

# Equity and Benefit-Sharing in International Water Law: Reflections on the 2015 World Water Congress

Posted on [August 3, 2015](#) by [Elisa Morgera](#)

Guest blog post by Ruby Moynihan\*



July 2015: The discussions that took place during the [2015 World Water Congress](#) hosted by the Scottish Government under it's [Hydro Nation Agenda](#) (Edinburgh, 25-29th May 2015) underscored the need for clarity on the international legal concept of benefit-sharing and its link to equity in international water law. This blog post starts by summarizing early scholarly attempts to link benefit-sharing and equity as conceptualized in water law to other international regimes including biodiversity and human rights. It then highlights some of the debates at the World Water Congress of relevance to further understand the actual and potential role of fair and equitable benefit-sharing in the context of international water law. The post concludes with an indication of future directions for research.

## Equity dilemmas for shared water resources

Equity concerns are at the heart of efforts to address the current global water governance crisis. Achieving equitable access, however, remains an elusive aspiration compared to the harsh reality for the estimated 780 million people who still do not have access to clean water and almost 2.5 billion who do not have access to adequate sanitation. Water inequity

between States (inter-State) is growing, with wealthy nations increasing their consumption of water resources including by importing water-intensive goods produced in poorer, often water-scarce, nations. According to [UN-Water](#), each person in North America and Europe consumes at least 3 cubic meters per day of virtual water in imported food, compared to 1.4 cubic meters per day in Asia and 1.1 cubic meters per day in Africa. Inequitable access within States (intra-State) is also prevalent in both wealthy and poorer nations despite significant progress towards achieving the [Millennium Development Goal 7](#) of improved access to water and sanitation.

Within the 270 shared international river basins, cross-border freshwater ecosystems are under increasing stress from cumulative pollution, overuse and the insatiable demand for water for the production of food, energy and other industrial purposes. Equity dilemmas are at the forefront of inter-State conflicts over use of shared transboundary waters – whether it be issues of too little water or impacts from too much (flooding), pollution, or ecosystem degradation, to name a few examples. Such dilemmas revolve around each watercourse State's equality of right – namely that each watercourse State is entitled to use and benefit from the watercourse in an equitable manner. The determination of equality of right between upstream and downstream States is arrived at on the basis of equity. International water law provides a legal framework for making this assessment on a case-by-case basis.

The concept of equity is thus central to international water law: its cornerstone principle of customary international law is that of equitable and reasonable utilization (ERU). ERU as codified by Article 5 of the 1997 [UN Watercourses Convention](#) (UNWC) is more than simply a mechanism for water allocation. [Rieu-Clarke, Moynihan and Magsig](#) have explained that ERU means that each State has a legally protected interest in an equitable share of the uses and benefits of an international watercourse (rule of equitable utilization) and a correlated duty to participate equitably in the resources development and protection (principle of equitable participation). However, this does not translate into a right to an equal share of the uses and benefits of the watercourse; nor does it mean that the water resource itself has to be divided into equal shares. The principle of equitable participation is particularly important for benefit-sharing. Equitable participation recognizes that cooperative action by watercourse States is absolutely necessary to produce maximum benefits for each of them, while helping to maintain an equitable allocation of uses and affording adequate protection to the watercourse States and the international watercourse itself.

What is considered a reasonable and equitable share of the uses, protection and benefits of an international watercourse is determined by taking into account a diverse range of factors, including natural (hydrographic, climate, etc.), economic, environmental and social factors (economic needs, population dependent on water, existing and potential future uses, conservation and availability of alternatives) – see Article 6 UNWC.

However the major challenge remains to decide what is equitable. [Rieu-clarke, Moynihan and Magsig](#) have indicated that equity in the context of international water law relates to fairness

(equality of treatment) and requires that the needs and interests of States are considered in an equal manner. The list of relevant factors provided by Article 6 UNWC helps understand and identify what the interests of States are and then weigh up in a fair manner how those interests can be balanced.

This notion of equity, forming part of ERU under the UNWC, has influenced several normative developments, such as the 2000 Protocol of the Southern African Development Community (SADC), 1995 [Mekong Agreement](#), 1992 [Water Convention under the UN Economic Commission for Europe](#) (UNECE), and was referred to by the International Court of Justice in the [Gabčíkovo-Nagymaros case](#).

