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Dispute settlement mechanism in trans-boundary freshwater allocation: an interference of international trade law and environmental law- a way forward to sustainable development?

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Dispute settlement mechanism in trans-boundary freshwater allocation: an interference of international trade law and environmental law; a way forward to sustainable development?

1.1 Introduction

God's Own Country is the brand title used by the state, Kerala, to promote tourism. The green lush with backwater lagoons, lakes and rivers add divinity to its natural serenity. Being residents of this water rich State, majority of people never came across water crisis. However, our state witnessed a new struggle in 2002-A struggle lead by an old tribal lady against a multinational giant, for water. This extra ordinary struggle for water originated from the over exploitation of groundwater resources by Coco Cola company in its Plachimada[1] Bottle Plant. [2] Today in every nook and corner of India, one can find bottled drinking water and aerated drinks. These bottled water bottles are considered as "safest and reliable drinking water" in the country.

Bottled water is one of the forms of water transfers to distant areas from surplus water basins and aquifers. Water transfers are known to the world from the Roman era where it was done through large aqueducts. However the same has given way to pipelines; inter basin water transfers and even the smallest forms of bottled waters. At a time when water is considered as an economic good and majority of the world population face water crisis, these water transfers most of which have a trans- boundary nature, raises several legal issues. This paper focus on the study to critically analyze the dispute settlement mechanism that can be employed in water transfers and how far sustainable development can be ensured through the interference of economic law and environmental law.

1.2 Water Transfer

Water use around the world is increasing at a fast rate. According to UN estimate, around one fifth of the world population is affected by water scarcity, other 500 million are approaching this stage and another quarter of the world population lacks necessary infrastructure to avail water

[1] Plachimada is a small hamlet in Palakkad district in Kerala. This district, known to be the rice bowl of the state, lies in rain shadow region of Western Ghats and hence experience severe water crisis. Majority of the population in the district depends on agriculture for their livelihood. Tribal population forms a strong base in Plachimada hamlet.

[2] Coco Cola Company through its subsidiary, Hindustan Coco cola Beverages Company Private Limited started a bottle plant in Plachimada. Soon after people in the region started facing water crisis in the form of lowering of water table as well as polluted water in the nearby water bodies. This led to local agitation lead by Mayilamma, a tribal woman which resulted in litigations in High court of Kerala. Discrepancy in the law relating to ownership of groundwater in India led to two conflicting judgments by Single and Division Bench of the same High court. Now the case is pending before the Hon'ble Supreme Court of India.

from the available resources.[3] This vast water deficit faced by the world is "largely invisible, historically recent and growing fast" are often realized when the water resources go dry.[4]

Many States have resorted to water transfers to meet this scarcity. The term "water transfer" has received significant attention owing to the socio-environmental concerns associated with it. By water transfer, it can either mean "*acquisition of new entitlements or to the reallocation of existing ones that result in the movement of water from the watershed of origin or the place of original use to a more distant location.*"[5]

Law of water rights both promotes and retards transfer of water resources. Those rights being a form of property rights are correlative rights than exclusive property rights.[6]

1.3 Trans-boundary water transfer

Water crosses the boundaries in three different ways- by natural or artificial flows in rivers, aquifers; by bulk transfers through pipelines, tankers; and in in virtual form.[7] While there have been several agreements regulating this trans boundary movement of natural water since long back which usually addressed only navigation and boundary issues between the riparian states, the new agreements address allocation and management issues and some address pollution control and ecosystem protection.[8]

The practice of water being transferred from water rich area to scarce area has been known since the time of Roman Aqueducts. Bulk removal of water may be defined as removal of water by human made diversions, including canals, tanker ships or pipeline.[9] However these transfers have severe environmental concerns since water is transferred from catchment area or other water rich area which is home to many aquatic species. In the same way the trees and plants in

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[3] 'Water Scarcity', http://www.un.org/waterforlifedecade/scarcity.shtml assessed on 20th November 2016

[4] Lester R. Brown, "Water Deficits Growing in Many Countries: Water Shortages May Cause Food Shortages", Earth Policy Institute- Plan B updates, 9 August 2002, http://www.earth-policy.org/plan_b_updates/2002/update15 assessed on 20th November 2016.

[5] A.DanTarlock, "Water Transfers: A means to achieve sustainable water use" in Edith Brown Weiss, Laurence Boisson De Chazournes and Nathalie Bernasconi-Osterwalder(ed) *Freshwater and International Economic Law* (OUP 2005)37

[6] Ibid 41

[7] Edith Brown Weiss, " Water Transfers and International Trade law" in Edith Brown Weiss, Laurence Boisson De Chazournes and Nathalie Bernasconi-Osterwalder(ed) *Freshwater and International Economic Law* (OUP 2005)63

[8] Ibid

[9] Ibid 67

that area would be affected threatening the bio-diversity of that particular area. The complicated legal mechanism arises in the dispute resolution of such transfers as the agreements may be concluded between states or states and private parties. Moreover the issue to be mooted here is whether the bulk water is considered as an economic good for the trade law principles to apply. If the answer is affirmative, whether relevant provisions of GATT 1994 would apply and what is the appropriate forum for dispute resolution?

