

SYMPOSIUM ON INTERSTATE DISPUTES OVER WATER RIGHTS

INTERNATIONAL WATER LAW PRINCIPLES IN NEGOTIATIONS AND WATER DIPLOMACY

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International water law (IWL) principles are often called upon to address disagreements and conflict between riparian states to a shared watercourse, with various parties invoking them to guide states' behavior towards cooperative solutions that benefit the water resources as well as broader regional cooperation and peace. This essay argues that it is particularly important to acknowledge the role IWL principles play in negotiation processes, that is, in an *ex ante* and non-judicial function, providing a framework for cooperation and contributing to lawmaking, which makes them important tools of international relations and water diplomacy. First, IWL principles are particularly relevant in negotiation processes. IWL principles are thus not only relevant to legal adjudication or enforcement, but are also tools of international relations and diplomacy. Additionally, in their *ex ante* role, in the context of negotiations or other non-judicial interactions between riparian states, IWL principles can pose an inherent dilemma, as they can both provide a framework for negotiations and be the focus of negotiations, each dimension having implications for the effectiveness of negotiations and the likelihood of negotiated compromise outcomes. Third, in spite of this inherent dilemma and its possible negative repercussions on negotiation outcomes, the use of IWL principles in negotiations has a lawmaking function, contributing to the further development and strengthening of the overall legal regime for governing shared watercourses.

IWL Principles in Conflict and Cooperation over Shared Water Resources

IWL principles have received a lot of attention by scholars in past decades—largely from legal scholars, but increasingly also from academics in other disciplines—who are searching for guidance on how to ensure that states use their shared water resources in a cooperative and sustainable manner. This is largely driven by increasing concerns about the state of the world's more than three hundred shared watercourses, challenged by overexploitation as much as by climate change, and the potential for disagreements and conflicts between riparian states that might arise from these challenges.

Disagreements in major basins have supported this concern: in the Aral Sea Basin, the conflict between Tajikistan and Uzbekistan over the Rogun Dam has raised concerns over broader regional destabilization and even inter-state violence in the 2010s; during the same time, the disagreement over the Xayaburi Hydropower Project (XHP) on the Mekong River, albeit fought with less rhetoric than the Rogun confrontation, made many observers fear for the stability and the economic development of mainland Southeast Asia; similarly, recent confrontations between Afghanistan and Iran have led to the outbreak of local violence and have occasionally strained relations between the two states in an already fragile region.

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IWL is often called upon to address such situations of disagreement and conflict. The expectation is that IWL principles will guide states' behavior towards finding cooperative solutions that bring about the best possible outcomes for water resources management, as well as for regional cooperation and stability more broadly. In reality, however, this is not always the case. Instead, IWL principles often are not sufficient to draw states into negotiating their contested issues, are not able to frame negotiations in a way that is conducive to compromise outcomes and thus long-term cooperation, or are the subject of disagreements themselves.

The Role of IWL Principles in Negotiations—Ex Post Versus Ex Ante Functions

As a starting point, two different roles of IWL principles can be differentiated: First, IWL principles can have an ex post function as they set the rules that states ought to comply with when using shared water resources and, thus, can be used retrospectively to assess a state's compliance or even enforce it. This is assumed to be an important function, especially from the perspective of more general international law. In reality, however, there are very few cases in which IWL principles have been applied ex post to determine states' compliance with an international legal regime—whether treaty or customary law—or even to enforce any rules. Instead, the use of IWL principles in adjudication is extremely rare, especially in comparison to other fields of international law. Some of the few exceptions are the ICJ's 1997 *Gabčíkovo-Nagymaros* and the 2010 *Pulp Mills* cases, as well as the Permanent Court of Arbitration's dealings with the *Kisbenganga* case. Moreover, in some of these cases the tribunals ultimately requested disputing parties to negotiate a mutually acceptable outcome (such as in the 1997 ICJ *Gabčíkovo-Nagymaros* ruling¹), thus referring the disputed matter back to the negotiation table. This is not to disregard the importance of the ex post application of IWL, but to emphasize that other dimensions of the IWL regime might in fact be underestimated and under-researched.

