

Why do we need international water law?

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Overview

- International Law – key characteristics
- Why do States cooperate (over water) (or not!)
 - Power dictates
 - Reciprocity and self-interest rules
 - Norms and ideas matter
- Evolution of International Water Law (IWL)
- Transboundary water treaty architecture

INTERNATIONAL LAW – KEY CHARACTERISTICS

Why is international law important?

- All communities develop rules and principles
- Adherence to certain values and standards
- Certainty, predictability, transparency and accountability
 - What a State is entitled to do
 - What a State is obliged to do
 - What a State must not do

International law

- Domestic vis-à-vis international
 - Domestic
 - Body to legislate or create laws
 - Hierarchy of courts with compulsory jurisdiction
 - Accepted system for enforcement of laws
 - International
 - No legislature
 - UN General Assembly Resolutions no legally binding as a general rule
 - No system of courts
 - International Court of Justice does not have compulsory jurisdiction to hear cases
 - No executive or governing entity
 - UN Security Council constrained by veto power

International law

- Dual character of international law
 - Operating system : sets out the general procedures for conduct of international relations, e.g. sources of international law
 - Normative system : provides direction for international relations by stipulating what is permissible or not permissible

International law

- The operating system
 - 190+ independent States all equal (in theory)
 - Horizontal : no overarching authority
 - States create law
 - primarily through custom and treaty
 - State choose whether or not to obey
 - Widespread and virtually uniform compliance
 - As with any legal system breaches of legal obligations occur

Determining what *is* international law

- Sources of international law
- A method of discovery
- Provides certainty and transparency
 - Determine when a proposition or practice becomes law
- Complex due to lack of one ultimate source
 - No single body creating law
 - No proper system of courts with compulsory and comprehensive jurisdiction
 - But a system nevertheless

Sources of International Law

Article 38(1), Statute of the International Court of Justice

The court, whose function it is to decide in accordance with international law such disputes as submitted to it, shall apply:

- (a) international conventions, whether general or particular, establishing rules expressly recognized by the contesting States;
- (b) International custom as evidence of a general practice accepted as law;
- (c) the general principles of law recognised by civilized nations;
- (d) Subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations as subsidiary means for the determination of rules of law



Sources of International Law

- Distinction between primary and secondary sources
 - Primary
 - Treaties, custom and general principles
 - Law-creating function
 - Secondary
 - Judicial decisions and academic writings
 - Law-determining function

Treaties

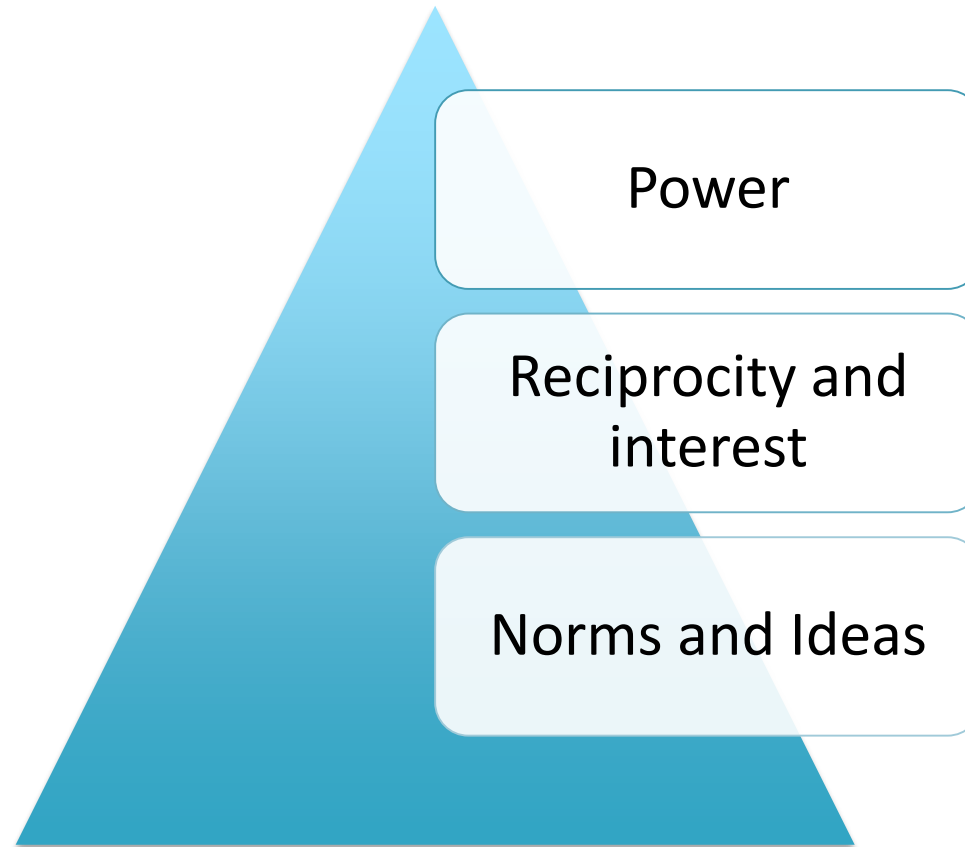
- 1969 Vienna Convention on the Law of Treaties (VCLT)
 - ‘An international agreement concluded between States in written form and governed by international law’
- Most discernable source of international law
- *Pacta sunt servanda*
 - Treaties are binding amongst parties
 - Must be performed in *good faith*