The third way of water transfers is water in virtual form when water forms the major component of packaged and agricultural products. In such cases the trade law rules apply to those products too whose detailed study is beyond the purview of this paper.

1.3.1 International water law on Tran's boundary water transfers

The core principles constituting the foundation of international water law include **the principles of absoluteterritorial sovereignty, absolute territorial integrity, community of interest**,[10]**Principles of equitable and reasonable utilization; an obligation not to cause significant harm; the principles of cooperation, information exchange, notification and consultation.**[11]

- **Principle of Absolute Territorial Sovereignty**

The principle of Absolute Territorial Sovereignty provides that each state possess absolute right in exploiting the water resources in its territory irrespective of the needs of other states.[12] This principle is associated with Harmon Doctrine[13] which states that under the principles, rules and precedents of international law, United States is under no obligation to share its waters with Mexico since by virtue of absolute sovereignty within its territory, it is entitled to

[10] Stephen C McCaffrey *The Law of International Watercourses* (2nd edn, OUP 2007) 112
[11] Muhammad MizanurRahaman, Principles of Trans-boundary Water Resources Management and Ganges Treaties: An Analysis', (2009) Vol. 25, No. 1, Water Resources Development, 159, 160
[12] Jonathan E. Cohen, 'International Law and Water Politics of the Euphrates,' (1991) 24 N.Y.U. J. Int'l L. & Pol. 503, 522 See Also Gabriel Eckstein, 'Groundwater Resources and Slovak-Hungary Dispute over Gabcikovo-Nagymaros' (1995)19 Suffolk Transnat'l L. Rev. 67,73
[13] Harmon Doctrine is named after Judson Harmon, Attorney-General of United States of America. In 1895, he gave his legal opinion in the dispute between United States of America and Mexico over diversions of waters of Rio –Grande by the farmers in the United States which reduced the natural water supply to Mexico. See Stephen McCaffreyn(9)76-110

use the waters for its domestic uses regardless of the trans-boundary consequences.[14] Though this principle was used as weapon by the upper riparian states, yet it failed to enjoy the support of international community.[15] The arbitral tribunal in **Lake Lanoux** arbitration[16] declined to accept this principle where it stated that according to the principles of good faith, the upstream state is obliged to consider the genuine interest of other riparian states.[17]

- **<u>Principle of Absolute Territorial Integrity</u>**

This principle, which is in sharp contrast to the principle of absolute territorial integrity, maintains that the lower riparian states have the right to natural and continuous flow of water in the trans-boundary water resources.[18] This casts an obligation on the upper riparian states that they may do nothing to impede the natural and continuous flow of water to the lower riparian states.[19] This principle also was less favored by the states.

The principles of absolute sovereignty and absolute territorial integrity are considered by many scholars as 'factually myopic and legally anarchic'[20] since they fail to consider the interests of other riparian states and fail to highlight that sovereignty entails both duties and rights.[21]

- **<u>Principle of Community of Interests</u>**

The principle is derived from the idea that a community of interests exists in the natural unity of watercourse[22] where the whole watercourse is considered as one economic and geographic

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[14] Stephen McCaffrey , *The Law of International Water courses* n(9)87
[15] Ibid.116. He cites the example of Indus Water treaty of 1960 between India and Pakistan, concluded in the auspices of World Bank where he notes that India had used this doctrine a one point where it is stated that India reserved the full freedom to extend to alter the system of irrigation within India. But at a latter point, as noted by the author, India changed her position to: that both parties have full, absolute and exclusive jurisdiction over the control, management and utilization of the natural resources in their territories.
[16] Lake Lanoux Arbitration (*France v. Spain*) (1957) 12 R.I.A.A. 281; 24 I.L.R. 101
[17] Arbitration was concerned between France and Spain with respect to the use of waters of lake Lanoux which feeds the river Carol flowing across the boundary of both states. The issue arose when France decided to divert the waters of the lake and Spain feared that the same would adversely affect their rights and interests, contrary to the Treaty of Bayonne of May 26, 1866, between France and Spain.
[18] Eckstein, 'Groundwater resources and Slovak-Hungary Dispute' n(11)74
[19]McCaffreyn(9)126
[20] Herbert A Smith, 'The Economic Uses of International Rivers (1931) King& Son Ltd.London,144 in McCaffreyn(9) 133
[21]McCaffreyn(9) 133
[22] McCaffrey n(9) 148

unit.[23] The concept of community of interests was endorsed by Grotius: "*thus a river, viewed as a stream, is the property of the people through whose territory it flows, or of the ruler whose sway that people is .....The same river, viewed as running water, has remained common property, so that anyone may drink or draw water from it.*"[24]

