27

INTERNATIONAL LAW AND WATER DIPLOMACY

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Key takeaways

- Build normative communities through well-developed treaty regimes and increasing synergies between environment and water-related treaties at all levels to improve coordinated management and protection of shared waters
- Support and further strengthen joint bodies that provide platforms for continuous interactions at the professional level to produce knowledge and understanding and to build durable relationships and a habit of cooperation
- Develop a sound procedural system of cooperation over shared waters through information exchange, consultations, and prior notifications, along with coordinated monitoring and assessment to ensure equitable and reasonable use of shared waters
- Foster implementation and integration of water treaties in the national legal order

Introduction

With the overarching goal of maintaining international peace and security (United Nations 1945a, Article 1), diplomacy and international law are in a symbiotic relationship. The practice of diplomacy is defined and constrained by norms of international law, which in turn are formed and changed in the course of diplomacy. Diplomacy plays a crucial role in forming a treaty and a custom – two main sources of international law. Treaties are the result of diplomatic negotiations and processes. Customs are shaped by diplomatic engagements through building up state practice and *opinio juris* – two essential elements for an international custom to emerge (United Nations 1945b, Article 38(1b)). Not only does diplomacy shape international law, but it also facilitates its operation, situating a state's behavior within the framework provided by international law. As to international law, it both empowers and limits the practice of diplomacy, defining the boundaries for the possible actions available to states. It serves as a medium through which actors in the international system communicate and provides a framework for the coexistence of and cooperation among states. This chapter examines how international law, through its system of norms and processes, may be used in line with diplomacy to promote cooperation over shared waters.

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International law as applied to shared waters

Shared waters are subject to a multilevel legal framework encompassing water and related treaties and other instruments at universal, regional, basin, and bilateral levels. Basin agreements addressing specificities of individual basins or issues (e.g., Indus Water Treaty, Mekong Treaty, Columbia River Treaty) are complemented by global framework conventions such as the 1997 UN Watercourses Convention (UNGA 1997) and the 1992 Water Convention (UNECE 1992) outlining general principles and norms. The Draft Articles on the Law of Transboundary Aquifers adopted by the United Nations General Assembly in 2008 (United Nations International Law Commission 2008) can serve as a tool for assisting the elaboration of management regimes for transboundary aquifers, such as in the case of the 2010 Guarani Aquifer Agreement. Multilateral environmental agreements (MEAs) contribute to addressing challenges related to water use, management, and protection in a more comprehensive way, with the Convention on Biological Diversity promoting the conservation of biological diversity, the sustainable use of its components, and the fair and equitable sharing of the benefits arising out of the utilization of genetic resources (United Nations 1992a); the Convention on Desertification aimed at combating desertification and mitigating the effects of drought through effective actions at all levels (United Nations 1994); and the Convention on Climate Change setting an overall framework for intergovernmental efforts to tackle climate change (United Nations 1992b); and the Ramsar Convention providing a cooperative framework for the conservation of wetland habitats (UNESCO 1971). Water-related matters are also treated in other areas of international law, such as trade and human rights. Combined reading and implementation of these instruments enable integrated solutions to contemporary water-related challenges.

The following sections outline key norms and procedures that together provide the normative frame for any actions of states and enable a sound legal framework for cooperation over shared waters.

Context and scope

The scope of the legal regime governing shared waters covers the geographical or hydrological extent of water and other related resources, defines the types of uses or activities governed by its provisions (including quantity and quality), and determines the range of legal actors eligible to participate in the watercourse utilization (Vinogradov *et al.* 2003).

Contemporary approaches to water use and protection define a hydrological scope based on the concepts of a 'watercourse' (or a river system) defined as "a system of surface waters and groundwaters constituting by virtue of their physical relationship a unitary whole and normally flowing into a common terminus" (UNGA 1997, Article 2(a) and 2(b)). Such understanding implies that the scope of regulation would also include land-based activities, which might affect the protection, preservation, and management related to a shared watercourse. This is more so with respect to provisions related to freshwater ecosystems, given that forests, wetlands, grasslands, and agricultural land play vital roles in the hydrological cycle through the services they provide.