Custom

- A general practice accepted as law
- Two elements
 - Practice: the material element
 - Use of certain weapons
 - Duration, consistency, repetition and generality
 - *Opinio juris sive necessitatis*: the psychological or subjective element
 - State believe that is is bound by a legal obligation
- Evidence
 - Authoritative interpretations of what States say and do
 - Official statements of government; national laws and policies; domestic judicial decisions; diplomatic correspondence; treaties; UN General Assembly declarations, ministerial declarations, and so forth

WHY DO STATES COOPERATE?

Why do States cooperate?



Why do States cooperate?

- Power and hegemony
 - States pursue their own interest based on their own capacities
 - Subject to relative power and interest of others
 - Power – traditionally material factors (economic and military)
 - Water treaties immaterial to power
 - Upstream States less likely to enter into treaty arrangements
 - Downstream States dictate treaty terms in their favour

Why do States cooperate?

- Reciprocity and incentives
 - States cooperate when they perceive there are benefits
 - Transboundary water cooperation can lead to multiple benefits
 - Benefits to the river
 - Benefits from the river
 - Benefits because of, and beyond, the river (Sadoff & Grey 2002)
 - Allocation of benefits critical to design of cooperative arrangements
 - How to address externalities?
 - Treaty regimes can play various functions
 - Benefit ‘finding’
 - Allocation of benefits
 - Foster further cooperation

Why do States cooperate?

- Norms and ideas
 - Beliefs and expectations that states have about each other
 - Constructed socially
 - Continuous interaction (practice)
 - Shared understandings
 - Recourse to legal principles
 - Bargaining power
 - Reputation and persuasion

International law

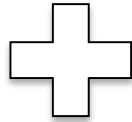
“International law is clearly much more than a simple set of rules. It is a culture in the broadest sense in that it constitutes a method of communicating claims, counter-claims, expectations and anticipations as well as providing a framework for assessing and prioritizing demands”

International Law, Shaw 2008

What makes international law work?

Legal framework

- Internal characteristics
 - Determinacy
 - Coherence, etc.



Communities of practice

- Processes and networks at sub-basin, basin, regional and global levels, e.g. UNECE WC Meeting of Parties



Shared understanding

- Awareness raising
- Trust and capacity building
- 'Timely' notification, or 'planned measures'?