Second, IWL principles can have an ex ante function as they shape negotiations and other cooperative processes at the global and, most importantly, at the basin level. This is due largely to the procedural rather than normatively determinative nature of many IWL norms.² Many IWL principles, such as the principle of equitable and reasonable utilization, were not meant as enforceable mechanisms to punish states ex post, but rather as an ex ante guidance for state behavior, supporting a greater good—the cooperative and sustainable management of shared water resources. Thus, IWL principles are particularly relevant in the negotiation process and are, therefore, not only part of an international legal regime, but also tools of water diplomacy.

The use of IWL principles in negotiations is very common and there are numerous cases in which states apply IWL principles to guide their behavior over shared water resources in a mutually agreeable and beneficial manner. This includes, for instance, the determination of development options that would be in line with the principles of equitable and reasonable utilization and of no significant harm early in the basin planning process. An example is the Okavango River Basin's Strategic Action Programme³ and its attempt to determine an “acceptable development space.” Another example can be found in the use of IWL principles to determine an institutionalized framework for cooperation (typically in the form of international water treaties or subsequent legal and policy documents), such as in the case of the Lake Victoria Basin, where the Protocol for Sustainable Development of Lake Victoria Basin commits parties to a number of IWL principles according to which they shall manage

¹ [Gabčíkovo-Nagymaros Project](#) (Hung. v. Slov.), 1997 ICJ REP 7, para. 139 (Sept. 25) and others.

² Owen McIntyre, *The Proceduralisation and Growing Maturity of International Water Law: Case Concerning Pulp Mills on the River Uruguay (Argentina v Uruguay)*, *International Court of Justice*, 22 J. ENVTL. L. 475, 467 (2010).

³ Permanent Okavango River Basin Water Comm'n, [Strategic Action Programme \(SAP\) for the Sustainable Development and Management of the Cubango-Okavango Basin](#) (2011).

the resources of the basin⁴). Likewise, IWL principles are applied in the Mekong River Basin in the context of a specific disagreement, the disagreement over the XHP in the Mekong River Basin, where dispute-resolution attempts focused on determining and then minimizing the project's impacts in order to ensure it would not contradict the principle of no significant harm, to which the states committed themselves in the 1995 Mekong Agreement.⁵

IWL principles thus fulfill a forward-looking and guiding role that appears to outweigh their role in adjudication and any other form of ex post application. That is, IWL principles play a more interactional than static role, making them essential components of a broader water diplomacy process.

IWL Principles as Negotiation Framework or as Subject of Negotiations

In their ex ante role in shaping negotiations (and cooperation processes more broadly), IWL principles can play two different, yet partly overlapping, roles that are potentially conflicting. First, they set the framework for negotiations. They provide substantive and procedural guidance to riparian states when negotiating over the use, development or protection of shared water resources. They delineate the space within which options can be found during negotiations. Second, IWL principles also can be the subject of negotiations themselves. When riparian states negotiating the use, development and protection of shared water resources disagree about the interpretation of an IWL principle or its application in a specific context, IWL principles themselves become the contested substance of negotiations. The more this happens, the more problematic negotiation processes become and lower the likelihood of effective negotiation outcomes. This presents an inherent dilemma in the role of IWL principles in negotiations.

IWL principles play a crucial role in cases where they are generally accepted as framing negotiations and setting the boundaries within which riparian states to a shared basin negotiate and agree to certain ways of using, developing and protecting their shared resources. By being generally accepted as boundary conditions with limited disagreement over their overall validity (something that international relations scholars refer to as “conflicts about means”⁶), they facilitate the identification of compromise solutions and limit all involved states' rights in favor of mutually beneficial outcomes. What matters in the negotiations is then the “how” to cooperate, not the “whether to cooperate at all.”