Basin-specific agreements define their scope in different ways. For example, the 1961 Columbia River Treaty between United States and Canada established a regime for sharing benefits as part of the transboundary waters management in the basin, while under the 1944 Colorado River Treaty the United States and Mexico agreed to a specific allocation of "the waters of the Rio Grande (Rio Bravo) between Fort Quitman, Texas and the Gulf of Mexico" (United States and Mexico 1944, Article 4) and "the waters of the Colorado River, from any and all sources" (United States and

Mexico 1944, Article 10). The Rhine Convention contains detailed provisions on geological and ecological scope, providing that the Convention applies to

> a) the Rhine; b) groundwater interacting with the Rhine; c) aquatic and terrestrial ecosystems which interact or could again interact with the Rhine; d) the Rhine catchment area, insofar as its pollution by noxious substances adversely affects the Rhine; e) The Rhine catchment area, insofar as it is of importance for flood prevention and protection along the Rhine.
>
> *(ICPR 1999)*

Substantive rights and obligations

Key substantive norms of the law governing the conduct of states in relation to shared waters include equitable and reasonable utilization, the no significant harm rule, and emerging obligations related to the protection of shared watercourses and their ecosystems.

Under the rule of equitable and reasonable utilization, a state has the right and duty to utilize the waters within its territory in a way that is equitable and reasonable vis-à-vis other states sharing the watercourse. The equitableness and reasonableness of any utilization are to be determined by weighing all relevant factors and comparing the benefit that would follow from the utilization with the injury or burden it might inflict on the interests of another watercourse state. In the event of a conflict between uses, its resolution shall be guided by the principles of equitable and reasonable utilization and prevention of significant harm, with special regard to the requirements of vital human needs.

The no significant harm rule derives its normative foundation from *sic utere tuo ut alienum non laedas*, or the good neighborliness principle. This due diligence obligation requires states, in utilizing an international watercourse in their territories, to take all appropriate measures to prevent the causing of significant harm to other watercourse states (UNGA 1997, Article 7(1)). In other words, states are not under an absolute obligation to guarantee that no significant harm will occur to other watercourse states but rather do their best to endeavor within their capacity in each particular circumstance and case to avoid significant harm. For instance, the state may be responsible for not enacting necessary legislation, for not enforcing its laws, for not preventing or terminating all illegal activity, or for not punishing the person responsible for it (International Law Commission 1994, p. 103).

The equitable and reasonable utilization and the no significant harm rule – both customary norms of international law – work in tandem, constraining the conduct and protecting the legitimate interest of all states, irrespective of their geographical location on a watercourse, on an equal footing.

Despite increasing support for the ecosystem approach in modern treaty practice and the work of international organizations, the obligation to protect and preserve the ecosystems of international watercourses is still treated as 'emerging' or 'developing' (McCaffrey 2001, pp. 257, 462, Birnie *et al.* 2009, pp. 559–560).[1] The 1992 UNECE Water Convention establishes sound rules for the Parties to 'take all appropriate measures' in order 'to ensure that transboundary waters are used with the aim of ecologically sound and rational water management, conservation of water resources and environmental protection,' and 'to ensure conservation and, where necessary, restoration of ecosystems' (UNECE 1992, Article 2(2)), and calls for measures to promote sustainable water-resources management, including the application of the ecosystem approach (UNECE 1992, Article 3(1)(i)). Further clarification on the ecosystem approach to water management can be found in the UNECE guidelines and recommendations, such as the 1993 Guidelines on the Ecosystem

Approach in Water Management (UNECE 1993) and the 2006 Recommendations on Payments for Ecosystem Services in Integrated Water Resources Management (UNECE 2006). The Ramsar Convention (UNESCO 1971) and Convention on Biological Diversity (United Nations 1992a) contribute to the protection of water ecosystems by focusing on maintaining water quality for wetlands and protecting biodiversity resources to ensure that hydrological ecosystems continue to perform their water purification functions, groundwater recharge, and flood control. The Ramsar Convention appears as a factor in several case studies in this volume, including the Sava River Basin (Chapter 42), the Sundarbans (Chapter 45), and Urmia Lake (Chapter 46).

Procedural cooperation

The procedural norms of international water law encompass a range of obligations, from a general duty to cooperate to obligations concerning data and information exchange, prior notification, and consultation. They are instrumental in providing concrete content to substantive obligations and ensuring that they are consistently implemented and complied with.

A state has a general duty to cooperate with other riparian states on the basis of sovereign equality, territorial integrity, and mutual benefit in order to attain optimal utilization and adequate protection of an international watercourse. Being an autonomous legal obligation, the general duty to cooperate regarding shared waters also translates into specific procedural obligations to exchange information with riparian states, consult with each other, notify regarding proposed activities, conduct environmental impact assessments, and work together in emergencies. The extent to which this repertoire of obligations is built into the existing legal architecture of transboundary water cooperation varies from basin to basin.