- Brunnée and Toope, *Legitimacy and legality in International Law* (2010)
- Franck, Legitimacy in the International Legal System, *AJIL* (1988)

THE EVOLUTION OF INTERNATIONAL WATER LAW

Origins of international water law

- Earliest recorded treaty believed to be in 2,500 BC
 - Between two Mesopotamian City (Umma and Lagash) over the Tigris River
 - Umma (upper riparian)
 - Lagash (lower riparian)
 - Water allocation for irrigated agriculture
 - Treaty recorded on the Stela of the Vultures, housed in the Louvre



Modern Era

- 1648 The Peace of Westphalia
 - Birth of the modern nation State
- Rights of navigation predominant in water cooperation
 - Addressed in major peace treaties of 19th and 20th Centuries
 - Congress of Vienna 1815
 - Freedom of navigation for commercial purposes (Rhine and other western rivers) and associated river commission
 - General Treaty of Peace 1856
 - Freedom of navigation of Danube and associated river commission
 - Treaty of Versailles 1919
 - Freedom of navigation for commercial purposes on major European rivers
 - Also dealt with non-navigational uses

Modern Era

- 1856 River Meuse
 - 1st diplomatic assertion of any rule of international law (Smith, 1931)
 - River Meuse
 - France – Belgium – the Netherlands
 - Dutch protest over Belgian diversion of Meuse into Campine Canal due to harm caused
 - Diminished navigability
 - Increased velocity
 - Floods

Modern Era

The Dutch claim:

“The Meuse being a river common both to Holland and to Belgium, it goes without saying that both parties are entitled to make the nature use of the stream, but at the same time, following general principles of law, each is bound to abstain from any action which might cause damage to the other. In other words, they cannot be allowed to make themselves masters of the water by diverting it to serve their own needs, whether for the purposes of navigation or of irrigation”

(translated in Smith, 1931)

Modern Era

- Early 20th Century
 - Increasing number of treaties dealing with non-navigational uses (mostly quantitative issues)
 - Mainly focused on adjusting allocations for irrigation
 - Accounts for 70-80% of uses
 - Slowly emerging trend to protect quality and ecosystems
 - Protection of fisheries (for human consumption)
 - Water quality standards or objectives
 - Regulating discharge of specified pollutants
 - Drive to a more holistic approach with greater understanding of watercourse systems
 - Agenda 21, IWRM, Ecosystem Approach, etc

Codification and progressive development

- “Codification”
 - “The more precise formulation and systematisation of rules of international law in fields where there already has been extensive State practice, precedent and doctrine”
- “Progressive development”
 - “The preparation of draft conventions on subjects which have not yet been regulated by international law or in regard to which the law has not yet been sufficiently developed in the practice of States”

Statute of the International Law Commission, 1947

“Private” codification efforts in IWL

- Institute of International Law
 - Founded in Ghent in 1873
 - 132 Leading International Lawyers
 - Objectives:
 - “lending its co-operation in any serious endeavour for the gradual and progressive codification of international law”

I·D·I
justitia et pax
INSTITUT DE DROIT INTERNATIONAL

“Private” codification efforts in IWL

- 1911 Madrid Resolution on International Regulations regarding the Use of International Watercourses
 - Riparian States ‘in a position of permanent physical dependence on each other’, and ‘no autonomy’
- 1961 Salzburg Resolution on Utilisation of Non-maritime International Waters (except navigation)
 - ‘Every State has the right to utilise waters which traverse or border its territory, subject to the limits imposed by international law’ (Art. 2)
 - Disagreements to be resolved on the basis of equity (Art. 3)
- 1979 Athens Resolution on the Pollution of Rivers and Lakes and International Law

“Private” codification efforts in IWL

- International Law Association
 - Founded in Brussels in 1873
 - Objectives
 - “the study, clarification and development of international law, both public and private, and the furtherance of international understanding and respect for international law”
 - 3,500 members serving in their individual capacity
 - Water Resources Committee



“Private” codification efforts in IWL

- 1966 Helsinki Rules on the Users of the Waters of International Rivers
 - 1st comprehensive codification of law in the field
 - 6 Chapters
 - General
 - Equitable utilisation
 - Pollution
 - Navigation
 - Timber Floating
 - Dispute settlement
 - Adopted the ‘drainage basin’ concept
 - Equitable and reasonable principle, plus relevant factors
 - Influenced treaty practice 1960s to 1990s

Work of the International Law Commission

1401 (XIV). Preliminary studies on the legal problems relating to the utilization and use of international rivers

The General Assembly,

Considering that it is desirable to initiate preliminary studies on the legal problems relating to the utilization and use of international rivers with a view to determining whether the subject is appropriate for codification,

Requests the Secretary-General to prepare and circulate to Member States a report containing:

(a) Information provided by Member States regarding their laws and legislation in force in the matter and, when necessary, a summary of such information;

(b) A summary of existing bilateral and multilateral treaties;

(c) A summary of decisions of international tribunals, including arbitral awards;

(d) A survey of studies made or being made by non-governmental organizations concerned with international law.

