

Definitions and scope within transboundary water treaty arrangements

Dr Alistair Rieu-Clarke

Reader in International Law

International Water Law in Africa, Training Workshop,
3-5th August, Entebbe, Uganda

Legal Analytical Framework

Key Elements	Details
1. Scope	<ul style="list-style-type: none">• Legal reach (what waters?)• Definitions (watercourse; uses)• Parties (States; RIEOs)
2. Substantive Norms	<ul style="list-style-type: none">• Legal duties & entitlements (equitable and reasonable utilisation; due diligence; protection)• Rules of substance (general or precise)
3. Procedural Rules	<ul style="list-style-type: none">• Rules of procedure (duty to cooperate as bridge)• Notification / exchange of information
4. Institutional Mechanisms	<ul style="list-style-type: none">• Joint bodies (RBOs)• Conference of the Parties (MoP; CoP)• Organisations / organs (Ministerial level; other)
5. Dispute Settlement	<ul style="list-style-type: none">• Dispute avoidance (consultation)• Dispute settlement (Art. 33 UN WC; other)• Compliance verification (reporting; facilitation)

Geographic scope

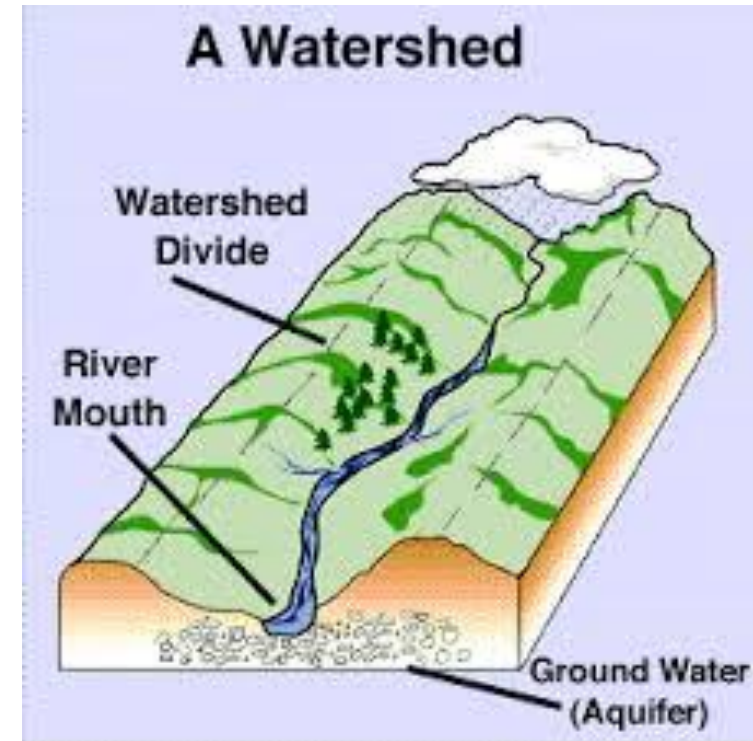
- Main river?
- Boundary rivers or successive rivers?
- Main river and tributaries
- Surface waters?
- Surface waters and groundwater?
- Land?
- Drainage basin?



ILA 1966 Helsinki Rules

“An international drainage basin is a geographical area extending over two or more States determined by the watershed limits of the systems of waters, including surface and underground waters, flowing into a common terminus”

Article II



ILA 1966 Helsinki Rules

- ILA Commentary to Article III:

“...a state, although not riparian to the principal stream of the basin, may nevertheless supply substantial quantities of water to that stream; **such a state thus is in a position to interfere with the supply of water through action with respect to the water flowing within its own territory**”

ILA 1966, p. 100

Special Rapporteurs

“From a scientific and economic – one might even say, from an objective – perspective, the use of **the “basin” concept** for the development of legal rules regarding international watercourse would seem the appropriate method of taking into account the interrelationships that apply throughout the entire area that is drained by a river system”

Schwebel, 1979, para. 41

State responses to ‘drainage basin’ concept

“... if reference were made to the geographical concept of a basin, it would leave open the possibility of undue and unacceptable restrictions which would affect not only the watercourse in question but also **all those which constitute it**, as well as those in the **geographical areas** through which they pass”

UN Doc. A/CN.4/294, at 154 (Bolivia)

UN Watercourses Convention

Article 1

The present Convention applies to uses of international watercourses **and their waters** for purposes other than navigation and to measures of protection, preservation and management related to the uses of those watercourses and their waters

Article 2(a)

“Watercourse” – “means a system of surface waters and groundwaters constituting by virtue of their physical relationship a unitary whole and normally flowing into a common terminus”

*Only covers connected groundwaters

UN Watercourses Convention

- Is 'watercourse' too narrow?
 - Article 6 UNWC call for States to account for drainage basin when determining factors relevant to equitable and reasonable utilisation
 - Article 20 obliges States to protect and preserve the ecosystems of international watercourses

UNECE Water Convention

Article 1(1)

“Transboundary waters” – “means any surface **or** ground waters which mark, cross or are located on boundaries between two or more States....”