As a matter of a general legal duty, states shall, on a regular basis, exchange readily available data and information concerning an international watercourse (UNECE 1992, Article 13, UNGA 1997, Article 9). While states are also encouraged to the widest exchange of information, the data and information that are subject to exchange usually relate to the condition of the watercourse, particularly hydrological, meteorological, hydrogeological, ecological and water quality status as well as related forecasts. Many river basin commissions developed their own procedures and systems for information exchange (e.g., The 1968 Columbia River Treaty Hydrometeorological Committee Terms of Reference, The 2001 Procedures for Data and Information Sharing in the Mekong Basin, The 2009 Nile Basin Data and Information Sharing and Exchange Interim Procedures, The 2010 OKACOM Protocol on Hydrological Data Sharing for the Okavango River Basin, The 2014 Policy on the Exchange of Hydrological and Meteorological Data in the Sava Basin).

Riparian states are also required to consult with each other regarding their shared waters. As a matter of customary law, the 1997 UN Watercourses Convention requires states to consult each other at least in two instances: (i) when planned measures in one state may cause significant transboundary effect in another, and (ii) when it is necessary to achieve and maintain equitable and reasonable use. The Ramsar Convention requires the Parties to "consult with each other about implementing obligations arising from the Convention, especially in the case of a wetland extending over the territories of more than one Contracting Party or where a water system is shared by Contracting Parties" (UNESCO 1971, Article 5(1)).

As a part of customary international law, riparian states have obligations to exchange information, conduct an environmental impact assessment, give prior notification, and consult each other on possible effects of planned measures that may have a significant adverse effect. The 1997 UN Watercourses Convention and the 1991 UNECE Convention on Environmental Impact

Assessment in a Transboundary Context (the Espoo Convention) (UNECE 1991) envisage the most detailed provisions in this regard,[2] while some basin agreements also developed their own procedures in the case of planned measures (e.g., Mekong).

The general duty to notify each other and cooperate in cases of emergencies is widely endorsed in state practice (United Nations Conference on Environment and Development 1992, Principle 18; International Law Association 2004; Handl 2007, p. 542; Birnie *et al.* 2009, p. 571), including on shared waters (UNECE 1992, Articles 3(j), 14; UNGA 1997, Articles 27, 28). The need for anticipatory and responsive cooperation throughout all phases of emergency situations, such as prevention, preparedness, response, and restoration, gains even greater significance in light of continuing extreme climatic and other events.

Joint bodies

Shared water management is most effectively accomplished through joint bodies established by the states concerned. Given the diversity of the contexts, joint bodies differ from each other in their design and the tasks assigned to them. They serve diverse functions, ranging from informational (gathering, analyzing, disseminating data), operational (actual water allocation, dealing with waterworks, construction, operation, and maintenance), normative (establishing joint or harmonized water quality objectives and standards, setting water allocation limits, developing procedures, guidelines, and other regulations), control (establishing observation and control on water quantity and quality), coordination (aligning national plans and measures), scientific and technical (conducting research, assessments, and other studies), forum (providing a place for exchange of views, experiences, consultations, and decision-making), and dispute resolution (facilitating initial examination of issues, fact-finding, and settling disagreements).

Many pan-European countries, in their national reports submitted under the UNECE Water Convention, highlighted the contribution of joint bodies to the maturity of transboundary interactions. Joint bodies are seen as playing a "leading role in [the] whole process of co-operation" (Slovakia), ensuring "maintenance of regular interaction among the countries in the region" (Uzbekistan), and "consistent present cooperation on working groups level" (Poland), as well as enabling "direct contact and communication between the parties at different levels" (Austria). Also recognized were the specific achievements of the joint bodies in "communication and arrangement of open forums for discussion" (Finland), and "open consultation and discussion on specific emerging water issues to identify shared solutions and prevent disputes" (Italy) (Ziganshina 2021).

It is of paramount importance that work within joint bodies enables continuous interactions at the professional level to produce knowledge and understanding and to build durable relationships and a habit of cooperation. Politics and formal negotiations matter, but confidence, trust, and respect will not be nourished without continuous interactions among professionals.

Implementation and compliance

Means of implementation and compliance verification consist of a set of rules and procedures aimed at monitoring, assessing, and facilitating implementation and compliance with treaties.