This significance principle of community of interests was highlighted by two major judicial authorities; one being the Permanent Court of Arbitration in its 1929 decision in the case concerning the *Territorial Jurisdiction of the International Commission of the River Oder*[25]and the other being ICJ judgment in the case concerning *Gabcikovo-Nagymoras Project(Hungary/Slovakia)*.[26] In River Oder judgment, PCA discussed the concept in the following terms:

> "*community of interest 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 of the whole course of the river and the exclusion of any preferential privilege of any one riparian State in relation to the others*."[27] Also "*If the common legal right is based on the existence of a navigable waterway separating or traversing several States, it is evident that this common right extends to the whole navigable course of the river and does not stop short at the last frontier.*"[28]

The same principle was reiterated by ICJ in Gabcikovo-Nagymoras.[29] Though this principle is extended to all territorial elements of hydrological cycle, including groundwater,[30] but the same has not yet been fully accepted by the international community.[31]

- **<u>Principle of Equitable and Reasonable Utilization of Resources</u>**

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[23] Jonathan E. Cohen, 'International Law and Water Politics of the Euphrates,' (1991) 24 N.Y.U. J. Int'l L. & Pol. 503,524-525
[24] Hugo Grotius, 'De Juri Belli Ac PacisLibriTres (1620-1625) (On the Law of War and Peace), vol.2, The Translation,(1925, Francis W.Kelsey,Clarendon Press) in Stephen Mccaffey n(9)148
[25] Judgment No.16, 10Sept.1929, PCIJ Ser.A No.23
[26] 1997 ICJ 7, Judgment of 25 September 1997
[27] PCIJ Ser.A No.23, 27
[28] Ibid 28
[29] 1997 ICJ 7,para 85
[30] McCaffrey n(9)161
[31] Eckstein, 'Groundwater Resources and Slovak-Hungary Dispute'n (11) 81 See also Jonathan E. Cohen n(22)525

The principle of equitable and reasonable utilization of resources aims to maximize the benefits of water courses and limiting the burdens on the riparian states.[32] The origin of the principle can be traced to the United States Supreme Court decisions of twentieth century regarding apportionment between states.[33] ICJ has upheld the customary status of this principle in Gabcikovo-Nagymoras case.[34] The principle of equitable and reasonable utilization of resources, based on the concept of *sic uteretuoutalienum non laedas,* ensures each riparian state reasonable and equitable share of the international watercourses.[35] This principle mainly governs apportionment, or allocation of water between states sharing an international watercourse.[36]

Stephen McCaffrey notes that according to this principle, each riparian state enjoys a legally protected interest in the equitable share in uses and benefits of the trans-boundary watercourses.[37]The principle was applied by the US Supreme Court in *Kansas v. Colorado*[38]highlighting that "*the right to the reasonable and beneficial use of a running stream is common to all the riparian proprietors and so on, each is bound so to use his common right, by all the proprietors….*"[39] Equitable and reasonable use not only applies to quantity of water that is involved, but also to all those activities for which concerned state uses such water.[40]

It is to be pointed that the principle so far applied in apportionment of surface waters is applicable to usage of groundwater resources and apportionment of benefits thereof.[41] The reasonable use with respect to aquifers connotes both the preservation of the water resources in accordance with the recharge regime and exploitation in accordance with the differential requirements of the riparian states which should ensure that each state obtains maximum

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[32] Eckstein, 'Groundwater Resources and Slovak-Hungary Dispute'n(11) 78

[33] McCaffrey *The Law of International Water courses*n(4)384. See also *Kansas v. Colorado*, 206 U.S.46 (1907), *Wyoming v. Colorado,* 459 U.S.419 (1922); *Connecticut v.Massachusetts*, 282 U.S.660 (1931); *Washington v. Oregon*, 297 U.S 517(1936)

[34]Gabchikovo-Nagyamorus, 1997 ICJ 7, Para 78, 85, 147, 150

[35] Eckstein, Groundwater Resources and Slovak-Hungary Dispute' n(11) 79

[36] McCaffrey n(9)385

[37] McCaffrey n(9)388

[38] 206 U.S.46 (1907)

[39] Ibid 104 in Stephen McCaffrey n(9) 389

[40] Ibid 389

[41] Julio Barberis, 'The Development of International Law of Trans-boundary Groundwater'(1991) 31 Nat. Resources J. 167,176

satisfaction with minimum harm to the co-riparian state.[42] The total benefits to the exploiting state and the inconveniences caused thereby to the other state must be considered when the rule is applied in groundwater exploitation.[43]

- **Principle of Obligation not to Cause Significant Harm**

The Principle of obligation not to cause significant harm to others is the general obligation of each State in International Law.[44] In *Trial Smelter arbitration*, it was held that *'under the principles of international law, no State has the right to use or permit the use of its territory in such a manner as to cause injury by fumes in or to the territory of another or the properties or persons therein, when the case is of serious consequence and the injury is established by clear and convincing evidence'*.[45]
International Court of Justice also invoked the principle in *Corfu Channel* case by stating that every state has the obligation not to allow its territory to be used for acts contrary to the rights of others.[46] The principle, identified with the maxim, *sic tuteretuoutalienium non laedas* (so use your own as not to harm that of other) have received customary status in international law[47] and has been applied in many international treaties and Declarations.[48]