### **What role for fair and equitable benefit-sharing in international water law?**

[Fair and equitable benefit-sharing](#) in the context of international water law and policy has arisen in the process of drafting new or amending existing transboundary water agreements and their related soft-law and policy instruments; and in response to large-scale river basin infrastructure development projects, particularly hydro-power dams. Benefit-sharing in both scenarios has been put forward by State and non-State actors as a conceptual frame to enable States to identify a broader range of benefits and costs from the use and protection of river basin resources and engage in a process of dialogue over how those benefits and costs could be shared between States. Employed in this way, benefit-sharing is expected to strengthen inter-State cooperation, equitable utilization, equitable participation and the implementation of an ecosystem approach. The beneficiaries of benefit-sharing under international water law are mostly identified as States, rather than non-State actors. A selection of relevant examples from different regions include the 1961 [Columbia River Treaty](#) (Articles V-X), 2000 SADC Revised Protocol on Shared Watercourses (Article 3(7)) and [SADC Draft Guideline on Benefit Sharing](#), 2003 [Lake Tanganyika Convention](#) (Articles 4, 5 and 11), the 1995 [Mekong River Agreement](#) (Articles 1, 2 and 5) and its [2011-15 Strategic Plan](#) (Principle 1), and the 1998 Agreement Between Kazakhstan, the Kyrgyz Republic and Uzbekistan on the Use of Water and Energy Resources of the Syr Darya Basin (Articles I and IV). [Sadoff and Grey](#) have elaborated that such benefit-sharing arrangements could involve, for example, making payments to upstream riparian States for watershed management that brings benefits downstream (e.g. reduced flooding and sediment load). Thus stewardship of headwaters and watersheds might entitle upstream riparian States to share some portion of the downstream benefits that their stewardship helps to facilitate, and thus share the costs of the stewardship.

[Wouters and Moynihan](#) have argued that benefit-sharing contributes to the attainment of the principle of equitable and reasonable use and participation (Article 5 UNWC): the interactions between utilization, participation and benefits in Article 5 of UNWC indicate the possibility that riparian States may allocate rights to the water resource and/or agree to focus on the sharing of benefits arising from its use and protection. The 'and/or' is important as benefit-sharing is seen as an inherent option within ERU, rather than an alternative policy concept to

ERU. The opposite view has often been argued within [non-legal literature](#), where ERU is understood to concern water allocation, rather than the allocation of benefits arising from the use of water resources. In addition, successful benefit-sharing requires a continuous cooperative process. The substantive and procedural obligations of cooperation under Articles 8 and Part III of the UNWC further support benefit-sharing by providing obligations for notification and consultation, joint monitoring, exchange of data and information. However, inter-State benefit-sharing is not at present considered an obligation under international water law.

In the context of large infrastructure/project development, attention is generally focused on intra-State sharing of benefits of energy, revenues from energy, flood control, water storage possibilities, fisheries, irrigated food production and also non-water use-related benefits, such as increased trade. Compensation is also envisaged for ecosystem damage and its impact on affected people. A recent example is the Ruzizi III and Rusumo Falls hydropower projects in Africa's Great Lakes region. [Drombowsky et al.](#) have demonstrated the lack of linkage between inter- and intra-State benefit-sharing arrangements as infrastructure is jointly owned and electricity jointly shared between riparian States, whereas benefit-sharing mechanisms are planned in response to World Bank policies to support the local population. For example, benefit-sharing arrangements include the development of alternative economic activities and the provision of employment opportunities for the directly affected populations, rural electrification and proposed payment for ecosystem services – rewarding the local population for watershed and erosion-control services in the immediate project zone. As Drombowsky et. al point out, most of these proposed intra-State benefit-sharing arrangements will be funded out of the projects' investment budgets, are non-monetary and not revenue-based, and would be limited to the initial years of the respective hydropower projects. These examples are particularly significant as they appear to give some consideration to the rights and interests of local communities and indigenous peoples, who do not receive adequate attention under international water law.

### **Benefit-sharing and Equity at the 2015 World Water Congress**

The 2015 World Water Congress – a triennial event run by the International Water Resources Association – included 250 parallel sessions and 37 special sessions, bringing together multiple disciplines across academia, industry, public and private sectors and non-governmental organizations to discuss critical global and local water issues. Equity proved to be a topic frequently mentioned at the Congress, although ensuing debates demonstrated a need for clarity around this concept when applied to water law at the intra- and inter-State levels.

Benefit-sharing was mentioned in the opening remarks of the Congress, where the concept was viewed as important to achieving water security and central to the water-energy-food nexus, by both the President of the IWRA Prof. Dogan Altinbilek and the President of the World Water Council, Prof. Ben Braga. Benefit-sharing was only discussed in a handful of

sessions throughout the week.

To exchange initial ideas on the possible role of fair and equitable benefit-sharing in international water law, the [BeneLex project](#) partnered with the [UNESCO Centre for Water Law, Policy and Science at Dundee University](#) and the [Strathclyde Centre for Environmental Law and Governance](#) in a parallel session on 'Water and Equity: Questions of Access and Benefit-Sharing.' The session brought together a panel of speakers from international environmental, human rights and economic law, as well as water practitioners, to debate a working definition of equity as a tool to integrate [ideas of justice](#) into relationships regulated by international law, balancing competing rights and interests at stake to forge long-lasting partnerships among the (State and/or non-State) actors involved. It was also suggested that "ideas of justice" would be those encapsulated in different areas of international law.