Many global and pan-regional treaties have specific mechanisms to facilitate and review implementation and compliance. All conventions under the umbrella of the UNECE and global MEAs, such as the Ramsar Convention, the Convention on Biodiversity, the Convention on Desertification, and the Convention on Climate Change, provide sound institutional support to

facilitate implementation and compliance with their requirements through the meetings of the parties, secretariats, implementation or compliance committees, and various working groups and boards. Most of these conventions provide for some form of general reporting and monitoring to review performance to which all parties are subject and a noncompliance response (compliance or implementation committee or an inquiry commission).

The Implementation Committee under the UNECE Water Convention, which is designed to be simple, non-confrontational, non-adversarial, transparent, supportive, and cooperative in nature, stands out from other similar bodies by its advisory procedure. Under this unique tool, a Party, or Parties jointly, can request advice from the Committee about its or their efforts and difficulties in implementing or applying the Convention (UNECE 2012, Appendix I, para 19–20). In 2020–2021, the Implementation Committee assisted Albania and Montenegro to improve cooperation under their 2018 Framework Agreement on Mutual Relations in the Field of Management of Transboundary Waters and the bilateral commission established therein. Montenegro made a request for advice related to its concerns about the possible transboundary impact of planned additional small hydropower plants on the Cijevna/Cem River in Albania. Albania consented to participate in the advisory procedure. As a result of joint consultations with these two countries held by the Implementation Committee, Albania and Montenegro have agreed to establish a joint technical working group on monitoring and assessment and to develop and implement an information exchange protocol to operationalize their cooperation on the shared Cijevna/Cem River basin (UNECE 2021). It can be hoped that other countries will also take advantage of such an opportunity to prevent potential tensions.

Avoiding and settling controversies

Procedures for dispute prevention and settlement are governed either by the terms of general international law or by the provisions of a particular legal instrument. Dispute settlement mechanisms range from the negotiated settlement of controversies to rarely used highly formal procedures of binding adjudication and can be broadly divided into diplomatic and judicial means. Diplomatic means are those procedures where the parties retain control over the dispute insofar as they may accept or reject a proposed settlement (consultation, negotiation, fact-finding, inquiry, mediation, conciliation). Judicial means result in binding decisions for the parties to the dispute (arbitration and judicial settlement). It may also be possible to have recourse to regional arrangements and international organizations (such as joint bodies) as a means of dispute settlement.

Dispute prevention and settlement provisions in treaties usually encompass a multistep approach, which typically starts with discussions within joint institutions or expert group negotiations, followed by diplomatic negotiations between the parties only or employing third parties assisting the parties to find joint solutions (good offices, mediation, conciliation) and may end, as a final step, with dispute resolution by the binding decision of a third party, such as an independent/impartial expert, court, or tribunal. There is also the possibility of finding advisory or binding decisions through the involvement of a neutral expert or expert commission (e.g., Indus Waters Treaty) or through establishing an impartial fact-finding commission to resolve a dispute (UNECE 1992).

This broad repertoire of means provides parties with a choice of internal and external dispute settlement procedures depending on their preferences, cultural and political circumstances, and context. Internal dispute settlement processes such as joint institutions, technical group meetings, technical investigations, and negotiation enable joint problem-solving by the parties by securing confidentiality and control over the decision. On its part, third-party involvement through good

offices, mediation, conciliation, a neutral expert or expert commission, arbitration, and court provides for neutrality and impartiality and can bring additional technical and scientific expertise.

With few exceptions, formal dispute settlement provisions such as arbitration and judicial settlement provided for in treaties remain rarely used. The recent exceptions include the Indus Waters Kishenganga Arbitration and the International Court of Justice's case on the Silala River. A seven-member Court of Arbitration has been set up by India and Pakistan pursuant to the Indus Waters Treaty upon Pakistan's request for arbitration concerning India's construction of the Kishenganga Hydro-Electric Project. The award rendered by the Court of Arbitration in 2013 was binding upon the Parties and without appeal, whereas Chile and Bolivia agreed to submit the dispute over the status and use of the waters of the Silala to the International Court of Justice, which rendered its binding decision on December 1, 2022. See Chapter 44 in this volume for more details of the Silala case.

Both procedures have proven effective in settling water disputes and promoting equitable and reasonable use of shared waters. However, the judicial settlement of water-related disputes brought into question the need for more effective integration of scientific experts in dispute resolution procedures. In this regard, the tribunal set for the Kishenganga Arbitration, composed of engineers, was able to address technical aspects more effectively and quickly.