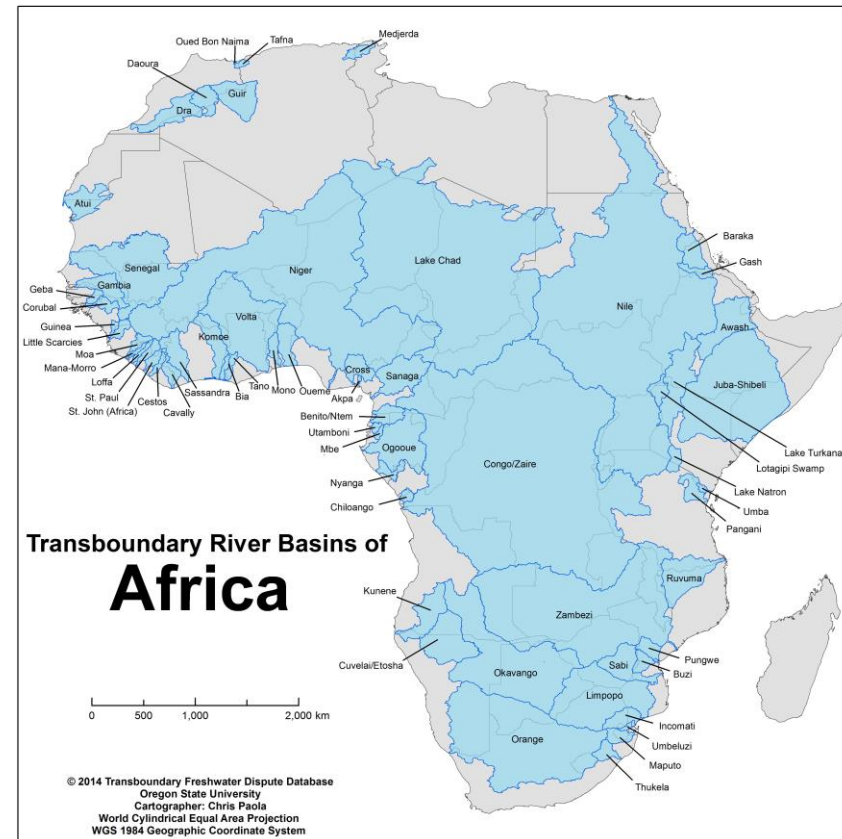
*842nd plenary meeting,
21 November 1959.*



TRANSBOUNDARY WATER TREATY ARCHITECTURE

Transboundary water cooperation and conflict – Africa

- 64 transboundary river basins
- 38 transboundary aquifers
- Regional integration
 - SADC Revised Protocol
 - West Africa, IGAD developing regional water policies
 - Fragmented system of basin-specific and bilateral agreements