The ICJ's Advisory Opinion on the Legality of the threat or Use of Nuclear Weapons[49] and its judgment in Gabcikovo-Nagymaros[50] and Pulp Mill Case[51] once again endorsed the obligation of States not to cause significant trans-boundary environmental harm as a rule of

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[42] Julio A. Barberis, 'International Groundwater Resources Law', (FAO Legislative Study,Rome 1986) 48,49
[43] Ibid 49
[44]McCaffreyn(9)406. See also Island of Palmas Case (U. S. v. Neth.), 2 R. Int'l Arb. Awards 829, 839 (1928) in Julio Barbaris, n(40) 170
[45] Trail smelter case (United States, Canada), 16 April 1938 and 11 March 1941, Volume III United Nations Reports of International Arbitral Awards, 1905,1965
[46] Corfu Channel Case(*United Kingdom v Albania*), 1949 ICJ 4, 22
[47] Eckstein (n 11) 75 and McCaffrey n(9)416
[48] Preamble to the 1972, Convention on The Prevention of Marine Pollution by Dumping of Wastes and Other Matter; 1979 Convention on the Long Range Trans-boundary Air Pollution; United Nations Convention on the Law of the Sea;1992 United Nations Framework Convention on Climate Change; Art 3 of the 1992 Convention on Biological Diversity. See also Principle 21 of the 1972 Stockholm Declaration of the United Nations Conference on the Human Environment, Principle 2 of 1992 Rio Declaration on Environment and Development
[49] 1996 ICJ 226
[50] 1997 ICJ 7
[51] Pulp Mills on the River Uruguay (*Argentina v. Uruguay*), Judgment, 2010 ICJ 14

Customary International Law.[52]Article 3 of the 2001 ILC Draft Articles on '**International Liability for Injurious Consequences Arising out of Acts not prohibited by International Law (Prevention of Trans-boundary Harm from Hazardous Activity)**'also deals with prevention of trans-boundary harm when it provides that: *The State of origin shall take all appropriate measures to prevent* ***significant trans-boundary harm*** *or at any event to minimize the risk thereof.*[53]

This principle which states that the injury to the other State should not be factual injury per se but injury to the legally entitled right[54] has been an integral part in the protection of international watercourses

The customary international law relating to transfer and sharing of water resources have been codified in 1997 UN International Watercourse Convention.[55] The convention applies to non-navigational uses of the water courses[56] and to measures of protection, preservation and management related to the uses of those watercourses and their waters.[57] The convention requires the States to utilize the water of international water course in a reasonable and equitable manner[58] and must take all take all appropriate measures to prevent the causing of significant harm to other watercourse States.[59]

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[52]GüntherHandl, Declaration of The United Nations Conference on The Human Environment (Stockholm Declaration), 1972 and The Rio Declaration on Environment and Development, 1992 available at http://legal.un.org/avl/pdf/ha/dunche/dunche_e.pdf p3 assessed on 16th December 2016. Also McCaffreyn(9)424

[53]International Law Commission, Draft articles on Prevention of Trans-boundary Harm from Hazardous Activities, adopted at its fifty-third session, 2001 <http://legal.un.org/docs/?path=../ilc/texts/instruments/english/commentaries/9_7_2001.pdf&lang=EF> assessed on 18th December 2016

[54]McCaffrey, n(9) 408

[55] Convention on the Law of the Non-navigational Uses of International Watercourses, 1997, Adopted by the General Assembly of the United Nations on 21 May 1997. Entered into force on 17 August 2014, available at http://legal.un.org/ilc/texts/instruments/english/conventions/8_3_1997.pdf assessed on 24 December 2016

[56] Article 2 (a) of the Convention defines "Watercourse" as a system of surface waters and ground waters constituting by virtue of their physical relationship a unitary whole and normally flowing into a common terminus;

[57] Article 1(1) of the Convention

[58] Article 5(1) of the Convention providesthat: Watercourse States shall in their respective territories utilize an international watercourse in an equitable and reasonable manner. In particular, an international watercourse shall be used and developed by watercourse States with a view to attaining optimal and sustainable utilization thereof and benefits therefrom, taking into account the interests of the watercourse States concerned, consistent with adequate protection of the watercourse. Article 6 of the convention has provided the factors relevant to reasonable and equitable utilization of the water resources.

[59] Article 7 (1) of the Convention provides that: Watercourse States shall, in utilizing an international watercourse in their territories, take all appropriate measures to prevent the causing of significant harm to other watercourse States.

