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Transboundary Legal Perspective: International Water Law

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Chapter 2.

Transboundary Legal Perspective

International Water Law

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Introduction to International Law

A. What is International Law

International law is the accepted set of rules that govern the conduct and relations of states. It serves as a framework for state conduct and a mechanism for encouraging stability and consistency in international relations among nations.

International law differs from domestic legal systems in a number of important ways. First, the key actors under international law who possess rights and obligations are nation-states. In other words, international law is primarily applicable to nation-states, and only applies to private citizens and business entities under special circumstances.

Second, while most national legal system employ a central law-making body or legislature to make the laws, an executive to implement and enforce such laws, and a judiciary to interpret the laws, international law operates in an entirely different manner. With some exceptions, the development, implementation, and enforcement aspects of international law are based on negotiated agreements. This means that states typically are not bound to a particular international obligation unless they have expressed their consent to comply with that requirement.

Sovereignty is the chief explanation and justification for this consent-based approach to international law. Sovereignty refers to the supreme, absolute and uncontrollable power by which a state may govern itself. It applies internally and affords the state the power to rule within its territory, as well as externally where it has the freedom to carry out its activities without interference or control by other states. In the international arena, traditional sovereignty is limited only where one nation's rights interfere with those of another.

As a result, international legal rules develop when states need to cooperate with other states, or otherwise where national interests are aligned. These needs and aligned interests, in turn, create incentives for states to comply with international law.

B. How is International Law Created

International law is formed through the mutual consent of nations that is provided by the states either explicitly in a written agreement (codified international law), or through their consistent adherence to certain conduct (customary international law). Both sources of law are critical to the development of international law and can operate in tandem.

■ Codified International Law

Codified international law encompasses all written agreements that are intended to be legally binding instruments by the states parties to such agreements. While these agreements may be called conventions, treaties, pacts, protocols, charters, and letter agreements, the important criteria are that they be 1) in written form, and 2) specifically intended to be both legally binding and governed by international law. As such, codified international law does not apply to written instruments that are not intended to be legally binding, such as declarations, resolutions, and memoranda of agreement.

A treaty or other written agreement between nations is like a legal contract between individuals or business entities and binds all of the parties based on their consent to be obligated. Treaties typically address issues that transcend national boundaries and that require cooperation and coordination among the states. Moreover, they can codify existing, well-accepted international norms, as well as create new binding rules based on specific circumstances.

■ Customary International Law

Customary international law refers to international commitments arising from established state practices rather than from written obligations. It results from 1) a general and consistent conduct of states that is 2) followed from a sense that such behavior is both legally appropriate and mandated. The fist component is described as "state

practice," and reflects a need to show that a significant number of states are abiding by certain conduct over time. The second component, termed "opinio juris," requires that the conduct be pursued out of a sense of legal obligation rather than moral responsibility or threat of reprisal.

Customary international law differs from conventional international law in the sense that it exists, even in its unwritten form. This is not to say that codified and customary international law are mutually exclusive. Articulations of customary international law are often found in bilateral and multilateral treaties and conventions. Likewise, a norm found in numerous international agreements could be deemed a part of customary international law where the number of states that are bound to the specific treaty, and which conform their conduct to the particular conduct or norm, becomes significant.

■ Additional Sources of International Law

Two other sources of international law should be mentioned: general principles of law, and subsidiary sources of international law.

"General principles of law" refers to law derived from the domestic practices of the majority of legal systems around the world. Such general principles can include legal norms that are broadly recognized – such as rules relating to estoppel and proportionality, the principle of good faith, and prohibitions against slavery – and are identified through inference, analogy, and inductive reasoning from existing international or domestic (national) laws. General principles of law are only utilized in the rare instance where rules of codified or customary international law are lacking or inadequate.

"Subsidiary" sources of international law refer to sources regarded as of secondary, rather than primary, significance. They include decisions of international and domestic courts and tribunals, as well as the published interpretations of the most highly qualified scholars from around the world. While judges and scholars do not create law in the international arena, their analysis of state practice and international norms can serve as evidence of customary international law.