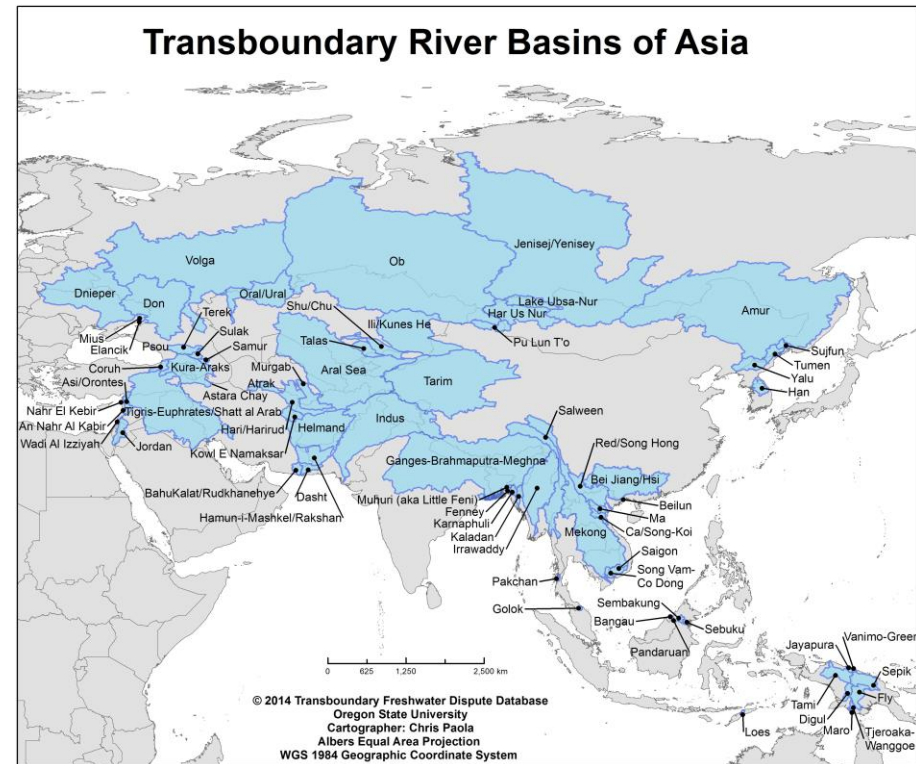
Transboundary water cooperation and conflict – Europe

- 71 transboundary river basins
- 89 transboundary aquifers
- Strong regional integration
 - EU Water Framework Directive
 - UNECE Water Convention
- Most basins covered by basin-specific arrangements



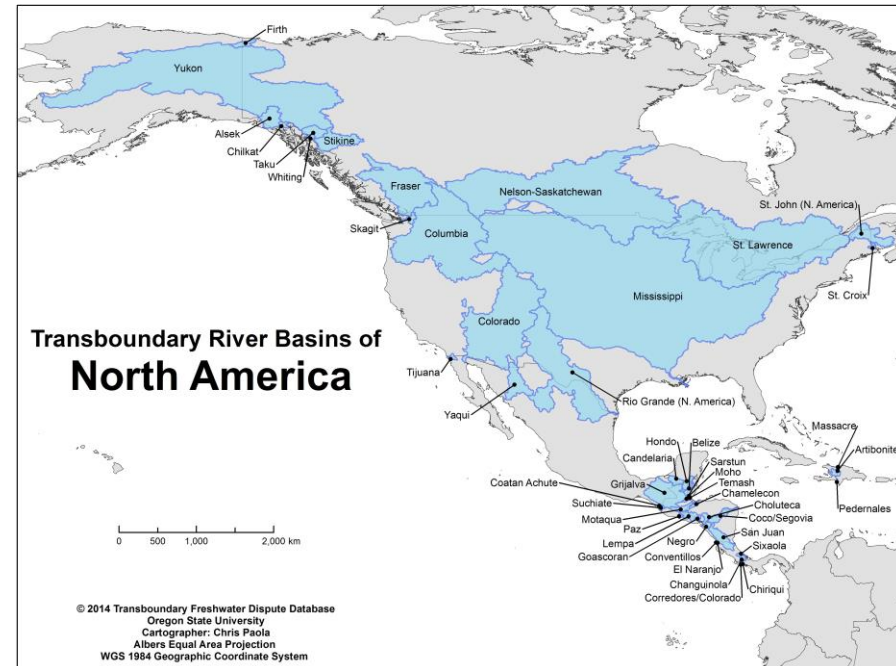
Transboundary water cooperation and conflict – Asia

- 80 transboundary rivers basins
- 12 transboundary aquifers
- Fragmented system of basin-specific and bilateral agreements
 - 95 Mekong Agreement (4 lower riparians)
 - Major rivers lacking comprehensive agreement (Aral Sea, Indus, GBM, Salween, Jordan, Tigris-Euphrates)



