THE CHALLENGES OF RESOLVING INTERNATIONAL NON-NAVIGABLE WATER DISPUTES

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This past century there has been a gradual development and articulation of the law of the non-navigable uses of transboundary water under both U.S. and international law. The U.S. Supreme Court issued its first interstate water decision in 1902; and by 1922, the Court had applied the principle of equitable apportionment to allocate the waters of an interstate watercourse. *Wyoming v. Colorado*, 259 U.S. 419 (1922) (apportioning the Laramie River). This principle has since been refined, and the U.S. Supreme Court has now issued more than 40 separate opinions on interstate waters. International courts and arbitral tribunals have also enunciated and refined similar principles under international law. *See, e.g., Diversion of Water from the Meuse (Neth. v. Belg.)*, 1937 P.C.I.J. (ser. A/B) No. 70 (June 28) (Permanent Court of International Justice); *Indus Waters Kishenganga Arbitration (Pak. v. India)*, Final Award (Dec. 20, 2013), *available at* http://www.pca-cpa.org (arbitration administered by the Permanent Court of Arbitration).

I. The Problem: The Lack of Binding Dispute Resolution Mechanisms

The adjudication of transboundary water disputes has been far more common in the United States between states, however, than internationally between countries. By one count, there have been fewer than ten international adjudications. One reason for this discrepancy is that U.S. states have a forum for binding adjudication of their interstate water disputes—the U.S. Supreme Court—whereas few international water treaties provide for binding adjudication.

Adjudication of water disputes is unavailable on many major contested international rivers, including the Nile, the Euphrates, and several major rivers of Central Asia, for example the Syr Darya and Amu Darya. This is for at least two reasons. First, only 40 percent of the world's 276 transboundary freshwater lake and river basins are governed by international agreements, and 80 percent of these agreements involve only two countries, even though many countries may share these basins. Second, where agreements do exist, these agreements do not provide for binding dispute resolution. As a result, disputes over international watercourses have rarely been adjudicated. A prominent recent exception is the *Case Concerning the Gabčíkovo–Nagymaros Project* between Hungary and Slovakia over water projects on the Danube River. This case was adjudicated because after the dispute arose both countries, remarkably, voluntarily submitted it to the International Court of Justice.

Many countries have recognized the problem posed by a lack of effective enforcement mechanisms, and are increasingly including dispute resolution provisions in the treaties concerning the use of non-navigable waters: dispute resolution provisions appeared in 31 percent of water treaties concluded before 1950; 44 percent after 1950; and in 61 percent signed since 1990. *See*, M. Giordano et al., *Review of the Evolution and State of Transboundary Freshwater Treaties*, 13 INT'L ENVIRON. AGREEMENTS 2 (May 2013).

II. The UN Watercourses Convention: Big Step Forward or Missed Opportunity?

Countries now have an additional tool at their disposal: the 1997 UN Convention on the Law of the Non-Navigational Uses of International Watercourses (Convention) has just entered into force. The impetus for the Convention was the UN General Assembly's request in 1970 to the International Law Commission (ILC) to attempt to codify the non-navigational uses of international watercourses. The ILC presented the General Assembly with the text of the Convention 27 years later in 1997. The Convention finally entered into force 17 years after that —on August 17, 2014—once enough countries had become

Parties. Currently, the Convention applies to the transboundary lake and river basins (and their hydrologically connected groundwater) of 36 Parties. Three other countries signed but have not yet become Parties to the Convention: Paraguay, Venezuela, and Yemen.

The Convention is the first global treaty to govern transboundary non-navigable water use, and to establish mechanisms for resolving international water disputes. It therefore holds the promise of covering a significant number of international waterways that were not previously subject to an international agreement, regulation, or a method of dispute resolution.

The Convention is important for at least four reasons:

First, it is widely viewed as codifying three principles of customary international law, namely, (1) "equitable and reasonable utilization and participation"; (2) the "obligation not to cause significant harm" to other Parties; and (3) prior notification to potentially affected Parties of planned measures, such as dams, diversions, etc. The notification provisions mandate exchanges of information and require good faith negotiation between Parties if one Party believes that planned measures would violate the principles of equitable use and the obligation not to cause significant harm.

Second, the Convention provides for the protection and preservation of watercourse ecosystems and the reduction of pollution.

Third, the Convention requires good faith cooperation and the regular exchange of hydrological, meteorological, hydrogeological, and ecological data. The purpose of this cooperation is to "attain optimal utilization and adequate protection" of international watercourses, and to facilitate this goal the Convention urges (but does not require) Parties to establish joint international mechanisms or commissions.

Fourth, the Convention provides creative forms of dispute resolution. It does not, unfortunately, require binding adjudication of disputes.

1. Enforcement of the Convention by Companies and Individuals

One of the most interesting innovations of the Convention is the requirement that when Parties' citizens (including companies) claim injury due to treaty violations by another Party, that Party must provide the other Party's citizens with access to its domestic mechanisms for providing remedies, such as courts and administrative bodies. These citizens are also entitled to environmental information, without discrimination on the basis of nationality, residence, or the place where the damage occurred (or is likely to occur). *See*, Art. 32 (Non-discrimination). Depending on the country, this may represent a significant new source of remedies for individuals that are harmed by improper water diversions or transboundary pollution.