Although these principles are applicable to the transferring of trans-boundary water resources in its natural form, so far for no bulk transfers these principles have been applied. Bulk transfers of water will be the need of the day in the very near future owing to the increased concerns of climate change and its impact on the water resources of the world. In such a case it is to be mooted whether these water law principles which were applicable to natural transfers are applicable to this new form. In the following paragraph, the authors try to analyze how far the above mentioned principles can be applied in bulk transfers.

The principle of absolute territorial sovereignty which guarantees every state to the right to exploit water resources in their territory irrespective of the needs of other states when applied in case of bulk transfers raise the question of right to water of other riparian states along with the environmental destruction by one state to the ecology of the whole river thus denying completely the right to those states who depend on that water resources while trying to secure access to water resources to population on some other parts of the globe. The same is the result if the principle of absolute territorial integrity is applied. In such a case the right is denied to the upper riparian states by the lower riparian states. Community of interest principle considers the river as the property of all population of those territories through which the river passes. Hence there is no absolute right for on section alone. The bulk transfer from one territory affecting the water rights of others give rise to the legal right against the exploiter in favor of other states. If the transfer is done with the consent of all the concerned states, this rule can be applied; still the environmental costs of such transfers need to be addressed.

The most relevant principles that have applicability in bulk water transfers is that of principle of reasonable and equitable utilization and the principle of no significant harm. Both these principles to an extent address the right of other riparian states in case of water use by fellow riparian states. The concern here is also same as in other cases-environmental impact. The factors concerning reasonable and equitable utilization of water resources enumerated under Article 6 of UN Watercourses Convention[60] take into account Geographic, hydrographic,

[60] Article 6(1) of the Convention provides that : Utilization of an international watercourse in an equitable and reasonable manner within the meaning of Article 5 requires taking into account all relevant factors and circumstances, including:

(a) Geographic, hydrographic, hydrological, climatic, ecological and other factors of a natural character;

hydrological, climatic, and ecological and other factors along with socio-economic needs of the water courses states. In case of utilization of water resources by the state if any significant harm has occurred to other states, the concerned state in cooperation with the affected state is duty bound to mitigate or eliminate such harm.[61] Since there is no convention yet which governs the bulk water transfers between the countries, these principles have not been incorporated in any binding instruments. However if the state practice follow these principles in such transfers, it would become a part of the customary international law with respect to such transfers.

1.3.2 International Trade Law and Bulk Transfers.

Water transfers have been guided and regulated by particular agreements entered into by supplier and receiver countries. When water is marketed in the form of bulk transfers via pipelines and tankers, it falls under the purview of international trade law- WTO regime comes into effect.

The main provisions which are applicable in such transfers are Article 1, III and XI of GATT 1994 among which Article XI is the most significant.[62] Article XI deals with *General Elimination of Quantitative Restrictions*where paragraph 1 provides the rule on export and import restrictions- "*No prohibitions or restrictions other than duties, taxes or other charges, whether made effective through quotas, import or export licences or other measures, shall be instituted or maintained by any contracting party on the importation of any product of the territory of any other contracting party or on the exportation or sale for export of any product*

(b) The social and economic needs of the watercourse states concerned;
(c) The population dependent on the watercourse in each watercourse state;
(d) The effects of the use or uses of the watercourses in one watercourse State on other watercourse states;
(e) Existing and potential uses of the watercourse;
(f) Conservation, protection, development and economy of use of the water resources of the watercourse and the costs of measures taken to that effect;
(g) The availability of alternatives, of comparable value, to a particular planned or existing use.

[61] Article 7 (2): Where significant harm nevertheless is caused to another watercourse state, the states whose use causes such harm shall, in the absence of agreement to such use, take all appropriate measures, having due regard for the provisions of Article 5 and Article 6, in consultation with the affected state, to eliminate or mitigate such harm and, where appropriate, to discuss the question of compensation.

[62] Edith Brown Weissn(7) 71

destined for the territory of any other contracting party." The exception to paragraph 1is provided in subsequent paragraph 2.[63]

Since the condition for these provisions to apply is that item under consideration should be a product, the prerequisite condition in this case is to prove whether bulk transfers are products or not. If the answer is affirmative, the provision apply and not in the other case. In the former case, if the state who is indulged in water transfers bans the exports, it would be violating the provision of paragraph 1 unless it can be justified under paragraph 2.

Significant factor in paragraph 2 is such restriction can be applied only *temporarily*; applied to prevent or relieve critical shortages of food stuffs or other essential products *essential* to the exporting state. The concern that arises here is whether the ecosystem preservation in the form of preserving water is essential to the exporting state? Can the state ban water transfers for protecting environment? When it is done for a long term goal can it be done only temporarily? Only if the ban is temporarily, it will be justified under paragraph 2. This is a significant issue to be addressed to ensure sustainable development in the world. It is to be highlighted that only if the environment survives, trade also flourish since both are essential for a good future.