C. Enforcement of International Law

While international law is a form of law, it operates very differently from the domestic legal systems of states. Enforcement, for example, does not occur through an executive branch of government using enforcement officers. Rather, because international law functions as a consent-based form of governance, enforcement of international law is achieved through collective action and reciprocity. Thus, collective economic, diplomatic, and military sanctions are the tools most often used

as mechanisms for enforcing international obligations. Such sanctions may be imposed through the United Nations, by regional intergovernmental organizations (s.a., European Union or Organization of American States), by informal coalitions of nations, and occasionally by individual states. As a result, the notion of reciprocity also acts as a form of enforcement of international law. In other words, states are more likely to abide by an agreement or negotiate a resolution to a dispute in order to receive the same treatment.

Of course, international law may also be addressed through international tribunals. Such tribunals, however, are not compulsory and require the consent of the disputing states to have the matter adjudicated by the panel, as well as to accept the judgment of the panel. While the International Court of Justice and International Court of Arbitration are two examples of permanent tribunals, there are others that are established on an ad hoc basis and, therefore, have only temporary existence for the purpose of an adjudication.

D. Hierarchy in International Law

Treaties and convention generally reign supreme in international law as they comprise ratified formal agreements (like contracts) between nations. Next in the hierarchy come customary international law, which are obligatory to the extent that they do not conflict with commitments contained in treaties and conventions. Third in the hierarchy are generally accepted principles of law, which usually are used only where gaps exist in codified and customary international law. While the above three sources of law are regarded as primary sources, judicial decisions and the writings of highly qualified scholars are viewed as subsidiary sources of international law. These latter sources are typically used to bolster the existence of legal norms found in codified and customary international law, or referenced to support arguments regarding emerging trends in the law.

While the above hierarchy of law is widely recognized, it is not absolute. The international legal system acknowledges a number of important exceptions.

■ Peremptory Norms

Certain norms of customary international law are regarded as being of such fundamental importance that they are recognized as peremptory or *jus cogens* norms. These are norms from which no derogation is ever permitted and include prohibitions against slavery, crimes against humanity, and other highly egregious acts.

■ Conflict in Laws

Where two principles of law apply to the same factual situation but where those two norms conflict, two principles of law may be utilized. Where the two laws differ in their specificity – one law addresses

the subject matter generally, while the other law addresses it more specifically – the principle of *lex specialis derogat legi generali* provides that the law governing the specific subject matter (*lex specialis*) overrides the law that only governs general matters (*lex generalis*). Thus, for example, where a regional or global convention provides generally for the equitable allocation of water between two states, but a treaty between the two nations allots the water in disproportionate proportion, the treaty provision would override the more general obligation. Where both laws equally address the subject matter in terms of specificity, the "last-in-time" rule usually applies. In other words, a treaty with a particular rule (or a new customary practice) would supersede an older treaty or customary practice that proffers a contrary rule.

Introduction to International Water Law

A. What is International Water Law

International water law encompasses the accepted set of rules governing relations among nations over fresh water resources. It provides a general framework for state conduct in the regulation, allocation, management, and protection of transboundary freshwater bodies, such as rivers, lakes, wetlands, and aquifers.

B. Scope of International Water Law

International water law generally applies to fresh water resources. It does not apply to marine or oceanic water where a separate body of law – "Maritime Law" and the "Law of the Seas" – applies. It also does not apply to fresh water bodies that are entirely domestic, but rather only to those that are systemically connected within a transboundary drainage basin, also described as a "watercourse."

Under the 1997 *UN Convention on the Law of the Non-Navigational Uses of International Watercourses*, the most prominent articulation and codification of international water law, a "watercourse" is 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," while an "International watercourse" refers to "a watercourse, parts of which are situated in different states." Considered together, the term watercourse is conceived broadly and encompasses the entire system of interrelated waters in a drainage basin or catchment, including tributaries, that traverses an international political boundary.

The interpretation of watercourse under the 1997 UN Watercourses Convention also extends to certain, but not all, ground water resources. Based on the definition of watercourse, only aquifers

that are systemically (hydraulically) linked to a transboundary river or lake and that normally flow to a common terminus are covered by the norms articulated in the Convention. Aquifers that do not have a hydraulic connection to a transboundary surface water body, such as fossil aquifers, fall outside the scope of the Watercourses Convention, even where the unconnected aquifer itself is transboundary.