An example can be found in the aforementioned negotiations around the XHP on the Mekong mainstream. In spite of representing a substantial disagreement between the project developing state (Laos) and opposing states (Cambodia and Vietnam), it appeared throughout the negotiations that there was a general understanding by all of the parties that the principle of equitable and reasonable utilization (Article 5 of the Mekong Agreement) and the principle of no significant harm (Article 7 of the Mekong Agreement) were applicable to all parties. Moreover, there was an overall acceptance that the procedural principle of prior notification—codified in the Mekong Agreement (Article 5) and further operationalized in the Procedures for Notification, Prior Consultation and Agreement⁷—was to be adhered to. Disagreements during negotiations about the prior notification and consultation process therefore concerned questions of how to adhere to the principles (and negotiating parties' perceptions of this varied), rather than questioning them. The compromise outcome—the inclusion of mitigation

⁴ [Protocol for Sustainable Development of Lake Victoria Basin](#) arts. 4–8., Nov. 29, 2003.

⁵ [Agreement on the Cooperation for the Sustainable Development of the Mekong River Basin](#), Apr. 5, 1995.

⁶ Andreas Hasenclever et al., *Interest, Power, Knowledge: The Study of International Regimes*, 40 MERSHON INT'L STUD. REV. 177, 192 (1996).

⁷ Mekong River Comm'n, [Procedures for Notification, Prior Consultation and Agreement \(PNPCA\)](#) (2003).

measures for expected negative environmental impacts in the form of additional fish migration aids and sediment flushing gates—confirms this assessment.⁸

When IWL principles become the subject of negotiations themselves, they often create a fundamental disagreement between states where values and, thus, the overall basis of cooperation, are contested instead of “only” the interpretation of these principles within a jointly acceptable framework. The main tensions that typically arise concern the principle of equitable and reasonable utilization and the principle of no significant harm, which are still, to some degree, perceived as conflicting by many policy-makers and negotiators.⁹ Upstream states tend to favor the principle of equitable and reasonable utilization, highlighting their right to develop water resources in spite of existing downstream uses. Downstream states, on the other hand, often build their negotiation strategies around the principle of no significant harm, often in order to protect preexisting uses.

A typical case can be found in the negotiations over the Grand Ethiopian Renaissance Dam (GERD). While Ethiopia maintains the principle of equitable and reasonable utilization and an interpretation of the principle that strengthens the right of each riparian to develop and use the water resources of a shared river in spite of preexisting uses, Egypt relies on an extreme version of the principle of no significant harm, interpreting it as “no harm at all” that protects all preexisting uses.¹⁰ And even prior to the construction of the GERD, throughout the negotiation process on Nile cooperation more generally, including the negotiations of the Cooperative Framework Agreement,¹¹ the use of IWL principles by riparian states has largely promoted conflictual rather than cooperative behavior.¹²

Which of the two sides of the spectrum—understood as a continuum rather than two distinct features—dominates in negotiations varies across time and place. It is largely determined by different factors that shape states’ relations over shared water resources more generally. These are also referred to as exogenous factors.¹³

Negotiations in basins also often shift along the spectrum, from an understanding of IWL principles as a contested matter of negotiations to an agreed upon framework that guides negotiations—or in the other direction. In the case of the Indus River Basin, at the beginning of bilateral relations in the 1940s, India relied heavily on the principle of equitable and reasonable utilization and Pakistan on the principle of no significant harm. The harsh opposition between the countries concerning the two key IWL principles as they were perceived by the states was the main reason why negotiations failed. Only when an external facilitator, the World Bank, came in during the 1950s was a solution found that, to a large extent, rests on the mutual recognition of each party’s rights to the river’s water and, thus, the acceptance of both principles. This exogenous factor paved the way to the 1960 Indus Waters Treaty.¹⁴

IWL Principles and Lawmaking

The fact that IWL principles can both provide the framework for negotiations and be the subject of negotiations, placing them at the center of potential disagreements, does not, however, mean that they are entirely

⁸ Susanne Schmeier, *Prior Notification of Planned Measures: A Response to the No-Harm Dilemma?*, 30 INT’L ENVTL. AGREEMENTS 683 (2020).