Article 1 and III of GATT 1994 also attract significance. Article 1 of GATT dealing with most favored nation clause provides for "……*any advantage, favor, privilege or immunity granted by any contracting party to any product originating in or destined for any other country shall be accorded immediately and unconditionally to the like product originating in or destined for the territories of all other contracting parties.*" This become relevant when the importing country imports water from more than one country or exporter exports to more than one nation, then no discrimination can be done against such exporters or importers respectively. If any privilege is granted to anyone, it should accord to all immediately and unconditionally.

Article III of GATT 1994 dealing with national treatment of like products, in paragraph 4 provides that *"The products of the territory of any contracting party imported into the territory of any other contracting party shall be accorded treatment no less favorable than that accorded to like products of national origin in respect of all laws, regulations and*

[63] Paragraph 2(a) of Article XI of GATT1994: Export prohibitions or restrictions temporarily applied to prevent or relieve critical shortages of foodstuffs or other products essential to the exporting contracting party;

requirements affecting their internal sale, offering for sale, purchase, transportation, distribution or use."

This provision requires imported bulk water, if it is a like product, be not treated less favorable than like products of the importing country.

If an importer or exporter violates any of these provisions, it can give rise to action in WTO against the violator. There is yet another provision which can be used for protecting environment of the exporting as well as importing country.[64] Article XX[65] enables the countries to seek general exceptions for action s which are necessary to protect human, animal or plant life or health and for conservation of exhaustive natural resources. According to this provision, bulk water transfers can be regulated by both countries to protect wild life and exhaustive natural resources. But will water resources form exhaustive natural resources? Due to human intervention and uncontrolled exploitation of water resources, water resources are reaching to that stage. Hence measures can be initiated to protect such resources for preserving for future. Moreover all these conditions should satisfy the chapeau of this provision.

Though water transfers in bulk have not become so frequent, since this would be the need of the day in long run, the rules applicable to such transfers need to be analyzed in detail.

1.4 Dispute settlement mechanism in water transfers.

Nothing in this world is hassle free. Same is water transfers. Water transfers occur between countries, countries and private players or between private players. Here arises the need to look into mechanisms for dispute settlement mechanism in such water transfers so as to make it problem free. B.R Chauhanobserves that "*the development, management and settlement of*

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[64] As mentioned above, the bulk transfers can lead to damage to ecosystem in exporting country. In the same way, when water is imported in bulk, the exotic species in such water resources can prove harmful to the native species in importing country.

[65] Article XX of GATT 1994 provides that : "Subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade, nothing in this Agreement shall be construed to prevent the adoption or enforcement by any contracting party of measures:

(b) necessary to protect human, animal or plant life or health;

(g) relating to the conservation of exhaustible natural resources if such measures are made effective in conjunction with restrictions on domestic production or consumption;

disputes pertaining to water resources, such as rivers, lakes, springs, waterways, waterfalls and aqueducts, at international as well as inter-state level, create not only legal but also social, economic and political problems for the concerned states or countries as units of international community or provinces etc., as units of federal polity, as the case may be."[66]

1.4.1 International water law and Dispute settlement mechanism

The UN Charter calls upon the member States to settle their disputes peacefully.[67] In water disputes too, the States are obliged to settle their disputes peacefully. International Law Association in its 52nd Conference at Helsinki adopted "The Helsinki Rules on the Uses of the Waters of International Rivers" which came to be known as Helsinki Rules. Chapter 6 of the Rules provide the detailed "procedure for the prevention and settlement of Disputes" which makes the States duty bound to resort to means of prevention and settlement of disputes stipulated in the applicable treaties binding upon them.[68]

The rules require the basin states to furnish relevant and reasonably available information to other basin states regarding the use of and activities with respect to water of international rivers in their territory.[69]It should also furnish notice of the proposed activities or installation which would alter the regime of the basin and lead to the rise of a dispute between them.[70] In

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[66]B.R.Chauhan, *Settlement of International and Inter-State Water Disputes in India* (N.M.Tripathi, Bombay, 1992)7

[67] Article 2 (3) of UN Charter -All Members shall settle their international disputes by peaceful means in such a manner that international peace and security, and justice, are not endangered.

[68] Article XXVIII of Helsinki rules provides that

> 1. States are under a primary obligation to resort to means of prevention and settlement of disputes stipulated in the applicable treaties binding upon them.
> 2. States are limited to the means of prevention and settlement of disputes stipulated in treaties binding upon them only to the extent provided by the applicable treaties.

[69] Article XXIX (1) - With a view to preventing disputes from arising between basin States as to their legal rights or other interest, it is recommended that each basin State furnish relevant and reasonably available information to the other basin States concerning the waters of a drainage basin within its territory and its use of, and activities with respect to such waters.