C. Principle Tenets of International Water Law

As with every facet of international law, international water law is the product of decades of legal development. It is comprised of customs and principles that have been interpreted and refined by nations and negotiators, national legislatures and scholars. International water law originated with the uncompromising notions of absolute territorial sovereignty and absolute territorial integrity. The first supported primarily the claims of upstream states to the unrestrained use of resources found within their territories, regardless of transboundary and downstream consequences. The latter provided lower riparian nations with the right to the undiminished natural flow of a river's flow, regardless of any limitations it may impose on upstream nations. Given their absolutist and intractable nature, it suffices to say that both notions have been decisively rejected by the international community.

Today, a form of limited sovereignty applies globally for transboundary watercourses. In essence, this approach calls for the recognition that all riparians to a particular transboundary water body have rights to that shared resources. In other words, a state's sovereignty is only unlimited until it interferes with the sovereign rights of another state. Moreover, this limited sovereignty approach recognizes that for nations to maximize their rights, they must engage in a minimum degree of cooperation with their riparian neighbors. Under this general rubric, international water law now recognizes at least two substantive and three procedural legal obligations.

■ Substantive Obligations under International Water Law

Equitable and reasonable utilization

The rule of equitable and reasonable utilization is the one of the cornerstones of international water law and is fundamental to the peaceful management of transboundary water resources. The obligation requires each riparian state to continuously ensure that its uses of the waters of a transboundary watercourse are both equitable and reasonable in relation to the interests and uses of other riparian states.

In most situations, equity is interpreted in terms of an equitable share of the benefits (but not necessarily the water)

of a watercourse, while reasonableness is interpreted in terms of the appropriateness of the particular use of the water under all of the relevant circumstances. What constitutes equitable and reasonable in a given situation is assessed through an analysis of all germane factors and conditions, such as: geographic, hydrologic, hydrographic, climatic and ecological circumstances; prior, existing, and potential uses of the waters; social and economic needs of each state; feasibility of alternatives to the proposed project; and compensation as a means for resolving conflicts.

Such an assessment can, but need not be an objective calculation and can be achieved through diplomacy and negotiated conclusions. For example, where riparian states agree to allocate the vast majority of a river's volume to one nation based on a negotiated settlement, the outcome could still be deemed equitable and reasonable so long as the parties engaged in fair negotiations.

The determination of equitable and reasonable utilization, however, does not result in a permanent outcome. Rather, it is a dynamic process that, over time, is subject to changing circumstances. For example, a prolonged drought or significance population growth could require the reinterpretation of a previously achieved accord over what constitutes equitable and reasonable on a watercourse. As a result, the principle of equitable and reasonable utilization requires regular communication and cooperation among the riparians.

No significant harm

The rule of no significant harm is also regarded as a fundamental principle of international water law. The principle refers to the obligations of states to not cause another state significant harm through the use of a transboundary watercourse. Application of this notion requires an understanding that harm is generally defined in terms of an impact on the people or the interests of another state in the use of the watercourse. A negative impact to the environment by itself, and which does not affect the population, economic development, or other critical interests of a nation, might not be actionable. Additionally, only those harmful impacts that rise to the level of "significant" will violate the norm. What is deemed as "significant" will depend on the degree of harm that has historically been acceptable under normal conditions, as well as the actual impairment or damages caused by the conduct. Regardless, the negative impact must be higher than merely perceptible or trivial, but can be less than severe or substantial in order for it to be deemed a violation.

In addition, the duty to prevent significant harm to other riparian states is not absolute. Rather, it is based on a due diligence standard, which means that a country must exercise its best efforts to prevent such harm. Hence, compliance with the obligation is, in part, a function of a country's ability to fulfill the obligation. Countries lacking financial or technical resources would be afforded greater leniency in fulfilling this

obligation, while those with the required competence and assets will be held to a stricter standard.

