

International Law:

Facilitating Transboundary Water Cooperation



Key messages

- More than 260 internationally shared watercourses contribute to the economic, social, and environmental well-being of over 70 percent of the world's population. When water crosses *national borders*, states need to cooperate to resolve problems and share limited resources.
- International law provides the rules that govern the use of transboundary water resources and facilitate cooperation. Central to these is the *duty to cooperate* – one of the main normative pillars of international law.
- International agreements and rules of customary law can help sovereign states reconcile competing claims. The UN has produced three key instruments which provide guidance for states.
- When transboundary waters are not governed by treaty, customary international law guides state actions. Each state is entitled to, and obliged to ensure, *equitable and reasonable use* of shared waters, which includes a due-diligence obligation not to cause significant harm.
- Transboundary watercourse treaty regimes should address the core elements of scope, substantive rules, procedural rules, institutional mechanisms, and dispute settlement.
- The potential for effective cooperation is increased when relevant institutional mechanisms, like river-basin organisations and commissions, are established, supported, and fully functional.

The importance of international law

"In these times of unprecedented inter-connection between states and peoples it is my sincere belief that a firm reliance on international law must underpin any and all future developments on the global stage."

Extract from a speech by then President of the International Court of Justice, Judge Hisashi Owada, to the UN General Assembly, 26 October 2011.

► A global challenge

Africa is home to most of the world's major transboundary watercourses which account for some 90 percent of the continent's surface water resources. Among the most important rivers are the Congo, Incomati, Limpopo, Niger, Nile, Okavango, Orange, Senegal, Volta, and Zambezi. Many of these rivers are governed by multilateral and bilateral agreements, but there are gaps in the agreements and cooperation within river basins is uneven.

Some of the world's most heavily used transboundary watercourses are in *Asia*, including the Ganges–Brahmaputra, Indus, and Mekong. They serve countries with large populations that face enormous economic challenges, such as Bangladesh, China, and India. This region also includes rivers running across Central Asia such as the Aral Sea basin shared by Afghanistan, Kazakhstan, Kyrgyzstan, Tajikistan, Turkmenistan, and Uzbekistan. Most of Asia's rivers are governed by treaties, but many are bilateral in nature and full-fledged basin-wide cooperation remains elusive.

Significant and largely unregulated transboundary watercourses cross *South America* – the Amazon, La Plata, Orinoco – and *Central America* – the Choluteca, Chiriqui, Grijalva, and Lempa. While there are examples of transboundary cooperation, such as the La Plata river, the challenge for the two regions is to develop more basin-wide agreements and to effectively implement existing arrangements.

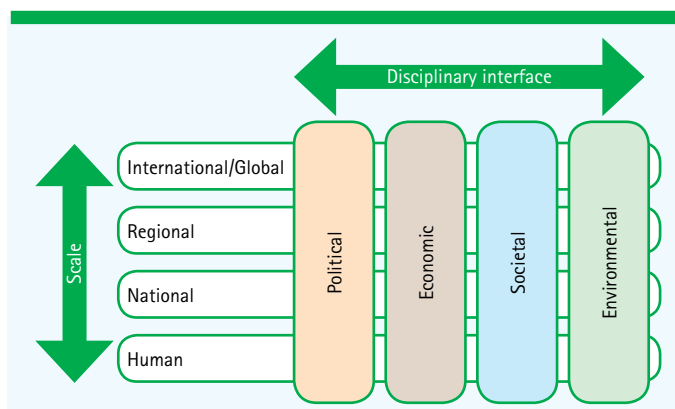
Western Europe is the only region that has a mature and functional region-wide legal instrument covering transboundary waters. This is the 1992 UNECE Transboundary Watercourses Convention, now open for universal endorsement after some 20 years of implementation. The EU Water Framework Directive also applies to watersheds that cross European state borders. Both legal instruments, together with a number of basin-specific agreements, govern Europe's vast network of transboundary waters.

Central and Eastern Europe are currently experiencing an upsurge in treaty-making, and a new GWP initiative aims to enhance transboundary cooperation. But despite constantly expanding watercourse regimes and work by national governments and regional institutions, there is still room for improvement, especially for ecosystem protection.

► International water law in practice

International law is not the only instrument available to address transboundary water conflicts, but it provides an over-arching framework to address issues that span scales and sectors. Figure 1 demonstrates the linkages among the problems of managing transboundary water resources.

Figure 1



The 2012 UN meeting on Water, Peace, and Security highlighted the importance of improving transboundary water cooperation. While political will determines the degree and quality of cooperation across borders, international law determines the rules that govern the conduct of individual nations.

The *duty to cooperate* is at the heart of the UN Charter, and the rules of international law governing transboundary water resources have evolved around this fundamental notion. International water law provides a platform for integrating the legal, scientific, and policy issues relevant to the use of transboundary watercourses. At an operational level, it also offers mechanisms for implementing rights and duties, as well as procedures for managing transboundary watercourses and resolving conflicts.