Article 1(6)

“Riparian parties shall cooperate through multilateral agreements... covering the relevant catchment areas or parts thereof”

*Covers both connected *and* confined aquifers

2008 ILC Transboundary Aquifer

Article 2

- (a) “aquifer” means a permeable water-bearing geological formation underlain by a less permeable layer *and the water* contained in the saturated zone of the formation.

Article 3

Each aquifer State has sovereignty over the portion of a transboundary aquifer or aquifer system located within its territory.

2009 Nile Cooperative Framework Agreement

Article 1

The present Framework applies to the use, development, protection, conservation and management of the Nile River Basin and its resources and establishes an institutional mechanism for cooperation among the Nile Basin States.

Article 2

- (a) “Nile River Basin” means the geographical area determined by the watershed limits of the Nile River system of waters; this term is used where there is reference to environmental protection, conservation or development.
- (b) “Nile River system” means the Nile River and the surface waters and groundwaters which are related to the Nile River; this term is used where there is reference to utilisation of water;

1909 Boundary Water Treaty

Preliminary Article

For the purpose of this treaty boundary waters are defined as the waters from main shore to main shore of the lakes and rivers and connecting waterways, or the portions thereof, along which the international boundary between the United States and the Dominion of Canada passes, including all bays, arms, and inlets thereof, **but not including tributary waters** which in their natural channels would flow into such lakes, rivers, and waterways, or waters flowing from such lakes, rivers, and waterways, or the waters of rivers flowing across the boundary.

1909 Boundary Waters Treaty

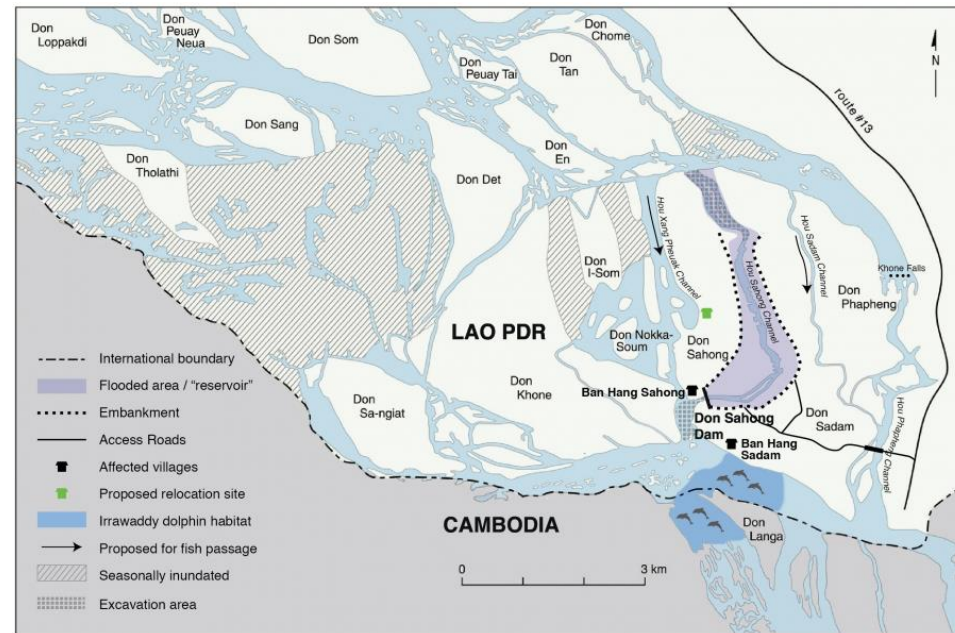
- Article II

“...any interference with or diversion from their natural channel of such [boundary] waters on either side of the boundary, resulting in any injury on the other side of the boundary, shall give rise to the same rights and entitle the injured parties to the same legal remedies as if such injury took place in the country where such diversion or interference occurs.”

*Implicit drainage basin approach?

The Case of Don Sahong

- 2006 MoU signed between Laos and Mega First Corp for feasibility study
- 2008 Project development agreement signed.
- 2013 Laos *notified* MRC of intention to construct Don Sahong
- Cambodia, Thailand and Vietnam argued it was on mainstream and subject to prior consultation
- Laos claimed dam only on a channel with the mainstream.
- Ultimately, went through consultation process agreed, and submitted June 2014



Summary and conclusions

- Scope
 - Covers legal reach of any agreement
- Diversity in defining the resource
 - Mainstream and/or tributaries
 - Groundwater and /or surface water
- Drainage basin/ river basin
 - Politically sensitive
 - Generally reflected in treaty practice
- Differing approaches
 - UNWC
 - Narrow definition of 'watercourse' but wider application reflected in substantive norms
 - Mekong Agreement
 - Wide approach in Agreement's purpose, ie. sustainable development of the basin, but narrow application through substantive and procedural norms (i.e, notification, prior consultation and agreement thresholds)
- Key messages:
 - Read agreements very carefully
 - Ambiguity in definitions has its risks

Thanks for listening!