While the principles of equitable and reasonable utilization and no significant harm are not mutually exclusive, it is conceivable that one state's use of a transboundary watercourse could cause another state significant harm, but could also be deemed an equitable and reasonable use. For example, the diversion by a drought-stricken upstream nation of the majority of the flow of a transboundary river might result in a substantial decrease in water reaching a downstream riparian that rises to the level of significant harm. However, if the downstream riparian has alternative sources of freshwater available, the diversion could be deemed equitable and reasonable under the circumstances. While the dispute has been debated among scholars, the majority and better view is that the no significant harm rule is subordinate to that of equitable and reasonable utilization. In other words, if a use is equitable and reasonable, it is justifiable even if it causes significant harm.

■ Procedural Obligations under International Water Law

Cooperation

International law, and specifically international water law, imposes a duty on all states to cooperate. Cooperation is, in fact, absolutely necessary to ensure good relations in the international arena. In the context of a watercourse, this means that riparian states must engage each other, at the very least, when they encounter a conflict over the uses of the watercourse.

Implementing such cooperation clearly overlaps with all of the procedural obligations discussed in the following section. Nonetheless, the duty to cooperate is itself a separate, procedural obligation under international water law. It reflects that fact that cooperation is grounded in good faith and must be affirmatively pursued. Thus, for example, unnecessary delays or systematic refusals to consider proposals by other riparians, or even superficial cooperation without an intention to achieve an accord, could be deemed a violation of the obligation.

Regular Exchange of Data and Information

The need to exchange data and information on the conditions of a transboundary watercourse is unequivocal. Without the sharing of such material, the activities of each riparian state will be hampered by an inability to fully project and mitigate any deleterious consequences that might result from the utilization of the watercourse. Thus, the obligation is intended to ensure that all riparian states possess the facts necessary to utilize the transboundary watercourse in an equitable and reasonable manner, as well as in a manner that prevents or minimizes significant harm.

The obligation to exchange data and information, however, is not a static requirement. Since watercourse conditions and climates can vary substantially, the obligation requires a "regular" exchange, meaning that the sharing of material must be conducted on a systematic and ongoing basis.

While the precise types of data and information that must be shared is not always detailed, when read in concert with the chief obligation of equitable and reasonable utilization, it is evident that the material should encompass watercourse-related data and information, such as: geographic, hydrologic, hydrographic, climatic and ecological conditions; prior, existing, and potential uses of the waters; social and economic needs of each state; existing and proposed projects; and availability of alternative sources of fresh water.

Where a state has been asked to provide data or information that is not readily available, the requested state must employ its "best efforts" to comply with the request. In other words, it must provide all material that can be readily generated or collected, must not stall for time, and must not provide irrelevant material. The requested state, however, may require a reasonable charge to cover the costs of generating or collecting that data or information.

Prior Notification of Planned Measures

The duty to provide prior notification of planned measures is a procedural mechanism designed both to encourage communications and cooperation, and to minimize the possibility that a proposed activity might cause the violation of the principles of equitable and reasonable utilization or no significant harm. Fundamentally, the obligation requires a state that is planning an activity related to a transboundary watercourse, and that might be prejudicial to other riparian states, to notify those potentially affected states. In order to provide the potentially affected state context, such notification must be accompanied with all readily accessible and relevant data and information that has been generated and collected about the planned measures. Once notification is provided, the state planning the activity has a duty to consult with the potentially affected states. All states involved are then expected to arrive at an equitable resolution regarding any differences between them pertaining to the planned activity.

D. Sources of International Water Law

■ Codified International Water Law

The most prominent and authoritative codification of International Water Law is the *1997 UN Convention on the Law of the Non-navigational Uses of International Watercourses*. Adopted by the UN General Assembly on 21 May 1997, the Watercourses Convention

entered into force on 17 August 2014 when the 35th nation (Vietnam) submitted its notice of ratification. As of 1 January 2015, the Convention had been ratified by 36 Parties.

While regarded as a European Convention, the Member States of the *1992 UN/ECE Convention on the Protection and Use of Transboundary Watercourses and International Lakes* recently initiated action to open that instrument to global membership. The 1992 UN/ECE Convention, was originally opened for membership on 17 March 1992, and came into force on 6 October 1996. As of 29 December 2015, the Convention had been ratified by 41 Parties including the European Union.