There are also clear signs of strengthening the role of joint bodies in dispute prevention and settlement. In many river basins, joint bodies are already tasked with addressing and resolving any issues and differences that may arise between riparian countries or their authorized entities. For example, India and Pakistan created the Permanent Indus Commission to promote cooperation in the development of the Indus waters, which has managed to survive wars, military stand-offs, and the recent rise of water nationalism between the two countries. Commissioners are high-ranking engineers who represent their respective governments and serve as the regular channel of communication for all matters related to the implementation of the 1960 Indus Waters Treaty. According to the Indus Waters Treaty's multitiered conflict resolution mechanism, the Permanent Indus Commission must undertake the initial examination of any "question" that might arise between the countries relating to the Treaty. Since its inception, the Commission has resolved most submitted questions, with few exceptions.

Another example is the long-standing cooperation of the United States and Mexico within the International Boundary and Water Commission, which is tasked with settling the differences that occur between the countries concerning the interpretation or application of the 1944 Water Treaty (United States and Mexico 1944), subject to the approval of both countries. This cooperation is described in more detail in Chapter 43. Over the years, the Commission helped to address a range of water-related controversies, including the salinity crisis on the Colorado River, the United States' plan to line the All-American Canal, Mexico's fulfillment of agreements to deliver Rio Grande water to Texas, and the difficulty in securing ecological values in the Colorado River Delta groundwater disputes. In late 2020, the Commission settled the Mexican water debt crisis on the Rio Grande (International Boundary and Water Commission 2020).

Conclusion

Shared waters pose serious challenges to legal regulation, given the need to address complex hydrological, ecological, and socio-economic issues in a peaceful and sustainable manner. International law has already responded to these multiple challenges by providing a distinct corpus of norms and principles that identify parameters (rights and duties) of the required conduct of states and

outline specific means and procedures for peaceful and sustainable management of shared waters. All these together provide the normative frame for any actions.

It is true, however, that international water law, with its two basic norms of equitable and reasonable utilization and no significant harm, is one of those areas of international law where open-textured norms prevail. It is explained by the need for a flexible, all-encompassing approach to reconciling a broad range of existing and new economic, social, and environmental issues in each particular watercourse constantly changing over time. To complement this approach, the procedural system of cooperation over shared waters between riparian countries and through joint bodies is well developed. Among the oldest of international organizations, river commissions have long been at the forefront of technical and diplomatic interactions over shared waters between riparian states.

The multiplicity of treaties at different levels and at the intersection of various areas of law, such as water, biodiversity, climate, and environment, contributed to the improved management and protection of shared waters. But this diversity also requires more rigorous actions from states and treaty bodies in increasing synergies and enabling their complementary implementation and application to avoid the risk of conflicting interpretations.

Treaty-based institutionalization, such as practiced within the UNECE Water Convention and the Ramsar Convention, may be seen as a fruitful way of cultivating mutual learning, coordination of actions, socialization, and partnerships between treaty parties and non-parties but also between various legal instruments. For instance, the UNECE Water Convention and its programs of work support the achievement of numerous MEAs and international commitments, including the Paris Agreement, Addis Ababa Action Agenda, Sendai Framework for Disaster Risk Reduction 2015–2030, and the Outcome document of the United Nations Conference on Sustainable Development "The future we want" (UNECE 2022). In addition to joint work within expert groups and task forces, the Water Convention operationalizes these obligations, working closely with the countries, international organizations, development agencies, and financial institutions. Similarly, the Ramsar Convention continuously cooperates with all relevant conventions, organizations, and initiatives to contribute to enhancing global, regional, and coherent national-level implementation of MEAs as well as to advance mainstreaming of wetlands and biodiversity concerns into relevant sectors (Contracting Parties to the Ramsar Convention on Wetlands 2022).

The variety of norms and treaties suggest that states trust in the rule of law and institutions; however, as with any other area of law, international water law finds itself in constant need of improvement to be better prepared for future challenges. Thus, certain issues such as governance of groundwater, virtual water, and atmospheric water have not been or are only partially addressed by international regulation. These are just a few examples of the areas where law and diplomacy could further contribute to improved shared water governance systems for a better future for all. Ironically, the need for forward-looking legal regulations also follows from the 2023 UN Water Conference, which did not have a legally binding document as its outcome but sent a clear message that water issues are too diverse and complex and, therefore, require context-specific, evidence-driven, and rule-based responses.

Notes

1 For the opposite view, see (International Law Association 2004, p. 28).

2 See (UNGA 1997, Article 13) (Period for reply to notification), (UNGA 1997, Article 14) (Obligations of the notifying State during the period for reply), (UNGA 1997, Article 15) (Reply to notification), (UNGA 1997, Article 16) (Absence of reply to notification), and (UNECE 1991, Article 3).

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