearth of cooperation, riparian states are not able to maximize the

\textsuperscript{27} Supra note 3, p. 347
\textsuperscript{28} G. WILLIAN SHERK, DIVIDING THE WATERS: THE RESOLUTION OF INTERSTATE WATER CONFLICTS IN THE UNITED STATES, the Hague: Kluwer Law, 2000, p. 60
\textsuperscript{29} D. A. CAPONERA, “LEGAL ASPECTS OF TRANSBOUNDARY RIVER BASIN IN THE MIDDLE EAST: THE AL ASI (ORONTES), The Jordan and the Nile” 33 NRJ, 1993, p. 654
benefits of such an immense resource. On the contrary, such huge resources have been largely misutilised and the nations have greatly suffered.\textsuperscript{30} Nepal though has realised that water resources have become both a symbol of national identity and pride, and a source of economic potential and its utilisation has become the key strategy for the development of the nation.\textsuperscript{31} The reluctance of the lower riparian state to share the downstream benefits accruing from the work of the upstream state has become the major obstacle in the utilisation of these resources. The principles of equity are as universal as those of justice. They do not give untrammelled discretion to override the law, but represent rather a body of norms capable of remedying a lack of subtlety and flexibility which may affect the system of laws.\textsuperscript{32}

Numerous studies suggest that Nepal can hold water between 67 to 112 MAF at various sites\textsuperscript{33} and this water, if stored and regulated, will meet most of the demand of entire people of the Himalayan block at least for another 50 to 100 years.\textsuperscript{34} From the above regulated water multifaceted benefits, such as flood control (US $ 500 to 600 million could be saved each year), hydropower, navigation and miscellaneous benefits can be derived, which are desperately required by all nations of south Asia.\textsuperscript{35}

However to ensure such benefits the attitude of the downstream country should be cooperative and bolster a strong political will of using the available resources for mutual benefits. And in absence of such willingness upstream states would be heavily burdened, while downstream states would benefit without having to invest anything as in case of Indo-Nepal relation, where on the one hand India is reluctant to share the downstream benefits derived from the damming in Nepal which would obviously submerge large swathes of territory and cause extinction of flora and fauna so that such areas could not be reused again. On the other hand, the downstream country would receive regulated water during the dry season which would help boost crop yields, provide sites for renewable source of energy, control and prevent huge loss of lives and property from floods and accrue other

\textsuperscript{32} V. Lowe, The Role of Equity in International Law, 12 Australian YB IL (1992), p. 74.
\textsuperscript{33} C. K SHARMA, WATER AND ENERGY RESOURCES OF THE HIMALAYAN BLOCK, Kathmandu: Sangeeta Shrama, 1983, p. 342
\textsuperscript{34} Ibid, p. 285
\textsuperscript{35} C. K. SHARMA, A TREATIES ON WATER RESOURCES OF NEPAL, Kathmandu: Sangeeta Sharma, 1997, p. 425-429
benefits such as navigation, industrial and recreational derived from the work of the upstream state.\(^{36}\)

Irony as much it may sound, India on the other hand has been insisting that Bangladesh recognise the downstream benefits from the proposed Tipaimukh dam on the Brahmaputra river at the north-eastern border of Assam and agree to the Brahmaputra-Ganga link canal. This proposal was forwarded by India in response to Bangladesh’s demand to augment water in the Ganges basin. The project will derive flood control (in Sylhet and Cachar, Bangladesh) and regulated flow benefits during the dry season to Bangladesh.\(^{37}\)

In recent treaty between Nepal and India the Mahakali River Treaty of 1996, fortunately Nepal and India seem to have agreed in principle to share the cost in proportion to the benefits, thus endorsing downstream benefits in practice. Article 3 (3) states, “the cost of the project shall be borne by the parties in proportion to the benefits accruing to them. Both the parties shall jointly endeavour to mobilize the finance required for the implementation of the project.”\(^{38}\) This arrangement should be implemented between two countries in water resources basins without any hesitation.

CONCLUSIONS

The prerequisite for achieving or sharing broader benefits are co-operation, good neighbourly relations, and good faith between the riparian states. In other words, if a downstream riparian state were to benefit from the hard work and investment made by an upper riparian state on a water resource project in a boundary or trans-boundary watercourse, without itself investing anything on it, the former must pay for the benefits in proportion to the costs. The downstream benefits could be in terms of water augmentation, flood moderation, power generation, recreation, fisheries and so on. The avoided cost theory (a theory to calculate and share the cost and benefits) will be helpful in assessing the benefits. As a case in point, it seems that Nepal is willing to sell power to India at the alternative thermal or nuclear replacement cost, plus generation cost.\(^{39}\)


\(^{37}\) Ibid. p. 220

\(^{38}\) 37 ILM 1997, p. 700.

Equity is used to mean different things in different contexts. Still there can be little doubt that equity is a principle of international law. It’s use and endorsement by the ICJ has ensured that, in appropriate situations, it plays a pivotal role in judicial decision making as well.\textsuperscript{40} The principle of downstream benefits and unjust enrichment are closely linked with the element of equity, which provides for distributive justice and a very fair solution to the intricate issues of allocation and sharing of water from a boundary and transboundary resource. Therefore, in the context of existing Indo-Nepal relation in water resources utilisation and sharing, the principle of equitable sharing of downstream benefits is the legal basis for moving forward and opening the windows of opportunity for the prosperity of the people of this region.

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\textsuperscript{40} D. A. French, International Environmental Law and the Achievement of Intergenerational Equity, 31 ELR, (2000), p. 10469