Transboundary water cooperation and conflict – North America

- 19 transboundary river basins
- 17 transboundary aquifers
- 1909 Boundary Waters Treaty
 - International Joint Commission (Canada-US)
 - Numerous US-Canada bilateral agreements
- 1944 US-Mexico Treaty
 - International Boundary and Water Commission (US-Mexico)



Transboundary water cooperation and conflict – Latin America

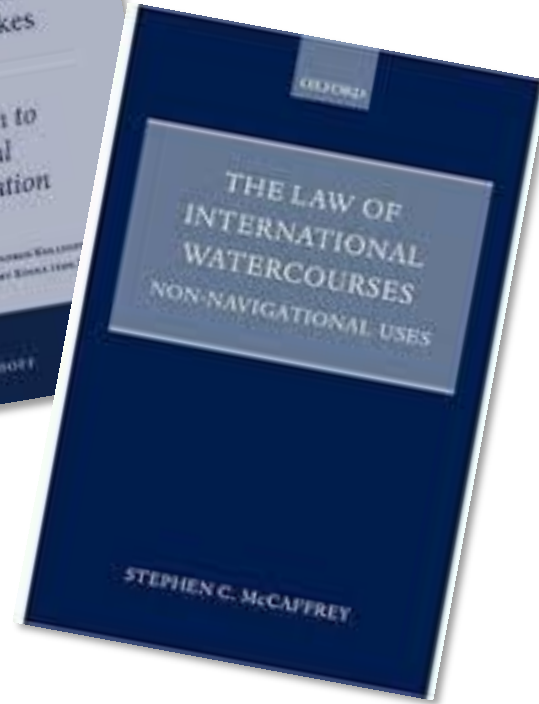
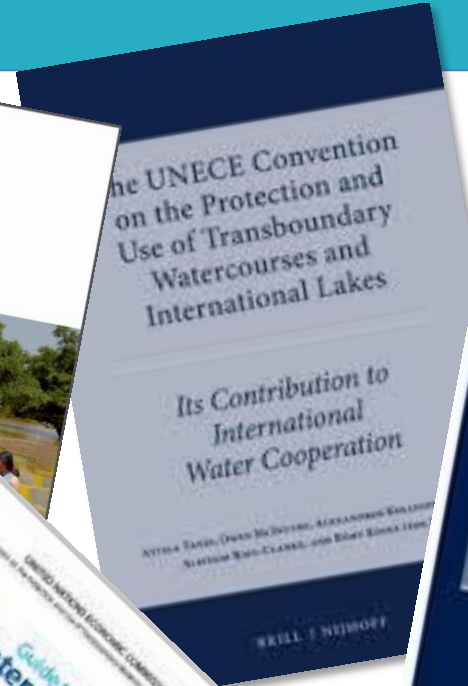
- 67 transboundary river basins
- 51 Transboundary aquifers
- Fragmented system of basin-specific and bilateral agreements
 - 8 basins partially covered by specific treaties, e.g. 2010 Guarani Aquifer Agreement, 1978 Amazon Treaty, 1975 Uruguay Statute



Summary and conclusions

- International law
 - Consent based system
 - Requires more than words
- Why do State cooperate
 - For a number of reasons!
- Significant practice of treaty adoption on transboundary rivers and aquifers
 - Fragmentation remains a key challenge

Key materials



Useful Websites

- UN Watercourses Convention On-line User's Guide
 - <http://www.unwatercoursesconvention.org>
- Water Law and Governance Support Platform
 - <http://www.waterlawandgovernance.org>
- Audiovisual Library of International Law
 - <http://legal.un.org/avl/ha/clnuiw/clnuiw.html>
- Transboundary Freshwater Dispute Database
 - <http://www.transboundarywaters.orst.edu>
- International Water Law Project
 - <http://www.internationalwaterlaw.org>
- UNECE Water Convention
 - <http://www.unece.org/env/water/>
- WWF Water Conventions
 - http://wwf.panda.org/what_we_do/how_we_work/policy/conventions/water_conventions/

QUESTIONS?