Three key UN instruments provide important guidance on how states should approach the beneficial exploitation of their transboundary water resources: the 1977 UN Convention on the Law of the Non-Navigational Uses of International Watercourses (UNWC); the 1992 UNECE Convention on the Protection and Use of Transboundary Watercourses and International Lakes (UNECE TWC); and the 2011 UN Resolution on the Human Right to Water and Sanitation.

International law provides a 'meta-framework' for international relations; it provides an identifiable corpus of rules of treaty and customary law that determine the legality of State actions for water resources that cross national boundaries. International water law provides a platform for identifying and integrating relevant legal, scientific, and policy issues, and aspects of water use such as the traditional reference to "all relevant factors and circumstances" when determining equitable use. At an operational level, international law offers a range of tools and mechanisms for implementation through concrete rules containing specific rights and duties, as well as procedures for managing transboundary watercourses or resolving interstate conflicts.



▶ The treaty framework

More than 400 agreements now govern international cooperation on transboundary watercourses. In addition to these treaties, rules of customary international law confer specific legal entitlements and impose obligations on watercourse states.

The overarching rule of treaty and customary law is the principle of *equitable and reasonable use*, which is a right and duty on all watercourse states governing transboundary watercourses and requires states to take all appropriate measures not to cause significant harm. This substantive rule is operationalised through rules of procedure, such as the exchange of information, prior notification, and consultations.

▶ Transboundary regimes: core elements

There are five core elements that need to be addressed in transboundary water management regimes:

1. *Scope* determines the geographical and hydrological parameters of a treaty's application by defining both the water resources governed and the states or parties eligible to participate. A well-developed regime should define the waters covered using either geographic or hydrological criteria.
2. *Substantive rules* comprise legal norms that establish the rights and obligations of watercourse states. Under both customary international law and treaty law, states are entitled to equitable and reasonable use of shared water

resources. But they must also take all appropriate measures to prevent causing significant harm to other watercourse states.

3. *Procedural rules* provide the operational framework for managing transboundary watercourses and the practical means for implementing the substantive rules agreed to by the states.
4. *Institutional mechanisms* comprise joint bodies or institutional arrangements designed to serve as the focal point for inter-state cooperation and for day-to-day management of shared watercourses. They help to prevent and resolve disputes through technical expertise. Different approaches have been adopted around the world reflecting regional preferences.
5. *Dispute settlement*. Watercourse states have adopted most of the peaceful methods of settling disputes set forth under the UN Charter. The most common recourse is to negotiations, good offices, and fact-finding, supported by joint bodies and regional institutions. Consistent with the rules of international law, states must agree to dispute settlement procedures. No state can be required to go to court or arbitration without consent.

▶ Policy recommendations

A number of high-level policy fora have included transboundary water resources on their global agendas, including the recent UN Roundtable on Water Security, the World Economic Forum,



the 6th World Water Forum, and preparatory meetings for Rio+20.

The 2012 Bonn Conference urged governments to “adopt a basin-wide perspective reflecting the principles of integrated water resources management”. The Rio+20 final-outcome document recognised “that water is at the core of sustainable development as it is closely linked to a number of key global challenges”.

Reports from the Organization for Economic Cooperation and Development highlight the critical importance of water reform and propose “a three-pronged approach to making water reform happen based on the fundamental building blocks of financing, governance, and increased coherence between water and sectoral policies”.

The World Trade Organization emphasised that “global governance must be anchored in laws and regulations accompanied by mechanisms for their enforcement, including binding dispute settlements”.

More work needs to be done to address fragmentation and incoherence across legal regimes that govern transboundary

waters. Some international lawyers argue that the availability and use of fresh water should be recognised as a “common concern of humanity”, similar to approaches taken with climate change and biodiversity. Others suggest that a new rule is emerging that requires all states to cooperate in managing the world’s water resources.

Possible ways to facilitate transboundary water cooperation include:

- Targeted support for enhancing national capacity in transboundary water resources management, including developing expertise in water law;
- Continued and reinvigorated support for the UN’s transboundary water-related activities, including its work on water security and support for the entry into force of the 1997 UNWC and more universal support for the 1992 UNECE TWC;
- Renewed global focus on the ‘duty to cooperate’ in international law as integral to managing transboundary waters, including a clear articulation of what this means in the context of the UN 2013 International Year of Water Cooperation.

The Global Water Partnership is an intergovernmental organisation of 13 Regional Water Partnerships, 84 Country Water Partnerships and more than 2,800 Partner Organisations in 169 countries. Our vision is a water secure world. Our mission is to support the sustainable development and management of water resources at all levels through Integrated Water Resources Management (IWRM). IWRM is a process that promotes the coordinated development and management of water, land and related resources in order to maximise economic and social welfare in an equitable manner, without compromising the sustainability of vital ecosystems and the environment.

Global Water Partnership
 Global Secretariat
 Drottninggatan 33
 SE-111 51 Stockholm
 Sweden
www.gwp.org, www.gwptoolbox.org
 August 2013