Among the speakers at the event, BENELEX PI Morgera illustrated how equity is framed under the Convention on Biological Diversity through the concept of fair and equitable sharing of benefits, both in an inter- and intra-State dimension. Mechlem of the University of Ulster pointed out that although there are few explicit references to equity in human rights treaty texts, equity is increasingly used in the human rights area by way of interpretation when scarce resources need to be allocated in a just and fair manner in inter-State, intergenerational and intra-State dimensions (the latter in relation to economic, social and cultural rights guaranteeing access to scarce resources such as food and water or services such as healthcare). Tignino of the University of Geneva explored the 2000 [Senegalese Water Charter](#) as an example of integrated international water and human rights law, which brings States and non-State actors together over decisions regarding equitable use of water resources. Challenges around linking equity to benefit-sharing in the Niger river basin were examined by Skinner of the International Institute for Environment and Development (IIED), who discussed the proposal of [sharing hydro-power revenues](#) (see also [here](#)) from the Kandadji Dam between communities in the Niger basin and resettled peoples getting new irrigated lands based on existing property rights.

Various views over the contours of equity and how to apply it in practice were shared throughout the Congress week with lively discussions across disciplines of the different functions of equity in international water law and its relationship to different notions of justice. For instance, [Magsig](#)'s research applying the notion of "common concern" to international water law served to focus discussions on solidarity rather than competing national sovereign interests.

The relevance of the ecosystem approach and the ecosystem services approaches (ESA) as a way to deliver equity and support benefit-sharing in international water law was discussed by Moynihan in another event at the Congress. She noted that the UNWC includes less consideration of the ecosystem as a whole, ecosystem functioning or processes or services, than the international biodiversity regime, with regard to inter-State dimensions; whereas the pan-regional [UNECE water regime](#) explicitly provides for an ecosystem approach and



ecosystem services approaches with a stronger intra-State dimension, as well as a programme for quantifying the benefits of transboundary cooperation. She also noted that synergies between international water law, international biodiversity law, intra-State equity and human rights merit further research. During another parallel session, [McIntyre](#) argued that ‘the ESA is seen as a way to help foster a common understanding among co-riparian States regarding the nature and value of socially beneficial services provided by international watercourse ecosystems’. McIntyre addressed benefit-sharing with a focus on China as an exemplar of a critically important upstream State, examining the international watercourses it shares with its southern neighbours, and discussing which ecological improvements might be achieved through the adoption of benefit-sharing arrangements.

### **Future research directions**

As the 2015 World Water Congress has demonstrated, water lawyers and practitioners are continuously seeking to improve understandings of equity and increasingly do so by exploring its links to benefit-sharing in a transboundary basin context. Further research is needed to systematically analyze the instances where fair and equitable benefit-sharing is arising at basin, pan-regional and international level, and the extent to which it is supported by multilateral river basin agreements and/or driven by international financial institutions or other non-State actors through soft law or policy frameworks. This requires in-depth critical analysis of the beneficiaries and types of benefits being shared with a view to demonstrating the role of benefit-sharing in contributing to different notions of justice in international water law, as well as to the principles of equitable and reasonable use and participation, cooperation.

Future research should also explore the extent to which international water law can benefit from how the international biodiversity regime has addressed questions of fair and equitable benefit-sharing for building partnerships among different countries that share water resources, as well as for the empowerment of local communities and indigenous peoples that act as water ecosystem stewards, hold traditional knowledge that may be essential in sustainable water management, and are the most negatively affected by inequitable and unsustainable water management decisions. The extent to which the cross-fertilization between the [ecosystem approach](#), as conceptualized under different international environmental regimes, and the ecosystem services discourse may contribute to a more holistic understanding of the multiple benefits of protecting and sustainably managing transboundary freshwater ecosystems remains to be understood. This may help to better understand pathways that may forge greater multi-directional interaction between water and water-related international legal regimes (especially marine, human rights, development, climate, biodiversity and investment) and contribute to a less fragmented, as well as a more equitable and sustainable, approach to managing water resources in order to achieve global water security.

\* Ruby Moynihan is a Scottish Government Hydro Nation PhD Scholar at the University of Edinburgh, School of Law, UK, and Helmholtz Centre for Environmental Research, Germany.

This blog post does not necessarily reflect the views of the BENELEX team.

Photo: Rusumo Falls, courtesy of Steve Rwanda (Wiki Commons, creative commons licence) <https://commons.wikimedia.org/wiki/File:RusumoFalls1.jpg#file>

This entry was posted in **Uncategorized** by **Elisa Morgera**. Bookmark the **permalink** [<http://www.benelexblog.law.ed.ac.uk/2015/08/03/equity-and-benefit-sharing-in-international-water-law-reflections-on-the-2015-world-water-congress/>] .