■ Customary International Water Law

By its very nature, customary International Water Law is unwritten law. Hence, evidence for such customary laws is reliant on the publications of prominent scholars and on the work-product of non-governmental organizations whose purpose is to compile the status of International Law. A number of the more prominent publications addressing customary international water law can be found in the section IV (Reference for International Water Law).

The most prominent non-governmental organization whose purpose is to compile the status of international law is the International Law Association (ILA). Because of its unofficial status, the ILA's work-product is not considered to be an official source of international law. Nevertheless, the Association has always been held in the highest regard and its compilations are often cited as evidence of the state of international water law. The most influential ILA reports include:

- Helsinki Rules on the Uses of the Waters of International Rivers and Comments, in Report of the Fifty-Second Conference 484, Article II (1966)
- The Seoul Rules on International Groundwaters, in Report of the Sixty-Second Conference 251 (1987)

E. International Water Law and Transboundary Aquifers

While the scope of the UN Watercourses Convention does apply to many transboundary aquifers, there is an ongoing debate whether the same principles of law should apply equally and in a similar manner to surface as well as subsurface water resources. Consider that while over 3,600 treaties relating to the use of the world's 276 transboundary surface waters have been catalogued since 805 CE, there are only six[1] transboundary aquifers globally with a formal agreement in force out of around 600 transboundary aquifers that have been catalogued to date by UNESCO (UNESCO IGRAC, 2015). Clearly,

1. Northern Western Saharan Aquifer System, Iullemeden Aquifer, Nubian Sandstone Aquifer, Guaraní Aquifer, Genevese Aquifer, and Disi Aquifer.

experience in and knowledge about managing transboundary aquifers is limited. Moreover, many transboundary aquifers are either disconnected from all river basins or lie underneath multiple river basins, resulting in circumstances that are distinct from those found in most transboundary rivers and lakes. As a result, the status of international law for transboundary ground water resources is still in a very early stage of development.

It is noteworthy that in 2008, the UN International Law Commission submitted it proposals to the United Nations General Assembly in the form of Draft Articles on the Law of Transboundary Aquifers (Draft Articles). While the Draft Articles followed closely the structure of the UN Watercourses Convention, there were a number of significant alterations that accounted for the particular differences between surface and ground water bodies.

Taking into account the Draft Articles, the existing handful of agreements covering a transboundary aquifer, and the analysis of prominent scholars, a number of procedural norms for the management of transboundary aquifers appear to be emerging as customary norms of international law. Those include the aforementioned regular exchange of data and information, and prior notification of planned activities. They also include the corollary obligations to generate supplemental data and information on an on-going basis through monitoring and related activities, as well as to create an institutional mechanism to facilitate or implement the agreement.

F. International Water Law and Joint Institutional Mechanisms

Authorities, commissions, councils, and other institutional mechanisms are especially relevant to the management, allocation, protection, and development of international watercourses. They can help facilitate the procedural obligations noted above as well as minimize conditions that might implicate violations of the substantive international water law norms. Globally, there are at least 105 transboundary surface water bodies and eight transboundary aquifers that utilize some form of joint institutional mechanism (Eckstein and Sindico, 2014).

There is no ideal structure for an institutional mechanism. Such entities must be designed and organized in relation to political, social, economic, and environmental circumstances, as well as economic and technical capacities. They can be in the form of independent joint authorities with full legal personality and supranational character and authority, as was created by Mail, Mauritania, and Senegal in the Organization for the Development of the Senegal River, and by Mexico and the United States in the International Boundary and Water Commission.

Institutional mechanisms can also be structured as joint commissions with

political and administrative components that operate in a consultative capacity to the respective riparian governments. While the political division typically develops recommendations for managing the watercourse, the administrative division manages the daily responsibilities of the entity. Commissions occasionally also include a technical committee to provide background studies and technical expertise. Example of such commissions include the Genevese Aquifer Management Commission established by France and Switzerland to coordinate the exchange of information, monitoring, and ground water exploitation, and the Permanent Okavango River Basin Water Commission created by Angola, Botswana, and Namibia with the objective of acting as "technical advisor to the Contracting Parties ... on matters relating to the conservation, development and utilisation of the resources."

Other formats for joint institutional mechanisms that have been utilized on various transboundary rivers, lakes, and aquifers around the world include executive councils, consultative committees, and advisory boards.