[70] Article XXIX (2) - A State, regardless of its location in a drainage basin, should in particular furnish to any other basin State, the interests of which may be substantially affected, notice of any proposed construction or installation which would alter the regime of the basin in a way which might give rise to a dispute as defined in Article XXVI. The notice should include such essential facts as will permit the recipient to make an assessment of the probable effect of the proposed alteration

case of any question on utilization of waters of international drainage basin, the rules recommend the states to refer the dispute to a joint agency for formulating plans or recommendations.[71] In case if the joint agency fails, the States can seek the good offices or mediation of any third State or any international organization or a qualified person.[72] The next stage of dispute resolution if the good offices are not successful is forming a commission of inquiry or an ad hoc conciliation commission to find an acceptable solution.[73] They can also submit their dispute to a permanent arbitral tribunal or to ICJ if the commission has not been formed or was unsuccessful etc.[74]It also suggests that if the states resort to arbitration, they may recourse to Model Rules on Arbitration procedure prepared by International Law commission in its 10th session, 1958.[75]

Though these rules are comprehensive and can be applied, there are arguments that International law association, "being a non-official organization, its Resolutions cannot, technically, ipso-facto, claim binding validity in international law unless they are adopted in the form of a multilateral convention or followed by the States by the way of state-practice in

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[71] Article XXXI (1) - If a question or dispute arises which relates to the present or future utilization of the waters of an international drainage basin, it is recommended that the basin Stases refer the question or dispute to a joint agency and that they request the agency to survey the international drainage basin and to formulate plans or recommendations for the fullest and most efficient use thereof in the interests of all such States.

[72] Article XXXII If a question or a dispute is one which is considered by the States concerned to be incapable of resolution in the manner set forth in Article XXXI, it is recommended that they seek the good offices, or jointly request the mediation of a third State, of a qualified international organization or of a qualified person.

[73] Article XXXIII -

(1)If the States concerned have not been able to resolve their dispute through negotiation or have been unable to agree on the measures described in Article XXXI and XXXII, it is recommended that they form a commission of inquiry or an ad hoc conciliation commission, which shall endeavor to find a solution, likely to be accepted by the States concerned, of any dispute as to their legal rights.

(2) It is recommended that the conciliation commission be constituted in the manner set forth in the Annex.

[74] Article XXXIV -It is recommended that the States concerned agree to submit their legal disputes to an ad hoc arbitral tribunal, to a permanent arbitral tribunal or to the International Court of Justice if:

(a) A commission has not been formed as provided in Article XXXIII; or
(b) The commission has not been able to find a solution to be recommended; or
(c) A solution recommended has not been accepted by the States concerned; and
(d) An agreement has not been otherwise arrived at.

[75] Article XXXV- It is recommended that in the event of arbitration the State concerned have recourse to the Model Rules on Arbitral Procedure prepared by the International Law Commission of the United Nations at its tenth session in 1958.

their international dealings."[76] However, Helsinki Rules had a strong influence in development of international water law especially the 1997 UN Water courses Convention.Inspired by the work of International Law Association, the UN Convention in its Article 33 and Annex has provided a detailed mechanism for dispute resolution with special emphasis on arbitration as one of the compulsory means of dispute settlement.

Article 33(2) of Water course convention provide that *"If the parties concerned cannot reach agreement by negotiation requested by one of them, they may jointly seek the good offices of, or request mediation or conciliation by, a third party, or make use, as appropriate, of any joint watercourse institutions that may have been established by them or agree to submit the dispute to arbitration or to the International Court of Justice."* It also requires the State parties to the Convention at the time of ratifying, approving or acceding to the Convention to recognize as compulsory ipso facto the obligation to submit the disputes to either ICJ or an established arbitral tribunal for resolution.[77] Annex to the Convention provides the detailed rules and procedure for Arbitration of the disputes.[78] The arbitral tribunal shall render the decision in accordance with the provisions of the convention and international law.[79] The tribunal is required to render its decision within five months of its constitution and the

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[76] B R Chauhan, n(66) 71, Also See B R Chauhan, *Settlement of International Water Law Disputes in International Drainage Basin* (Eric Schmidt Verlag1981)

[77] Article 33(10) of UN Watercourse Convention provides that- When ratifying, accepting, approving or acceding to the present Convention, or at any time thereafter, a party which is not a regional economic integration organization may declare in a written instrument submitted to the depositary that, in respect of any dispute not resolved in accordance with paragraph 2, it recognizes as compulsory ipso facto, and without special agreement in relation to any party accepting the same obligation:

(a) Submission of the dispute to the International Court of Justice; and/or

(b) Arbitration by an arbitral tribunal established and operating, unless the parties to the dispute otherwise agreed, in accordance with the procedure laid down in the annex to the present Convention.

A party which is a regional economic integration organization may make a declaration with like effect in relation to arbitration in accordance with subparagraph (b)

[78]See Annex to the 1997 UN Water courses Convention, available at http://legal.un.org/ilc/texts/instruments/english/conventions/8_3_1997.pdf

[79] Article 5 of the Annex to the 1997 UN Water course Convention- The arbitral tribunal shall render its decisions in accordance with the provisions of this Convention and international law.

decision shall be final and without appeal unless the parties have earlier agreed to the appellate mechanism.[80]

If this elaborates the procedure for dispute settlement mechanism under water course convention when the water course is international in nature, will the same rules be applied in case of bulk water transfers which is considered as an economic good under trade law? The issue is which dispute settlement mechanism should be applied in case of bulk water transfers – whether the convention procedure be followed or the dispute settlement mechanism under WTO be followed?