⁹ Owen McIntyre, *The Current State of Development of the No Significant Harm Principle: How Far Have We Come*, 20 INT’L ENVTL. AGREEMENTS 601 (2020); Attila Tanzi, *The Inter-Relationship Between No Harm, Equitable and Reasonable Utilization and Cooperation Under International Water Law*, 20 INT’L ENVTL. AGREEMENTS 619 (2020).

¹⁰ Tamar Meshel, *Swimming Against the Current*, 61 HARV. INT’L L.J. 135 (2020).

¹¹ *Agreement on the Nile River Basin Cooperative Framework*, May 14, 2010.

¹² Jutta Brunnee & Stephen Toope, *The Changing Nile Basin Regime: Does Law Matter?*, 43 HARV. INT’L L.J. 105, 144 (2002).

¹³ SUSANNE SCHMEIER, *GOVERNING INTERNATIONAL WATERCOURSES* (2013).

¹⁴ *Indus Waters Treaty*, Sept. 19, 1960.

toothless, cannot shape riparian states' behavior, or their application is in vain. Instead, when moving beyond a momentary snapshot of certain negotiations at a certain place and time, IWL principles reveal their important norm-creating or even lawmaking function: Negotiations between riparian states of shared watercourses can lead to the emergence and manifestation of norms that are jointly constructed and brought to congruence, thus leading to a common understanding. While constructivist scholars of international law and international relations have long highlighted this additional role of international legal principles,¹⁵ limited attention has been paid to it in the specific field of IWL.

An example can be found in the case of the Okavango River Basin. In the original 1994 Agreement on the Establishment of a Permanent Okavango River Basin Water Commission (OKACOM), the focus of the negotiating parties was on setting up an institution that would act "as a technical advisor to the Contracting Parties on matters relating to the conservation, development and utilization of water resources of common interest."¹⁶ IWL principles were only briefly mentioned in the Preamble by reference to Agenda 21 of the 1992 Rio Conference, referring to "environmentally sound natural resources management, sustainable development and the equitable utilization of shared watercourse systems."¹⁷ Over time, however, cooperation between riparians deepened and, increasingly, state practice included the reference and adherence to IWL principles with a particular focus on no significant harm, given the tremendous importance of the basin's environment. In 2016, OKACOM member states jointly decided that a revised OKACOM Agreement was needed, allowing for a deepened and strengthened basis for cooperation in line with the IWL regime. As a result, and through on-going and consistent state practice, countries in the basin have further advanced and are now specifying IWL principles.

IWL principles are thus not fixed principles, but building blocks in a process that ultimately contributes to the formation of an increasingly accepted legal regime and a convergence of state practice towards compliance with this regime. The legal regime that is advanced can be based on customary law as well as treaty law at different levels, from the global to the regional and the basin level.

Conclusion

This essay has sought to shed light on IWL principles' role in negotiations, highlighting the important ex ante role they fulfill in guiding states' behavior. The principles do so by providing a framework in which states that share a watercourse can situate the use, development and protection of water resources. That is, IWL principles help set the rules of the "game" of cooperation, to which riparian states have generally committed. In cases where they fail to do so, because states' commitment to cooperation and their joint understanding of specific IWL principles is still limited—and in which IWL principles themselves become the subject of disagreement—the principles often still perform an important lawmaking function by further advancing, over time and often not in a linear manner, increasingly consistent state practice and the development of the legal regime. This makes IWL principles not only important elements of the international regime for governing shared watercourses, but also important means of water diplomacy that can help shape state practice towards a more cooperative and sustainable future.

¹⁵ Jutta Brunnee & Stephen Toope, *Interactional International Law and the Practice of Legality*, in INTERNATIONAL PRACTICES 108 (Emmanuel Adler & Vincent Pouliot eds., 2011).

¹⁶ [Agreement Between the Governments of the Republic of Angola, the Republic of Botswana and the Republic of Namibia on the Establishment of a Permanent Okavango River Basin Water Commission \(OKACOM\)](#) art. 1, Sept. 15, 1994.

¹⁷ *Id.* Preamble.