2. Non-Binding Dispute Resolution Between Parties

When a dispute under the Convention arises among Parties, any Party is entitled to trigger the dispute resolution process by formally requesting negotiations. When making this request, a Party may seek the good offices of a third party, or initiate mediation or conciliation. If these efforts are unsuccessful, and six months have passed, then either Party may submit the dispute to an independent fact-finding Commission (Commission). *See*, Art. 33 (Settlement of disputes).

Commissions are comprised of individuals appointed by each Party to the dispute, plus a chairman, agreed by the other commissioners, who cannot have the nationality of any of the Parties to the dispute. If the Parties fail to appoint a commissioner or agree on a chairman, the Secretary General of the United Nations appoints them. A Commission is charged with making "findings" and recommendations to achieve an "equitable solution of the dispute." Once constituted, a Commission has substantial

powers to investigate the dispute: it determines its own procedure, and has the authority to compel disclosures of information from the Parties, and to conduct site inspections. The fact-finding process is, therefore, quite robust. However, a Commission is not required to apply the Convention or international law. Also, although a Commission will recommend an equitable solution, the Parties are only obliged to consider it in "good faith"; they are not bound to adopt it.

To date, a dispute has not yet arisen under the Convention, so these procedures have not been tested. The capacity of a fact-finding Commission to resolve disputes is therefore uncertain.

3. Optional Dispute Adjudication Between Parties

Alternatively, the Convention allows Parties to opt in to a procedure for the binding adjudication of disputes in advance. This procedure allows either for the International Court of Justice to decide the dispute according to its rules, or for final determination by arbitration. To date, only three Parties—Hungary, Montenegro, and the Netherlands—have consented in advance to such adjudication.

The result is that, as things currently stand, it is unlikely that many disputes over the non-navigational use of international watercourses will be adjudicated. This is regrettable because the binding adjudication of disputes has many advantages: not least that determinations are based on law and, as a result, outcomes are more predictable. Another advantage of adjudications is that in most circumstances they finally resolve a dispute.

The absence of mandatory binding adjudication of disputes is also unfortunate because, as one commentator has noted, an instrument that sets forth principles for the allocation of water has little or no meaning if it does not have an adjudicatory process that will result in actual allocations. *See*, Lucius Caflisch, "Judicial Means for Settling Water Disputes," *Resolution of International Water Disputes*, Permanent Court of Arbitration/ Peace Palace Papers 2003, at 241. Some countries appeared to recognize this issue when the Convention was being negotiated, and attempted to insert a compulsory adjudication requirement. However, several other participants, including China, Colombia, France, India, Turkey, and Venezuela, defeated their attempt. *Id.* at 242, 244.

III. One Solution: International Water Project Financiers Should Require Recipient States to Join the Convention and Opt into Binding Dispute Resolution

Large-scale water infrastructure projects require outside financing, and this presents an invaluable opportunity to advance international water law and the peaceful settlement of international non-navigable water disputes. Stakeholders in these new projects should insist that the benefitting countries become Parties to the Convention and opt in to its binding dispute adjudication procedures. Third-party funders of such projects, such as the World Bank, the regional development banks, the International Monetary Fund, and government aid agencies, as well as private financiers, could and should make this a condition of financing and their involvement. At the very least, this is in their self-interest: investments will only be sustainable if (1) they meet the Convention's baseline requirements for the protection of watercourses and their ecosystems, and (2) disputes that arise in connection with these projects are resolved in a peaceful and fair manner.

Moreover, this approach has been used successfully before. For example, the World Bank insisted that India and Pakistan agree to the 1960 Indus Waters Treaty before embarking on an $800 million Indus Basin Development Fund for water projects in both countries. The treaty provided for the detailed allocation of waters on the Indus River and for the binding resolution of disputes concerning these water resources. India and Pakistan recently successfully concluded their first binding arbitration pursuant to the treaty.

There has been similar experience within the U.S. federal system. The U.S. government routinely conditions large water infrastructure projects on the beneficiary state entering into compacts allocating the waters of interstate watercourses. For example, the U.S. government only started planning water projects in the Republican River basin after the states of Kansas, Nebraska, and Colorado entered into the 1943 Republican River Compact, which allocated the waters of the river among the states. The negotiation of these compacts has forced states to agree to equitable apportionment of their interstate waters in advance, reducing costly disputes later.

In sum, there is truth in the Roman legal principle *ubi jus ibi remedium*: there is no right without a remedy. While the UN Watercourses Convention is a very significant step forward, its provisions must become widely enforceable for it to serve its purpose, and for it to make a meaningful contribution to the international system and the peaceful resolution of disputes. Parties to the Convention should opt in to binding dispute adjudication, and stakeholders in new projects and investments should insist on this. Only then can the rights and obligations of customary international law that the Convention embodies become a reality.

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