1.4.2 WTO and Dispute Settlement Mechanism.

Under WTO mechanism, Dispute Settlement Body consisting of all the WTO members enjoys the responsibility of dispute resolution, being *the sole authority to establish "panels" of experts to consider the case, and to accept or reject the panels' findings or the results of an appeal.*[81] The first step is conciliation which requires each member "to accord sympathetic consideration to and afford adequate opportunity for consultation regarding any representations made by another Member concerning measures affecting the operation of any covered agreement taken within the territory of the former."[82] All requests for consultations should be notified to DSB and relevant committees and councils of which the States are members.[83] The WTO mechanism also provides the options for seeking good offices, conciliation and mediation as means of voluntary dispute resolution if the parties to the dispute agree.[84] If the above means fail and the party request to the DSB in writing, panels shall be constituted by DSB at the latest for settlement of disputes.[85] All the panel

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[80] Article 14 of the Annex to the 1997 Water course Convention

> (1)The tribunal shall render its final decision within five months of the date on which it is fully constituted unless it finds it necessary to extend the time limit for a period which should not exceed five more months.
>
> (3)The award shall be binding on the parties to the dispute. It shall be without appeal unless the parties to the dispute have agreed in advance to an appellate procedure.

[81] Article 2 of the UNDERSTANDING ON RULES AND PROCEDURES GOVERNING THE SETTLEMENT OF DISPUTES(Annex 2 the Agreement Establishing WTO). Also See Chapter 3, "Settling Disputes", available at https://www.wto.org/english/thewto_e/whatis_e/tif_e/utw_chap3_e.pdf,assessed on 29th December 2016.

[82] Article 4 (2) of the UNDERSTANDING ON RULES AND PROCEDURES GOVERNING THE SETTLEMENT OF DISPUTES

[83] Article 4(4)

[84] Article 5

[85] Article 6

deliberations are confidential.[86] The panel report shall be circulated among the parties and after 60 days of the circulation, the report shall be adopted by DSB unless one of the parties notifies its intention to prefer an appeal.[87] The appellate body submits its report within 60 days and the report shall be accepted by the DSB within 30 days of the circulation of the report among the members.[88] Normally the time frame for dispute resolution shall be nearly one year.

1.5 Water transfer disputes- Water law v WTO to ensure sustainable development in future.

As mentioned above, the question here is which is the best method to resolve disputes that may arise in bulk water transfers? WTO regime governs the dispute related to goods and services. If the bulk water is considered as a product under GATT 1994, and the dispute arose as to interpretation of Article 1, III and XI of GATT 1994, WTO can be approached. If the same is not considered as a product, then it cannot be applicable. There comes the regime of Water law. If there is a particular agreement between the states, then resolution shall be according to such agreement. However, when the parties involved are not states only but private parties, then arbitration can be the only successful means as the convention provides the options for either ICJ or arbitration. The time limit for completion of arbitration is fixed to be 5 months; hence a speedy resolution can be possible. Unlike Helsinki rules which prescribe the model rules formulated by International Law commission for arbitration process to be followed, there are no such prescribed rules in convention to be strictly followed. Hence as there is no clarity as to the interpretation of bulk water transfers as economic good or as only a natural commodity, a specific resolution method cannot be prescribed. The authors strongly feel that arbitration under water course convention shall be the best optimal method to resolve the disputes as the dispute on bulk water transfers shall involve not only the quantity and quality of water transferred or time of delivery or cost involved, but the socio-environmental cost and questions too. The impact on ecology, biodiversity and ecosystem needs to be addressed.

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[86] Article 14
[87] Article 16
[88] Article 17

At a time when the world community is moving its goal from MDG to Sustainable Development Goals to be achieved by 2030, a huge question arises before this society. We ponder on the impact of climate change in the world and if this environment-unfriendly development continues, on one side we will face the harmful effects of climate change and the other side we strive to achieve SDG. Ensuring safe drinking water is one of the goals of SDG and with the impact of climate change; many countries may resort to water transfers from other countries to ensure safe drinking water to heir population in the very near future. Water transfers may also be considered as an tradable commodity under WTO.

This may give rise to disputes for whose resolution there should be some concrete rules. As arbitration can be effective means, UNCITRAL can play a significant role in framing effective rules which will take into account the elements of water law as well as trade law. UNCITRAL MODEL LAW on ARBITRATION has been adopted by the countries in framing their national legislations. Similarly and international consensus on such water transfers need to be formulated under the auspices of UNCITRAL to avoid a legal crisis that may arise in future. The world community needs to be enlightened that no trade can be successful at the cost of environment. Environment is the sole raw material for all trade though now industrial advancements have taken place. Hence environment should be sustained to ensure a healthy population to drive a healthy competition in trade.